

Law Commission

Consultation Paper No 209

CONTEMPT OF COURT

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

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

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman*, Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: To consider the law and procedure on some aspects of contempt of court. This consultation paper addresses:

- contempt by publication,
- the impact of the new media,
- contempts committed by jurors, and
- contempt in the face of the court.

Geographical scope: This consultation paper applies to the law of England and Wales.

Impact assessment: An impact assessment has been published on our website.

Online appendices: We have prepared some additional information relevant to this consultation which we have published on our website as a set of appendices, as follows:

Appendix A: Background to the Contempt of Court Act 1981

Appendix B: Contempt of Court and the European Convention on Human Rights

Appendix C: Contempt in overseas jurisdictions

Appendix D: Survey results

Appendix E: Jurisdictional basis for a court or tribunal to act on a contempt in its face

Appendix F: List of contempts and associated statutory provisions

Availability of materials: The consultation paper, appendices and impact assessment are available on our website at <http://lawcommission.justice.gov.uk/consultations/contempt.htm>.

Duration of the consultation: We invite responses from 28 November 2012 to 28 February 2013.

Comments may be sent:

Online to <https://consult.justice.gov.uk/law-commission/contempt>

OR

By email to contempt@lawcommission.gsi.gov.uk

OR

By post to Criminal Law Team, Law Commission, Steel House, 11 Tothill Street,
London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at: <https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>.

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THE LAW COMMISSION

CONTEMPT OF COURT

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CHAPTER 1

INTRODUCTION

THE NEED FOR REFORM

- 1.1 This project was referred to us by the Criminal Procedure Rules Committee during our consultation for our Eleventh Programme of Law Reform, and was subsequently included in that Programme.¹ Various high profile cases have occurred since the publication of the Eleventh Programme which underscore the need for this project. These include:
- (1) a juror who was found to have researched the defendant on the internet;²
 - (2) the first internet contempt by publication, which concerned the posting of an incriminating photograph of a defendant on a website;³
 - (3) contempt proceedings for the vilification of Chris Jefferies during the investigation into the murder of Joanna Yeates;⁴ and
 - (4) proceedings for contempt by publication following the collapse of the prosecution of Levi Bellfield.⁵
- 1.2 Such cases illustrate the challenge that is posed by the new media to the existing laws on contempt of court which pre-date the internet age. They also illustrate the continuing need for limits on media coverage in order to protect the administration of justice and the right to a fair trial.
- 1.3 It became clear during this project that there was a particularly pressing need for one aspect of our work: about the little-known offence of scandalising the court. We therefore brought forward our consultation, in order to contribute to public debate on it in a timely way. The prospect of abolishing the offence was raised in Parliament in July and we published our consultation paper on that question on 10 August.⁶ We published the responses to the consultation paper on our website in November, and we hope to publish our final report by early 2013.

BACKGROUND TO THIS PROJECT

- 1.4 Since the publication of the Eleventh Programme, the Attorney General emphasised the urgent need to reform the law in this area and at the end of January 2012 asked the Commission to prioritise work on this project. Our intention is to produce a report by spring 2014.

¹ Eleventh Programme of Law Reform (2011) Law Com No 330.

² *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

³ *A-G v Associated Newspapers Ltd* [2011] EWHC 1894 (Admin), [2012] Entertainment and Media Law Reports 7.

⁴ *A-G v MGN Ltd* [2011] EWHC 2383 (Admin), [2012] Entertainment and Media Law Reports 10.

⁵ *A-G v Associated Newspapers Ltd* [2012] EWHC 2029 (Admin), [2012] All ER (D) 185 (Jul).

⁶ Contempt of Court: Scandalising the Court (2012) Law Commission Consultation Paper No 207.

- 1.5 The law governing contempt of court is vast. Several specialist textbooks devote hundreds of pages to the topic. The number of different contempt offences is equally huge.⁷ Our work is necessarily constrained by the time and resources available and it would not be possible to produce meaningful reform proposals for the entire law of contempt within those constraints. This paper, therefore, addresses specific, practical problems that have been identified by our research and communication with stakeholders. In this way we aim to achieve the maximum benefit within available resources. We see the project as a classic example of the way that it was envisaged the Commission would operate under the Law Commissions Act 1965, namely to,

keep under review all the law ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.⁸

THE WAY WE HAVE WORKED

- 1.6 Given the time pressure under which we have worked, it has been even more important than usual for us to identify accurately the most pressing problems in need of review, and to evaluate the extent of the problems presented in practice.
- 1.7 In order to do this we held numerous stakeholder meetings at the earliest stages of the project. We have had discussions with key stakeholders within government, the judiciary, the legal system and media. In particular, we have consulted informally with: the Attorney General's Office; the Crown Prosecution Service; the Department of Culture Media and Sport; the Home Office; the Ministry of Justice; HM Courts and Tribunals Service; District Judges (Magistrates' Courts); Crown Court Judges and Recorders; High Court Judges; the Senior Judiciary; the Criminal Procedure Rules Committee secretariat and the Civil Procedure Rules Committee secretariat; the Criminal Cases Review Commission; the Judicial College, the Office of the Lord Chief Justice; journalists; and legal professionals, including those in independent practice and in-house lawyers working for the main print and broadcast media organisations.
- 1.8 In addition, we have undertaken some limited survey work of District Judges (Magistrates' Courts), and of Crown Court Judges and Recorders on specific issues.
- 1.9 We have also been fortunate in having assistance from Professor Cheryl Thomas from the Judicial Institute at University College London. Her ongoing empirical work has been particularly valuable in relation to the review of contempts committed by jurors and especially those involving jurors' use of the internet and modern media.

⁷ We have produced a comprehensive catalogue of individual contempts and their origins in Appendix F, but despite extensive research, given the range of possible contempts we cannot be confident that it is exhaustive. This is available online at <http://lawcommission.justice.gov.uk/consultations/contempt.htm>

⁸ Section 3(1).

THE PROBLEMS WE ADDRESS

- 1.10 Chapter 2 considers the law on contempt by publication both under the Contempt of Court Act 1981 and at common law. The nub of the problem examined in this chapter is how to balance the right of a defendant to a fair trial by an independent and impartial tribunal, with the right of the publisher to freedom of expression. We also consider whether the procedural approach to contempt by publication is adequate.
- 1.11 Concerns were raised by stakeholders about the impact of new technology on the question of who constitutes a publisher for the purposes of the Act. As more than one stakeholder commented, the rise of social media and so-called citizen journalism means that “everyone is a publisher” now. We examine how the substantive and procedural aspects of the law may need to be reformed to meet these developments.
- 1.12 Chapter 3 addresses these two vital questions: what is a publication, and who is a publisher? Our primary aim is to assess whether the 1981 Act is capable of dealing effectively with rapidly-developing media technologies, particularly with regard to social media. There is no case law on this point under the Act within England and Wales. We are also concerned, in so far as possible, to “future-proof” the 1981 Act so that it can continue to accommodate technological developments.
- 1.13 Chapter 4 is concerned with the immediate practical problem of jurors who seek information related to the proceedings beyond the evidence presented in court or those who disclose information related to their deliberations. Again, it is necessary to strike a balance between the public interest in the administration of justice, the defendant’s right to a fair trial, and the rights of the jurors concerned.
- 1.14 Chapter 5 examines criminal contempts in the face of the court committed in the Crown Court or in the magistrates’ courts when exercising criminal jurisdiction. Procedure in this area has recently been brought up to date by the Criminal Procedure Rules Committee. We explore other issues which were outside the scope of that Committee’s work. Our main aim in this chapter is to reveal the uncertainties about existing court powers and to make proposals which would make the law clear, fair and practicable.
- 1.15 There are, of course, many areas of contempt that we have not been able to examine. These include, for example, resolving the confusion over what is a “civil” contempt and what a “criminal” contempt, or the question of the appropriate rules of evidence that should apply when a party applies for another party to be held in contempt for failing to comply with a court order. We have concentrated on the areas of pressing practical need for reform and, therefore, this has necessarily limited the scope of the project. We have, however, considered the position of civil proceedings as regards the strict liability rule under section 2(2) of the 1981 Act. Similarly, we imagine that our proposals in relation to juror contempt will be applicable to jurors in civil trials.

THIS CONSULTATION

- 1.16 This paper is confined to discussion of the specific practical issues identified above. We have also prepared a series of detailed appendices dealing with: the background to the 1981 Act, the European Convention on Human Rights context

to the reforms, comparative law and law reform, survey results, a catalogue of specific contempts, and the impact assessment. These are available online at <http://lawcommission.justice.gov.uk/consultations/contempt.htm>.

- 1.17 This consultation closes on 28 February 2013. Responses can be provided online at <https://consult.justice.gov.uk/law-commission/contempt>, as well as by email and by post.

ACKNOWLEDGEMENTS

- 1.18 We have also been helped very much by the following people and we are very grateful to them. They are Professor Ian Cram, His Honour Judge Dawson, Professor Helen Fenwick, Professor Gavin Phillipson, Professor ATH Smith, Professor Cheryl Thomas, Mr Nick Taylor, Mr Micheal O'Flonn, Mr Justice Tugendhat, Mr Justice Fulford, His Honour Judge Wait, Professor Ian Walden, Professor Michael Hirst, the Chief Magistrate Howard Riddle, and staff at the Judicial College.

CHAPTER 2

CONTEMPT BY PUBLICATION

INTRODUCTION

- 2.1 This chapter considers the law on contempt by publication both under the Contempt of Court Act 1981 and at common law. In brief, by statute, a publication which occurs when civil or criminal proceedings are active which creates the substantial risk of seriously prejudicing or impeding proceedings is an offence irrespective of whether the publisher was aware of the risk. At common law, it is also an offence to publish material intending to impede or prejudice civil or criminal proceedings even if they are not then active. Other forms of contempt by publication, such as under section 12 of the Administration of Justice Act 1960, are beyond the scope of this consultation paper.¹
- 2.2 The law on contempt by publication was subject to substantial revision by the 1981 Act following the *Sunday Times* case,² in which the European Court of Human Rights (“ECtHR”) found that the law on strict liability contempt was incompatible with article 10 of the European Convention on Human Rights (“ECHR”). The revisions introduced were based substantially on the earlier recommendations of the Phillimore Committee.³ Nonetheless, some aspects of the pre-existing common law survived.⁴
- 2.3 This chapter begins with a brief explanation of the rationale for this kind of contempt and the impact of the ECHR.⁵ It then examines the statutory provisions dealing with the definition of active proceedings, the strict liability rule, and the exception to the rule under section 5 of the 1981 Act. The chapter moves to focus on the common law position with regard to intentional contempt. Subsequently, the relevant evidential and procedural rules are addressed. Reporting restrictions under sections 4(2) and 11 are then considered. Finally, the chapter examines the appropriate sanctions.

THE RATIONALE FOR CONTEMPT BY PUBLICATION

- 2.4 The rationale for an offence of contempt by publication arises from the need to protect the right to a fair trial, now enshrined in article 6 of the ECHR. As Professor Smith explains,

The fundamental objection to the publication of prejudicial material is that a person has a right to be tried according to the evidence properly placed before a court, and on that evidence alone. That

¹ Section 12 deals with publications relating to certain kinds of proceedings involving children, mental health or mental capacity, national security or a “secret process, discovery or invention”.

² *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74).

³ Report of the Committee on Contempt of Court (1974) Cmnd 5794. See Appendix A generally.

⁴ The common law also survives in other jurisdictions. See Appendix C generally.

⁵ More detail can be found in Appendix B.

evidence can be tested in examination and cross-examination of the witnesses, and is seen by all members of the jury.

In addition, the common law has certain exclusionary rules of evidence ... that are designed to protect the integrity of the trial process. That integrity is compromised if extraneous material is introduced into the process, as it potentially is when prejudicial commentary is made available to the members of the public who will eventually constitute the jury.⁶

2.5 On the other hand, it is also necessary to protect the right to freedom of expression, especially because reporting on legal proceedings serves an important public interest.

2.6 Article 10 of the ECHR provides:

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

2.7 However, the right may be restricted:

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.8 Article 10 is clearly engaged by the offence of contempt by publication in both its statutory and common law forms and, therefore, these restrictions on freedom of expression require justification under article 10(2). Accordingly, any restriction must be prescribed by law; pursue a legitimate aim (namely maintaining the authority and impartiality of the judiciary or protecting the reputation or rights of others, in particular their article 6 rights); and be necessary in a democratic society, including being proportionate. We consider the human rights implications of the current law and any proposed reforms briefly through the course of this chapter. Further detailed analysis can be found in the online supplement to this consultation paper.⁷

⁶ A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) paras 2.5 to 2.6, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

⁷ See Appendix B generally.

ACTIVE PROCEEDINGS UNDER THE 1981 ACT

Present law

- 2.9 Strict liability contempt by publication, which is defined in statute, can be committed only in respect of particular proceedings that are active at the time of publication, as defined by Schedule 1 to the Act.⁸ In general, criminal proceedings are active from the point of arrest without a warrant, issue of a warrant for arrest or of a summons, service of an indictment, or oral charge, whichever occurs first.
- 2.10 Criminal proceedings cease to be active when the defendant is acquitted or sentenced,⁹ or “by any other verdict, finding, order or decision which puts an end to the proceedings” or “by discontinuance or by operation of law”.¹⁰ If an arrest warrant is issued but no arrest made, proceedings cease to be active a year from the issue of the warrant.
- 2.11 The active period can also be triggered in respect of civil proceedings,¹¹ coroner’s inquests¹² and some tribunals of inquiry.¹³
- 2.12 Appellate proceedings (that is appeals, applications for judicial review or appeals by case stated) are treated as separate proceedings from those at first instance. In both criminal and civil appeals, proceedings are active from when the appeal process is commenced until it is “disposed of or abandoned, discontinued or withdrawn”.¹⁴ Where, as a result of the appeal process, there are new proceedings (such as a retrial), they are deemed active from the end of the appellate proceedings.¹⁵
- 2.13 Although liability is strict,¹⁶ under section 3 there is a defence of innocent publication if the publisher “does not know and has no reason to suspect that relevant proceedings are active”.¹⁷

Problems and potential solutions

- 2.14 There is very limited case law on the requirement that proceedings be active. Our preliminary discussions with stakeholders have revealed concerns about whether the active period covers the appropriate period of time around a court case. The

⁸ Section 2(3), s 2(4). Schedule 1 sets out in detail when proceedings are “active” and provides interpretative provisions. Section 19 explains the meaning of “court” and “legal proceedings”.

⁹ As broadly defined in Sch 1, para 6.

¹⁰ Schedule 1, para 5.

¹¹ Schedule 1, paras 12 and 13.

¹² *Peacock v London Weekend Television* (1986) 150 Justice of the Peace 71.

¹³ Section 20.

¹⁴ Schedule 1, para 15.

¹⁵ Schedule 1, para 16.

¹⁶ Section 1 of the Act explains that “in this Act ‘the strict liability rule’ means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so”.

¹⁷ See Ch 3 at paras 3.42 and 3.71.

debate about the appropriate point for the law to protect proceedings by classifying them as active must necessarily be seen in light of the so-called fade factor – the view that juries or judges are less likely to be influenced by material, the further in advance of the trial it is published.¹⁸

- 2.15 In respect of criminal proceedings, it can be difficult for the media to obtain information about whether a person has been arrested or an arrest warrant issued. Some stakeholders told us that police forces do not adopt a consistent approach to the release of the names of arrestees. In some cases, the publisher may have the protection of the defence of innocent publication in section 3 if they publish material relating to someone being unaware he or she is an arrestee.¹⁹ Whilst the failure by the police to supply the arrestee's name would not conclusively establish the defence, we consider that the defence ought to be established where there is a specific request for confirmation that the arrestee was a named person and the police respond, denying that this person has been arrested. If the police refused to comment following such request, establishing the defence may depend on what information the media representative has which led them to make such enquiry and whether they, therefore, have "reason to suspect" that proceedings are active, as required by section 3.
- 2.16 An additional problem arises because some individuals are arrested and remain on bail for many months before charges are brought or they are released from bail. In consequence, there can be a significant period of time when publication is restricted but no trial is imminent. It can also be difficult for the publisher to determine whether an individual has been released from bail.
- 2.17 These problems raise the question of whether the active period should be triggered not at arrest, but later, such as at the time of charge. However, that could increase the risk of serious prejudice to the proceedings, particularly in cases of notoriety or if there were only a short period of time between charge and trial. Although the Phillimore report recommended that the active period begin at charge,²⁰ this was rejected in the Contempt of Court Bill following extreme examples of police and press behaviour in the period between the arrest and charge of Peter Sutcliffe.²¹ An additional consideration favouring the present position is that the fade factor provides some protection to those who publish material during the active period but well before trial: commencement of the active period is not an automatic prohibition on publication, but a restriction limited to the requirement that the publication creates a substantial risk of serious prejudice or impediment.
- 2.18 Conversely, some stakeholders have suggested that the active period should begin even earlier to cover impact on future potential proceedings where there has as yet been no arrest or warrant for arrest. This suggestion relates to

¹⁸ Although the impact of the fade factor may these days be diminished by the maintenance of online archives. This issue is also related to the question of continuous publication which is addressed in Ch 3 at para 3.50 and following. Also, see discussion on the s 2(2) test at para 2.29 and following below.

¹⁹ See Ch 3 at paras 3.42 and 3.71.

²⁰ The Phillimore report para 123.

²¹ Miller para 6.20.

concerns about the prejudicial impact of reporting on high profile cases before suspects have been identified or arrested or a warrant issued.²²

2.19 We consider that the difficulty lies in ensuring that publishers are not unfairly at risk of committing contempt by publishing matters about an arrestee of whose identity they are unaware or about a person whom the publisher is unaware has been arrested. In part, that concern is met by the section 3 defence.²³ We do not consider that there is a compelling case for changing the commencement of active proceedings to the point of charge and are in favour of retaining the current triggers of arrest; the issue of a warrant or summons. **Do consultees agree that the current triggers of active proceedings as contained in the 1981 Act should remain?**

2.20 However, we believe that further reforms can be introduced to ensure the fair application of the Act and to ensure greater certainty and consistency in its application. We propose that the Home Office request that the Association of Chief Police Officers²⁴ issue guidance, for dissemination to police forces, which would encourage the police to adopt consistent decision-making about whether to release information about arrestees following a request from the media to identify the arrestee. We consider that such policy should establish that, generally, the names of arrestees will be released but that appropriate safeguards will need to be put in place to ensure that some names are withheld, for example, where it would lead to the unlawful identification of a complainant, where the arrestee is a youth or where an ongoing investigation may be hampered. We consider that such safeguards should be widely defined given that once a name is released, it may not be possible to retract it. **Do consultees agree that there should be a consistent policy adopted by police forces about whether to release information about arrestees, with appropriate safeguards?**

2.21 Finally, in relation to the commencement of active proceedings, we consider the position in respect of extradition to England and Wales, that is to say, mechanisms to bring a person into the domestic jurisdiction from a foreign jurisdiction. In respect of cases concerning returns from the European Union or Gibraltar (category 1 states under the Extradition Act 2003), a domestic arrest warrant is required to be issued prior to the issue of the European Arrest Warrant (EAW).²⁵ In respect of returns from other states (category 2 territories, which are certain designated states outside the EU), no extradition warrant is needed but a domestic arrest warrant will be issued and sent with the request for extradition to the foreign state. In either of these circumstances, the active period would be triggered by the issue of the domestic arrest warrant.

2.22 There may be concerns that, in extradition cases, significant delay may occur before the suspect can be apprehended and returned to this jurisdiction. This may mean that there is an extended period during which media coverage is

²² This period would in any event be covered by the law on intentional contempt. See para 2.56 and following below.

²³ See Ch 3 at paras 3.42 and 3.71.

²⁴ Or by the College of Policing, if appropriate.

²⁵ Extradition Act 2003, s 142(2)(b).

restricted. However, we consider that this delay is mitigated by taking into account the fact that proceedings will only remain active following the issue of an arrest warrant for a period of one year.²⁶ Whilst the warrant will not expire twelve months from issue, the active period will. Furthermore, the fade factor provides some protection to those who publish when there is an outstanding extradition warrant, but the suspect has not been apprehended for return to the domestic jurisdiction and proceedings are still deemed active (namely within the first twelve months of the warrant). In consequence, we see no reason why the active period should not be triggered by the issue of an arrest warrant in extradition proceedings. **Do consultees agree that the issue of an arrest warrant should trigger the active period in extradition cases?**

- 2.23 It has also been questioned whether it is necessary for proceedings to remain active until sentence has been passed. Some stakeholders have suggested that the active period might safely end when verdicts in respect of all the counts on the indictment/charges have been returned. In practical terms, it may be that the risk that publication between verdict and, if guilty, sentence will give rise to serious prejudice is less likely because the sentence will be imposed by judge alone or by magistrates. On the other hand, there may be concerns that those passing sentence may be susceptible to influence from media reporting.
- 2.24 There is evidence to suggest that many reputable publishers treat the final verdict as the end of the active period. There is clearly an argument for bringing the law into line with current practice. However, it is also necessary to caution against the creation of a climate – particularly in notorious cases – that might give rise to the perception that a judge or magistrate has been inappropriately influenced by prejudicial material when passing sentence.²⁷ **Do consultees agree that active proceedings under the 1981 Act should be amended to end at the delivery of the final verdict in the case?**

SUBSTANTIAL RISK OF SERIOUS PREJUDICE OR IMPEDIMENT UNDER THE 1981 ACT

Who can be prejudiced?

- 2.25 Reliable empirical research in England and Wales about the impact of publicity on jury and judicial decision-making is relatively scarce. One exception is research led by Professor Cheryl Thomas, which found that, of those jurors questioned who were sitting in high-profile cases, over one-third recalled some of the pre-trial media coverage, whilst one-fifth said they had found it hard to put such coverage out of their minds.²⁸ Some research has also been undertaken in other jurisdictions, although it reached conflicting conclusions and also often pre-

²⁶ Theoretically, there is a risk that, if an arrest warrant is issued and the active period expires after 12 months, but the suspect is not apprehended until some time after that expiry, active proceedings will only be reactivated by the suspect's arrest some time in the future. In such a scenario, there is a period of time when proceedings are inactive, so the media is free to publish material about the case. However, we consider that such a scenario would be very unusual.

²⁷ See paras 2.26 to 2.28 below. Clearly, there may be a risk that the conviction will be overturned on appeal and subject to a retrial, but that potentially prejudicial reporting may have occurred in the gap between the conviction and appeal. However, we consider that this problem cannot be addressed without excessive restriction on freedom of expression.

²⁸ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) pp 40 to 42.

dated the widespread use of the internet and social media (and of course jurors in other jurisdictions are differently instructed and restricted in what they can do, and the nature of publications also varies between jurisdictions).²⁹

- 2.26 Until recently, the courts considered that jurors were particularly vulnerable to media influence. However, it has been suggested that courts may be more trusting of jurors' ability to consider only the evidence heard in court, with the "drama of the trial" being a factor in focusing jurors' attention.³⁰ We recognise, however, that judicial opinion on the vulnerability of jurors "cannot be given the status of legal principles, and in truth they are no more than the reflections of individual judges based upon experience and common sense".³¹
- 2.27 The courts have taken differing views on the potential for professional judges to be influenced by publicity relating to a case, whether consciously or subconsciously.³² However, they have identified the risk that the public will *perceive* that judges are prejudiced by publicity, even if, in fact, they are not.³³
- 2.28 Historically, the courts appear to have taken the view that lay magistrates should be treated akin to jurors, although more recently it has been held that a lay bench's training and experience makes it less susceptible than jurors to

²⁹ See T Honess, S Barker, E Charman and M Levi, "Empirical and Legal Perspectives on the Impact of Pre-trial Publicity" [2002] *Criminal Law Review* 719, 721 to 727; J Armstrong Brandwood, "You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" (2000) 75 *New York University Law Review* 1412, 1417 to 1418; W Young, N Cameron and Y Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, Vol 2, 1999) pp 60 to 62, http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP_37Vol2.pdf (last visited 1 Nov 2012); E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1 *Journal of Court Innovation* 287, 289 to 291; and M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001), [http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/\\$file/mpp_rep.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/$file/mpp_rep.pdf) (last visited 1 Nov 2012).

³⁰ Arlidge, Eady and Smith on Contempt paras 4-118 and 4-121. Consider also the research findings that knowledge of a defendant's previous conviction has a prejudicial effect on jurors, as detailed in Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) Law Commission Consultation Paper No 141, Appendices C and D.

³¹ Arlidge, Eady and Smith on Contempt para 4-72.

³² See, eg, *R v Davies ex p Delbert-Evans* [1945] KB 435, 442 to 443; *R v Duffy ex p Nash* [1960] 2 QB 188, 200; *A-G v Times Newspapers Ltd* [1974] AC 273, 301; *Re Lonrho Plc* [1990] 2 AC 154, 209; and *A-G v BBC* [1981] AC 303, 335 and 343. Compare the position in Scotland: B Pillans, "Publication Contempt in Scotland: A Step Backwards?" [2009] *Communications Law* 90.

³³ *A-G v Channel Four Television Co Ltd* [1988] *Criminal Law Review* 237.

prejudice.³⁴ Witnesses and parties to proceedings may also be susceptible to influence by prejudicial publication.³⁵

Present law

2.29 Section 2(2) of the 1981 Act establishes that:

The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Substantial risk of serious prejudice

2.30 In *Attorney General v MGN Ltd*,³⁶ Lord Justice Schiemann set out ten key principles “governing the application of the strict liability rule”:³⁷

Principle (1) Each case must be decided on its own facts.

2.31 There are no hard and fast rules about what categories of material can or cannot be published once proceedings are active. For example, the following may amount to contempt, but will not always do so: publishing the previous convictions or other bad character of a defendant; revealing that a defendant faces other charges; direct or indirect assertions of guilt or innocence; or publishing confessions or admissions.³⁸

Principle (2) The court will look at each publication separately and test matters as at the time of publication ... nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk

³⁴ Compare *A-G v Times Newspapers Ltd* [1974] AC 273, 309 and *R (Mahfouz) v Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233, [2004] All ER 114 at [23]. Consider also the findings of the research into the prejudicial effect on magistrates of a defendant’s previous convictions, detailed in Evidence of Bad Character in Criminal Proceedings, (2001) Law Com No 273, Appendix A.

³⁵ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 and *A-G v Times Newspapers Ltd* [1974] AC 273, 296, although see also *Vine Products Ltd v Green* [1966] Ch 484, 496 and *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 425.

³⁶ [1997] Entertainment and Media Law Reports 284.

³⁷ [1997] Entertainment and Media Law Reports 284, 289 to 291 (footnotes omitted), cited in *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9 at [17].

³⁸ See, eg, *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [29], [2012] All ER (D) 185 (Jul); *A-G v Associated Newspapers* [1998] Entertainment and Media Law Reports 711; *A-G v ITV Central Ltd* [2008] EWHC 1984 (Admin), [2008] All ER (D) 192 (Jul); *A-G v MGN Ltd* [2009] EWHC 1645 (Admin); *A-G v MGN Ltd* [2002] EWHC 907 (Admin); *A-G v News Group Newspapers Ltd* (1984) 6 Cr App R (S) 418; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097; *R v Bolam ex p Haigh* (1949) 93 Solicitors Journal 220; *Thorpe v Waugh* [1979] CA Transcript Nos 282 and 313 and Borrie and Lowe: The Law of Contempt para 5.10.

2.32 Likewise, there may be contempt where the latest publication has “exacerbated or increased that risk” created by the earlier publications.³⁹ Whether there is a contempt is not determined by the outcome of the active proceedings: the question is what is in issue in the proceedings at the time of publication.⁴⁰ For example, in a case where identity is in issue, publication of photographs of the defendant is likely to constitute a contempt.⁴¹ The fact that the jury in the active proceedings had to be discharged is also not determinative. However, the section 2(2) test will be satisfied where “the publication would have given rise to a seriously arguable ground of appeal if the trial had been allowed to continue and proceeded to conviction”.⁴²

Principle (3) The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication.

2.33 Liability cannot be founded on the collective impact of publicity, that is to say, where different publishers cumulatively create a substantial risk of serious prejudice or impediment, but where no individual publisher, taken alone, does so.⁴³ This is because each individual publisher must be found to have created the substantial risk of serious prejudice. That approach conforms to orthodox criminal law doctrines on liability and ensures article 10 compliance.⁴⁴

2.34 Prejudice or impediment can be caused to either the prosecution or the defence. It has been suggested that “‘prejudice’ ... equates to ‘improperly affecting’ the course of proceedings”.⁴⁵

Principle (4) That risk must be substantial.

2.35 The courts’ interpretation of this has been less helpful than it might be: substantial means “not remote” or “not insubstantial” and the risk must be practical rather than theoretical.⁴⁶

³⁹ *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [11], [2012] All ER (D) 185 (Jul).

⁴⁰ See Ch 3 at paras 3.42 and 3.71.

⁴¹ See, eg, *A-G v Express Newspapers* [2004] EWHC 2859 (Admin); [2005] Entertainment and Media Law Reports 13. See also *Scottish Daily Record and Sunday Mail Ltd v Thomson* (2009) HCJAC 24.

⁴² *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [11], [2012] All ER (D) 185 (Jul), citing Simon Brown LJ in *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361, 371.

⁴³ *A-G v MGN Ltd* [1997] 1 All ER 456. This is unlike the position at common law before the 1981 Act: see Appendix A.

⁴⁴ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [17] to [20], although the Lord Chief Justice noted in that case at [19] that proposals to reform the law to allow for collective liability have been made. Also, see para 2.49 below .

⁴⁵ Arlidge, Eady and Smith on Contempt para 4-99.

⁴⁶ *A-G v English* [1983] 1 AC 116, 141 to 142; *A-G v News Group Newspapers Plc* [1987] QB 1, 15; *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 881; *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76, 80.

Principle (5) The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but *seriously* so.

- 2.36 The courts have, again not very helpfully, held that the term “serious” should be given its ordinary English meaning.⁴⁷

Principle (6) The court will not convict of contempt unless it is *sure* that the publication has created this substantial risk of that serious effect on the course of justice.

- 2.37 The criminal burden and standard of proof applies.

Principle (7) In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial

Principle (8) In making an assessment of the likelihood of the publication coming to the attention of a potential juror the court will consider amongst other matters: (a) whether the publication circulates in the area from which the jurors are likely to be drawn, and (b) how many copies circulated.

- 2.38 Thus, relevant factors when assessing the degree of risk and gravity of the prejudice would include a newspaper’s circulation in the locality of the trial, or the length of any television broadcast and its repetition. This principle obviously requires modification when considering its application to the new media, for example, the number of times an online publication is accessed will be a relevant factor.⁴⁸ The fact that no juror actually saw the material does not mean that no juror might have done, although the reaction of a juror who sees a publication may be relevant.⁴⁹

Principle (9) In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication the court will consider amongst other matters: (a) the prominence of the article in the publication, and (b) the novelty of the content of the article in the context of likely readers of that publication.

⁴⁷ *A-G v English* [1983] 1 AC 116, 142.

⁴⁸ *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin).

⁴⁹ *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904.

- 2.39 The style of the publication, for example, particularly sensationalist reporting, is relevant.⁵⁰

Principle (10) In making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters: (a) the length of time between publication and the likely date of the trial, (b) the focusing effect of listening over a prolonged period to evidence in a case, and (c) the likely effect of the judge's directions to a jury.

- 2.40 The court, therefore, has to consider the fade factor, although a long delay between publication and trial will not preclude a finding of contempt where the case or publication is memorable.⁵¹ A court will, however, also take into account the focus that jurors have on the evidence presented in the courtroom and the obligation on the judge to give them appropriate warnings and directions.⁵²
- 2.41 Whilst the principles summarised by Lord Justice Schiemann relate predominantly to the risk of prejudicing or impeding criminal proceedings, many of the same issues, including the location of the proceedings, the nature of the publication, and the period of time between publication and trial, are relevant to civil proceedings.⁵³

Substantial risk of serious impediment

- 2.42 It has been held that “impeding” and “prejudice” are neither mutually exclusive nor synonymous concepts, although they overlap.⁵⁴ There are limited authorities on what amounts to “impeding” the course of justice under section 2(2).
- 2.43 The course of justice relates to the “whole process of the law”⁵⁵ and, therefore, it is necessary to consider the impact that the publication may have on the process of the case in question. The authors of Arlidge, Eady and Smith suggest that influencing a defendant or litigant to act in a particular way, for example, to opt for a certain mode of trial, will amount to impediment.⁵⁶ In *Attorney General v Random House Group Ltd*⁵⁷ it was held that a publication which gives rise to applications by the defence to discharge the jury, causing delays and the risk that the judge would discharge the jury, creates a substantial risk of serious

⁵⁰ *A-G v Morgan* [1998] Entertainment and Media Law Reports 294. See also *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76.

⁵¹ See *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Morgan* [1998] Entertainment and Media Law Reports 294; *A-G v MGN Ltd* [2009] EWHC 1645 (Admin).

⁵² *A-G v Unger* [1998] 1 Cr App R 308; *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904. Compare *A-G v BBC* [1992] Crown Office Digest 264.

⁵³ *A-G v News Group Newspapers Ltd* [1987] QB 1.

⁵⁴ *A-G v BBC* [1992] Crown Office Digest 264; *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408; *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9; *A-G v MGN Ltd (No 2)* [2011] EWHC 2383 (Admin), [2012] Entertainment and Media Law Reports 10.

⁵⁵ *A-G v Times Newspapers Ltd*, *The Times* 12 Feb 1983 by Oliver LJ.

⁵⁶ Arlidge, Eady and Smith on Contempt paras 4-105 to 4-106.

⁵⁷ [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9.

impediment. However, just because a court needs to take time to consider the impact of publicity or give the jury a direction does not necessarily mean that justice has been impeded.⁵⁸ The vilification of an individual which could prevent defence witnesses from coming forward amounts to impediment.⁵⁹ Likewise, disclosure of a (confidential) Part 36 offer made in civil proceedings is likely to cause the trial to be abandoned and, therefore, will amount to impediment.⁶⁰

Problems and potential solutions

- 2.44 As noted, consideration of section 2(2) requires account to be taken of article 10. The domestic courts have held that the current section 2(2) test “falls comfortably within the limitations acknowledged in the Convention itself”⁶¹ under article 10(2). The compatibility of a finding of contempt with the ECHR cannot, however, be weighed solely in terms of the section 2(2) test, since it requires consideration of all the circumstances going to proportionality, such as the identity of the alleged contemnor and the sanction imposed. It must, therefore, be assessed on a case-by-case basis.
- 2.45 At present, section 2 involves a test with two benchmarks: the level of risk must be substantial; the degree of prejudice or impediment likely to be caused must be serious. Some commentators take the view that, following *Worm v Austria*,⁶² the threshold of *serious* prejudice or impediment is too high and that *any* prejudice or impediment caused by a publication should be sufficient to be in contempt. Some have suggested that *substantial* risk is too low a threshold, with *likelihood* of risk preferable.⁶³ It is certainly arguable that any degree of prejudice to a fair trial must be prevented (even prejudice which is less than serious). However, it is also arguable that the courts and the media must be able to predict with a greater degree of certainty whether that prejudice or impediment will in fact come about (so there should be more than merely a substantial risk). It is, therefore, not clear that the *degree* of risk, “and the *severity* of impact”⁶⁴ required under section 2(2) are currently ECHR compliant. **Do consultees consider that the right relationship between the degree of prejudice or impediment and the degree of risk is achieved in the current section 2(2) test?**
- 2.46 Additionally, some stakeholders voiced concern that there is a lack of clarity generally about the meanings of “prejudice” and “impede” and the relationship between the two terms. The case law often refers to both prejudice and impediment in the same breath, without differentiating between the two.

⁵⁸ *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361, although, of course, the test under s 2(2) merely requires *substantial risk of serious impediment*, not actual impediment.

⁵⁹ *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408, although compare *Chief Constable of Greater Manchester Police v Channel 5 Broadcast Ltd* [2005] EWCA Civ 739, [2005] Police Law Reports 183.

⁶⁰ Arlidge, Eady and Smith on Contempt para 4-135.

⁶¹ *A-G v MGN* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [33]; see also *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904, 918.

⁶² (1997) 25 EHRR 454 (App No 22714/93).

⁶³ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 275 to 279.

⁶⁴ J Jaconelli, “Defences to Speech Crimes” [2007] *European Human Rights Law Review* 27, 39 (emphasis in original).

Concerns were also raised that in *Attorney General v MGN Ltd*,⁶⁵ the issue of whether the publications created a substantial risk of serious *impediment* appears to have emerged mainly at the hearing, with the respondents having previously proceeded on the basis that they were being accused of creating a substantial risk of serious prejudice. This meant it was harder for those media organisations to understand the case against them. We, therefore, consider that there is a risk that media organisations may be disadvantaged by the confusion between the two tests. **Do consultees consider that the relationship between the terms “prejudice” and “impede” warrants clarification?**

- 2.47 If there is a need for clarification, we consider that the law could be made easier to follow and potentially fairer to publishers if the test under section 2(2) were split into two, one relating to prejudice and the other to impediment. The Attorney General would be required to specify the basis on which the respondent was in contempt – whether under one of the tests or perhaps both - to ensure that the respondent understood the case to answer. This would lead to the development of a body of jurisprudence on what amounts to impediment, and how it differs from or overlaps with prejudice, which would allow publishers and the Attorney General to predict with greater certainty the likely outcome of a case. **Do consultees think that section 2(2) should be split into two provisions, one dealing with prejudice, and the other with impediment?**
- 2.48 Some stakeholders also questioned whether there should be an alignment between (i) the test applied by the courts to determine an application to stay proceedings as an abuse of the process of the court on the ground of prejudicial publicity and (ii) the test under section 2(2). The test applied when considering an application for an abuse of process is whether it is possible for the defendant to have a fair trial. The court must consider what measures can be taken to reduce the impact of prejudicial publicity – for example, by giving warnings to jurors. However, the court will be required to stay the proceedings where “the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it”.⁶⁶
- 2.49 Obviously, the two tests occur in different contexts and are focused on different bodies (the defendant and the publisher respectively).⁶⁷ Contempt and an abuse of process have different standards of proof (contempt beyond reasonable doubt, abuse of process on the balance of probabilities).⁶⁸ The abuse of process test needs to account for the cumulative effect of publicity, given that the issue is whether a fair trial is possible in all the circumstances and the effect that media coverage has had on the independence and impartiality of the tribunal. In

⁶⁵ [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [15].

⁶⁶ See *Montgomery v HM Advocate* [2003] 1 AC 641, 667 and *Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659. See also D Young, M Summers and D Corker, *Abuse of Process in Criminal Proceedings* (3rd ed 2009); A L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed 2008); and J Oliveira, “Speaking with Two Voices: The Tension between Strict Liability Contempt and Abuse of Process in the Context of Adverse Pre-Trial Publicity” (2001) 31 *Hong Kong Law Journal* 459.

⁶⁷ See *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361.

⁶⁸ J Oliveira, “Speaking with Two Voices: The Tension between Strict Liability Contempt and Abuse of Process in the Context of Adverse Pre-Trial Publicity” (2001) 31 *Hong Kong Law Journal* 459, 479.

contrast, the contempt test is necessarily focused on individual publications,⁶⁹ because to hold media organisations in contempt for contributing to a climate of “trial by media”, where their individual publications would not give rise to a substantial risk of serious prejudice, could contravene article 10. In consequence, we consider that it would be a mistake to align the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2). **Do consultees agree that the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2) should remain distinct?**

SECTION 5 OF THE 1981 ACT

Present law

2.50 The 1981 Act provides a qualification to the strict liability rule under section 5:

A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

2.51 The court is required to consider first whether the publication creates a substantial risk of serious prejudice or impediment and if it does, whether section 5 applies. The burden is on the prosecution to show that the section does not apply once the respondent has met the evidential burden.⁷⁰

2.52 Section 5 has been interpreted liberally: even accusations can be considered part of a “discussion” and the section covers discussion of “controversial matters of general public interest”, in spite of the existence of contemporaneous legal proceedings.⁷¹ The test is “whether the risk created was merely an incidental consequence to the expounding of the main theme” of the publication.⁷²

Problems and potential solutions

2.53 Some commentators suggest that section 5 may not be ECHR compatible because a public interest defence cannot operate where a publication imperils the right to a fair trial:⁷³ article 6 must necessarily take primacy over the exercise of article 10 rights.⁷⁴ By contrast, some stakeholders were concerned that the ambit of section 5 is too narrow and that the media might be discouraged from

⁶⁹ *A-G v MGN Ltd* [1997] 1 All ER 456. See also the discussion in B Naylor, “Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials (1994) 53(3) *Cambridge Law Journal* 492.

⁷⁰ *A-G v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] Entertainment and Media Law Reports 9.

⁷¹ *A-G v English* [1983] 1 AC 116, 143 to 144.

⁷² *Arlidge, Eady and Smith on Contempt* para 4-320. Also, see Appendix C on the proposal for slightly different public interest criteria.

⁷³ See, eg, the discussion in H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 279 to 284.

⁷⁴ Borrie and Lowe: *The Law of Contempt* para 4.15.

publishing, even in general terms, about important social issues – allegations of child abuse within particular communities for example – in relation to which there are relevant active proceedings, although this view may arise from stakeholders’ overly conservative interpretations of the section.

2.54 We consider that section 5 strikes the appropriate balance between ensuring the right to a fair trial, whilst also permitting the media to report on important matters of public concern. The courts in applying section 5 must necessarily consider the impact of articles 6 and 10 when deciding whether the risk of impeding or prejudicing proceedings is incidental to the public interest value of the discussion.
Do consultees agree that section 5 should be retained in its current form?

2.55 Cases involving section 5 are relatively rare, perhaps because the Attorney General chooses not to proceed in cases where there is a reasonable argument that the section would apply. Greater clarity in respect of this could be gleaned if the Attorney General were to publish a prosecution policy. We consider this in more detail below (at paras 2.60 to 2.63).

INTENTIONAL CONTEMPT BY PUBLICATION

2.56 Intentional contempt by publication at common law was preserved by the 1981 Act,⁷⁵ although it is rarely invoked. It has been suggested by the authors of Arlidge, Eady and Smith that the conduct element of the offence is interference with the administration of justice.⁷⁶ They hypothesise⁷⁷ that common law contempt is more expansive than statutory contempt on the basis that it could apply:

- (1) to private communications, for example a letter to a witness pressuring them not to give evidence;
- (2) to creating a risk of serious prejudice which is less than “substantial” but more than minimal;⁷⁸
- (3) to creating a risk of prejudice which is less than “serious”, although not to “technical” contempt as this would not be ECHR compliant;⁷⁹
- (4) to proceedings which are inactive within the terms of the 1981 Act but which are pending;⁸⁰

⁷⁵ Section 6(c).

⁷⁶ Arlidge, Eady and Smith on Contempt para 5-7. Hooper LJ in *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 takes a similar view at [13], citing Lord Diplock in *A-G v Leveller Magazine Ltd* [1979] AC 440, 449.

⁷⁷ Arlidge, Eady and Smith on Contempt paras 5-12 to 5-13; 5-61; 5-65 to 5-66; 5-67 and following; 5-76; 5-96 to 5-99; and 5-100 to 5-101.

⁷⁸ See *A-G v English* [1983] 1 AC 116 and *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 at [13].

⁷⁹ One example of a “technical” contempt would be that referred to in the *Sunday Times* case [1974] AC 273, where, as Arlidge, Eady and Smith on Contempt note, “the House of Lords held that *any* pre-judgment of the issues in a pending case was a contempt even if it only created a small risk (excluding de minimis) that the proceedings would be prejudiced” para 5-20 (our emphasis).

⁸⁰ *In the Matter of A Contempt: Yousaf, Akhtar v Luton Crown Court* [2006] EWCA Crim 469, [2006] All ER (D) 106 at [13].

- (5) to proceedings which can be said to be “imminent” in that they are “virtually certain to take place” but have not yet begun,⁸¹ although this may be difficult to reconcile with the ECHR requirements of articles 7 and 10. It is unclear whether contempt can occur in respect of proceedings which are “on the cards” but not (yet) “virtually certain” to happen;
- (6) to potential appeal proceedings in the period between trial and appeal.
- 2.57 Common law contempt by publication requires proof of intention to prejudice proceedings, although there are ambiguities about this⁸² and other aspects of the law.⁸³ In light of these uncertainties, **do consultees consider that the common law of intentional contempt by publication should be defined in statute?**

EVIDENCE AND PROCEDURE

Present law

- 2.58 Proceedings under the strict liability rule can only be brought with the consent of the Attorney General (section 7 of the Act) or by the court on its own motion, although that is unusual.⁸⁴ The Attorney has been said to be the appropriate public officer to bring proceedings given the Attorney’s role as the guardian of the public interest.⁸⁵ The Attorney has discretion as to whether to bring proceedings⁸⁶ and the refusal to do so is not judicially reviewable.⁸⁷ The Attorney also issues advisory notices to media organisations where there are concerns that reporting may stray close to the territory of section 2(2). Common law contempt does not require the consent of the Attorney to bring proceedings.⁸⁸
- 2.59 The current procedure is governed by Civil Procedure Rule 81 and the related Practice Direction. Proceedings for contempt by publication are generally brought before the Divisional Court, and permission is required to bring such proceedings.⁸⁹ The civil rules of evidence apply (for example, evidence is served by affidavit), although proceedings for contempt are deemed criminal proceedings for the purposes of article 6 so the respondent is entitled to the enhanced protections of article 6(2) and 6(3).⁹⁰ It is unclear whether legal aid is available for contempt by publication cases either under the 1981 Act or at

⁸¹ Arlidge, Eady and Smith on Contempt para 5-12; *A-G v News Group Newspapers Ltd* [1989] QB 110; *A-G v Sport Newspapers Ltd* [1991] 1 WLR 1194. See J N Spencer, “Caught in Contempt of Court” (1992) 56 *Journal of Criminal Law* 73.

⁸² Arlidge, Eady and Smith on Contempt para 5-138 to 5-139.

⁸³ See, eg, Arlidge, Eady and Smith on Contempt, who at para 5-200 try to distil the key features of the law.

⁸⁴ *Balogh v St Albans Crown Court* [1975] QB 73, 85. This is unlike the position in Scotland where interested parties can bring proceedings: B Pillans, “Publication Contempt in Scotland: A Step Backwards?” [2009] *Communications Law* 90.

⁸⁵ Arlidge, Eady and Smith on Contempt para 2-184.

⁸⁶ See Lord Diplock’s comments in *A-G v Times Newspapers Ltd* [1974] AC 273, 311.

⁸⁷ *R v Solicitor General ex p Taylor* [1996] Administrative Law Reports 206.

⁸⁸ Arlidge, Eady and Smith on Contempt para 2-189, although there is confusion about the position when proceedings are brought privately but there could be an overlap between strict and intentional liability: para 4-197 and following.

⁸⁹ Civil Procedure Rules, r 81.12(3).

⁹⁰ *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

common law.⁹¹ There is a right of appeal for both the applicant and the respondent from the Divisional Court to the Supreme Court.⁹²

Problems and potential solutions

- 2.60 During our pre-consultation discussions, some stakeholders raised concerns that the factors the Attorney General takes into account when considering whether to bring proceedings are not transparent for the media or indeed the wider public. It was suggested that this created a risk of a lack of consistency in the decisions of different Attorneys General⁹³ (although some stakeholders noted that the current Attorney General for England and Wales has given helpful guidance to media organisations). Concerns here related both to different individuals occupying the office of Attorney General and to different Attorneys General for different parts of the UK. This difficulty appears to be compounded by the fact that the decisions of the Attorney General are not judicially reviewable (in contrast to those of the Crown Prosecution Service, in some circumstances).⁹⁴
- 2.61 From a human rights perspective, views differ about the extent to which vesting exclusive powers to bring contempt proceedings in the Attorney General is ECHR compliant, particularly with regard to articles 6 and 13.⁹⁵ Furthermore, it has been suggested that compliance with article 10 would be strengthened by understanding the factors that the Attorney considers, since this would remove any disadvantage for the media by ensuring that publishers can regulate their conduct in the knowledge of the circumstances in which the Attorney will exercise the power to bring contempt proceedings.⁹⁶
- 2.62 Stakeholders also differed in their views about the usefulness of the Attorney General's advisory notices, with some regarding them as helpful guidance and others taking the view that they had an unnecessary "chilling effect" on reporting. Many stakeholders commented that it can be difficult to obtain information which would inform their deliberations about whether a potential publication would amount to contempt, for example, to find out whether identification is in issue in criminal proceedings. Some stakeholders suggested that the Attorney General's advisories system or a system operated by a body dealing with press complaints⁹⁷ could be used to inform the press about such issues in order to

⁹¹ Arlidge, Eady and Smith on Contempt suggest that it is not (at para 15-124) but civil legal aid is available in cases where "the client may be subject to orders or penalties which are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6" of the ECHR, subject to an interests of justice test: Legal Services Commission, *Funding Code: Criteria*, s 14.

⁹² Administration of Justice Act 1960, s 13. Sections 1 and 2 set out procedural aspects.

⁹³ Borrie and Lowe: *The Law of Contempt* para 13.15 and U Smartt, "Who Still Observes the Law of Contempt?" (2007) 171 *Justice of the Peace Journal* 76.

⁹⁴ Archbold paras 1.337 to 1.338. The Attorney General is subject to judicial review in respect of some of his functions: H Woolf, J Jowell, A Le Sueur, C Donnelly, *De Smith's Judicial Review* (6th ed 2009) para 3.019.

⁹⁵ Compare H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 256 and Borrie and Lowe: *The Law of Contempt* para 13.13. The latter argues that the effective remedy is an appeal if the trial was unfair.

⁹⁶ Compare, in an art 8 context, *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345. See Appendix B, on strict liability contempt under s 2(2).

⁹⁷ Depending, of course, on the outcome of Lord Justice Leveson's Inquiry.

provide clarity. That said, the lack of available information about this may well be because, at least at an early stage of proceedings, the matters in issue for any potential trial are unknown.

2.63 Publication of the factors the Attorney takes into account when deciding whether to bring proceedings would provide guidance for the media on the interpretation of the law, transparency for the public, and could encourage consistency of decision-making between different Attorneys General. For example, aside from considering the strength of the evidence, it might also be important for the Attorney to consider various public interest criteria. These could include, for example, the impact of the alleged contempt on the active proceedings (including the cost of any consequences for those proceedings), whether the publication was repeated, the motivation of the publisher, the likely penalty which would follow a contempt finding, whether the publisher has previously been held in contempt, the likelihood of the conduct being repeated, the resources of the publisher, or other public interest criteria. **Do consultees consider that a list of the factors considered by the Attorney General when deciding whether to bring proceedings should be published?**

2.64 As we have explained, contempt by publication is currently tried before the Divisional Court under Civil Procedure Rule 81. Historically, trial on indictment was used for contempt by publication, although it has not been in recent times. In *Re Lonrho*,⁹⁸ where contempt proceedings were brought in the House of Lords, the respondents argued that the case should have been initiated by the Attorney General on indictment in the Crown Court. Lord Keith rejected this, citing *D* where it was held that:

For a very long time now, decisions in all contempt cases have been made by judges who are best equipped to tell whether a contempt has been committed and may very well be able to do so on affidavit evidence alone. It is not, we think, in the best interests of anyone, that a by now almost ancient way of proceeding [on indictment] should be resurrected⁹⁹

2.65 We consider that there may be merit in treating contempt by publication as an ordinary criminal offence, in the same way that other offences which may involve media defendants are tried in the criminal courts.¹⁰⁰ This is particularly so because, with the increase in “citizen journalism”, individual bloggers or tweeters may be more likely to be subject to contempt proceedings than in the past when the focus tended to be on corporate media organisations. If contempt by publication is to be treated as if it were a normal criminal offence, we consider that the Attorney General would still be the appropriate public officer to bring

⁹⁸ [1990] 2 AC 154,162.

⁹⁹ Lord Keith at 177 citing *D* [1984] AC 778, 792. More recently, in *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR at [7], the Lord Chief Justice explained that “it should now be clearly understood that trials for contempt of court on indictment are obsolete” albeit that this was not a case of contempt by publication. Likewise, see the Supreme Court of New Zealand case *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

¹⁰⁰ Although in Ireland concerns have been raised that trying contempt on indictment, initiated by the executive, prevents the court from protecting its own process on its own motion: *The State (DPP) v Walsh* [1981] IR 412; *Murphy v BBC* [2005] 3 IR 336.

proceedings. The Crown Prosecution Service would not be in a position to do so because of the potential conflict of interest if it were alleged that the publication in question had seriously prejudiced or impeded a criminal trial to which the CPS were the prosecuting party.¹⁰¹

- 2.66 If contempt by publication were prosecuted as a normal criminal offence that would automatically trigger the normal criminal investigative and trial process. There is obvious merit in those processes applying when an allegation can lead to criminal conviction and imprisonment. We foresee there being a greater likelihood of prosecutions for contempts against individuals who may be held in contempt on account of, for example, their twitter or blog posts.¹⁰² In such cases the benefits of the application of the orthodox criminal processes are even more obvious: police powers of arrest, detention, investigation and charge, bail under the Bail Act 1976, the procedure for sending cases from the magistrates' to the Crown Court under section 51 of the Crime and Disorder Act 1998, the criminal disclosure regime, and the criminal rules of evidence would all apply.¹⁰³ We do not consider that the adoption of such disclosure arrangements would in practice be onerous to the parties or to judges in any case under section 2, given that it is the publication itself which will form the basis of the evidence in most cases. Legal aid would also be available in the usual manner. Such change would have the great advantage of ensuring that defendants benefit fully from rules and procedures which can protect article 5 rights in respect of bail, and article 6 rights in respect of the trial process. Again, this could be particularly important if individuals, rather than companies, are tried for contempt.¹⁰⁴ That said, the adoption of such a procedure would represent a significant change from the current arrangements for dealing with contempt by publication. It would require those prosecuting and defending these cases to adopt criminal procedures with which they may be less familiar, and which could impose greater burdens.¹⁰⁵
- 2.67 We acknowledge that the benefits of prosecuting contempt by publication as a normal criminal offence would introduce some measure of inconsistency in the law given that other contempts, such as breach of section 4(2) or 11 orders (that is, orders imposing particular kinds of reporting restrictions, which we consider below¹⁰⁶) would still be dealt with by the Divisional Court or the court on its own

¹⁰¹ Some take the view that prosecution by the Attorney General may not be appropriate because of the Attorney's role as superintendent of the prosecution process; see A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) para 2.139, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012). However, we consider that there is no other suitable prosecuting agency to which responsibility for contempt should be given.

¹⁰² See Ch 3 at paras 3.32 to 3.39.

¹⁰³ We do not consider that contempt proceedings should be made subject to the Proceeds of Crime Act 2002. See para 2.116 below.

¹⁰⁴ Currently, issues of bail, for example, do not generally arise in relation to journalists or editors because the corporate publisher tends to be prosecuted.

¹⁰⁵ There may also be concerns about the s 5 defence in relation to jury trials. There may be a risk that, if a publisher wishes to draw public attention to a particular matter, they will seek to raise s 5 in order to further their cause during the contempt proceedings themselves. However, we do not consider that this risk is any higher in relation to a trial by jury than would exist currently in the Divisional Court.

¹⁰⁶ See paras 2.82 to 2.92 and following below.

motion. This may be unhelpful given the already discordant law on contempt of court generally.

- 2.68 **Do consultees consider that contempt by publication under section 2(2) should be tried subject to these procedural safeguards associated with a trial on indictment? If not, why not?**
- 2.69 Making contempt by publication under section 2(2) triable as if it were a normal criminal offence could be achieved by providing statutory clarification of its classification as an indictable only criminal offence. It may also be necessary to make consequential amendments to legislation given that some criminal justice legislation has specific provisions including or excluding contempt from its scope, and it would be necessary to clarify whether contempt by publication as a criminal offence required amendment to any of these.
- 2.70 If section 2(2) contempt deserves the processes associated with a trial on indictment, then it is difficult to see why intentional contempt should be different. Clearly, trying one of either section 2(2) or intentional contempt on indictment, but not the other, would introduce significant inconsistency into the law of contempt. It would, therefore, be preferable for both, or neither, to be tried in this way.
- 2.71 Admittedly, the process by which that might be achieved may be more complicated. This is because it would first be necessary to define intentional contempt by publication in statute, which could be challenging given the lack of clarity in the current law. On the other hand, specifying the offence in precise terms would remedy some of these uncertainties, and ensure that the law was article 7 compliant. Having said that, intentional contempt by publication is exceptionally rarely prosecuted. **Do consultees consider that intentional contempt by publication should be tried subject to the procedural safeguards associated with a trial on indictment? If not, why not?**
- 2.72 If contempts by publication are to be tried on indictment, **do consultees agree that it would be beneficial to clarify through legislation, for the avoidance of doubt, that the jurisdiction of the Divisional Court to deal with strict liability and intentional contempt by publication had been ousted?**
- 2.73 The surest way of providing the full panoply of criminal investigative powers and trial processes is to make these offences triable on indictment in the usual way. However, there may be concerns about the use of trial by jury for contempt by publication. On the one hand, some may consider that a jury would be able to deal with such a contempt following appropriate guidance on the law from the judge in the same manner as with other criminal offences.

- 2.74 On the other hand, there may be concerns about whether jurors would understand or be willing to accept restrictions on media coverage, particularly where it relates to those who are accused or convicted of notorious offences. Jurors are, after all, purchasers and readers of the very material which they may be invited to find constitutes a contempt. The content of the publications themselves may ensure that the juror has limited sympathy for the right to a fair trial of the individual concerned, given that, by their nature, such publications are likely to make allegations or disclosures about (further) unsavoury conduct by that individual. As the chapter on juror contempt explains, there is already evidence that some jurors ignore the trial judge's warnings and actively seek prejudicial material on the internet or in the media about the defendant whom they are trying.¹⁰⁷ Such jurors – who may already have limited respect for the rules of evidence and the need to approach the case with an unbiased perspective – may be reluctant to convict a publisher in respect of publications which prejudice a fair trial, given that they themselves may be blind to the risk of becoming prejudiced.
- 2.75 An alternative to trial with a jury would be to adopt a trial process incorporating the protections provided for by trial on indictment (for example, in respect of investigations, evidence, bail, disclosure and so on) but presided over by judge alone. There are arguments against such a hybrid trial “as if on indictment”. It would be a novel and unique procedure given that, currently, no other criminal offences are automatically tried as if on indictment without a jury.¹⁰⁸ Legislation allows for trial without jury in exceptional cases where there is a danger of jury tampering, but the statute requires the risk to be shown in the particular case, and the provisions are not activated by virtue of the offence itself, as would be the case here.¹⁰⁹ On the other hand, trial by judge alone could be quicker and cheaper than with a jury.
- 2.76 **Do consultees consider that contempt by publication (under section 2(2) and intentional contempt at common law) should be tried on indictment by a judge and jury in the usual way or should it be tried as if on indictment by a judge sitting alone? If consultees consider that trial should be by a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?**

¹⁰⁷ See Ch 4 at para 4.3.

¹⁰⁸ Criminal Justice Act 2003, s 43, allowing for trial without jury in certain fraud cases, was never brought into force. It was repealed by the Protection of Freedoms Act 2012, s 113.

¹⁰⁹ Criminal Justice Act 2003, s 44.

- 2.77 Presently, liability under section 2(2) or for intentional contempt at common law can be established under the doctrine of vicarious liability, meaning that a corporate publisher can be held liable for the acts of the individual editor or journalist.¹¹⁰ If publication contempts (both intentional and under section 2(2)) were to be tried on indictment, or as if on indictment, consideration may need to be given to the most appropriate means of establishing corporate liability for contempts. **Do consultees consider that it would be necessary to set out in statute the basis for corporate liability if intentional contempt and contempt under section 2(2) were tried on indictment or as if on indictment?**

REPORTING RESTRICTIONS UNDER THE 1981 ACT

Present law: section 4(1)

- 2.78 The 1981 Act provides:

4.— Contemporary reports of proceedings.

(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

- 2.79 Section 4(1) need only be invoked if the publication in question creates a substantial risk of serious prejudice. The burden is on the Attorney General to show that section 4(1) does not apply.¹¹¹

- 2.80 In respect of the requirement for good faith, it has been suggested that this should be interpreted taking into account “the underlying purpose for which the s 4(1) protection is intended, namely, the entitlement of the public to be informed about current legal proceedings”.¹¹² However, there are difficulties in respect of the requirement for “fair and accurate reporting” in that reports of only part of the proceedings may give a misleading picture of the proceedings as a whole. Nonetheless, minor inaccuracies should still be protected by section 4(1).¹¹³

- 2.81 Section 4(3) gives guidance as to what is “contemporaneous”. For the print media, publishing contemporaneously will usually occur if the report appears in the next edition of the newspaper in question.¹¹⁴ Where a section 4(2) order has been made, a subsequent report will be deemed contemporaneous if published “as soon as practicable”¹¹⁵ after the section 4(2) order is lifted or expires.

Present law: section 4(2)

- 2.82 The 1981 Act further provides under section 4:

¹¹⁰ Arlidge, Eady and Smith on Contempt para 4-207 and following and Arlidge, Eady and Smith on Contempt, ch 5.

¹¹¹ Arlidge, Eady and Smith on Contempt para 4-278.

¹¹² Arlidge, Eady and Smith on Contempt para 4-294.

¹¹³ Arlidge, Eady and Smith on Contempt paras 4-297 and 4-280.

¹¹⁴ Arlidge, Eady and Smith on Contempt para 4-289.

¹¹⁵ Section 4(3).

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

2.83 Section 4(2) provides a power to postpone the reporting of proceedings. It is limited to “any report” of the proceedings themselves and, therefore, cannot cover extra-judicial matters¹¹⁶ or reports which do not mention the current proceedings.¹¹⁷ Section 4(2) orders must be aimed at protecting those specific proceedings being heard when the application for an order is made and not the administration of justice in general.¹¹⁸

2.84 The concept of proceedings being “pending or imminent” is wider than the notion of “active” under the 1981 Act in that a section 4(2) order can be made where proceedings “are no more than contingent at the time of the order”.¹¹⁹ Publication can be postponed for as long as the court thinks necessary to protect the particular proceedings, although postponement cannot be indefinite.¹²⁰

2.85 There is, essentially, a three-stage test to surmount before an order can be made:¹²¹

(1) Is there a substantial risk of prejudice to the administration of justice in the current or other pending or imminent proceedings?

2.86 Substantial here means not insubstantial.¹²² In considering the risk, the court should bear in mind the jury’s ability to follow the directions of the trial judge, the fade factor, the “drama of the trial”, and should assume that press coverage will be fair and accurate.¹²³ The risk has to be assessed at the time that the order is sought¹²⁴ and the relevant risk is to the administration of justice not to other matters such as fears about community hostility towards witnesses.¹²⁵ It is

¹¹⁶ Such as a film of an arrest: *R v Rhuddlan Justices ex p HTV Ltd* [1986] Criminal Law Review 329. See also *Times Newspapers Ltd* [2009] EWCA Crim 571, although compare *Guardian Newspapers Ltd* [2001] EWCA Crim 1351.

¹¹⁷ *Allen v Grimsby Telegraph* [2011] EWHC 406 (QB), [2011] All ER (D) 30 (Mar).

¹¹⁸ Arlidge, Eady and Smith on Contempt paras 7-150 to 7-151.

¹¹⁹ Arlidge, Eady and Smith on Contempt para 7-180.

¹²⁰ *Times Newspapers Ltd* [2007] EWCA Crim 1925, [2008] 1 WLR 234.

¹²¹ See, eg, *MGN Pension Trustees Ltd v Bank of America National Trust and Savings Association* [1995] 2 All ER 355. The same approach was adopted in *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 and *R (Telegraph Group Plc) v Sherwood* [2001] EWCA Crim 1075, [2001] 1 WLR 1983.

¹²² Arlidge, Eady and Smith on Contempt paras 7-211 to 7-212.

¹²³ See, eg, *B* [2006] EWCA Crim 2692, [2007] Entertainment and Media Law Reports 5 at [25] and [31]; *Barlow Clowes Gilt Managers Ltd v Clowes*, *The Times* 2 Feb 1990 and also Arlidge, Eady and Smith on Contempt paras 7-213 and 7-222.

¹²⁴ *George* [2002] EWCA Crim 1923, [2003] Criminal Law Review 282 at [23].

¹²⁵ *Re MGN* [2011] EWCA Crim 100, [2011] 1 Cr App R 31 at [14].

notable that the test under section 4(2) does not require *serious* prejudice unlike that under section 2(2) and some have questioned how far section 4(2) can be said to be article 10 compliant if the prejudice is less than serious.¹²⁶

- (2) If so, is the order necessary to eliminate that risk, including considering possible alternative measures?

2.87 The order must be necessary for avoiding the risk and there should be no other way of avoiding it. Furthermore, the order must be likely to avoid the risk and if it is so, the order should be no wider than necessary for avoiding that risk.¹²⁷

- (3) If so, in light of the competing public interests at stake, ought the court to make the order and if so, in what terms? This is a value judgment.

2.88 This stage of the test should be considered in light of the article 10(2) requirement that any interference be “necessary in a democratic society”:

in considering whether it was “necessary” both in the sense under section 4(2) of the 1981 Act of avoiding a substantial risk of prejudice to the administration of justice and, therefore, of protecting the defendants’ right to a free trial under article 6 of the Convention and in the different sense contemplated by article 10 of the Convention as being “prescribed by law” and “necessary in a democratic society” by reference to wider considerations of public policy, the factors to be taken into account could be expressed as a three-part test ... [in respect of the third part of the test] even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by articles 6 and 10 of the Convention.¹²⁸

2.89 The courts have held that there is a strong public interest in the media reporting legal proceedings.¹²⁹ Nonetheless, in striking the balance between the right to a fair trial and the freedom of speech of the media, it is the fair trial which takes primacy.¹³⁰

¹²⁶ Arlidge, Eady and Smith on Contempt para 7-199. Although see the discussion about the substantial risk of serious prejudice test under s 2(2), at para 2.30 and following above .

¹²⁷ *MGN Pension Trustees Ltd v Bank of America National Trust and Savings Association* [1995] 2 All ER 355; *Re MGN* [2011] EWCA Crim 100, [2011] 1 Cr App R 31 at [14].

¹²⁸ *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [69] citing the headnote from *R (Telegraph Group Plc) v Sherwood* [2001] EWCA Crim 1075, [2001] 1 WLR 1983.

¹²⁹ *Re Central Independent Television Plc* [1991] 1 WLR 4; *R v Beck ex p Daily Telegraph Plc* [1993] 2 All ER 177 and *Re MGN Ltd* [2011] EWCA Crim 100, 1 Cr App R 31.

¹³⁰ *B* [2006] EWCA Crim 2692, [2007] Entertainment and Media Law Reports 5. There is discussion of the rationale for this in the New Zealand case of *B* [2008] NZCA 130, [2009] 1 NZLR 293.

- 2.90 The failure to make an order may mean that reports of what occurs in open court can be published, even if what is being reported was revealed in the absence of the jury, although there is a lack of clarity about this in the current law.¹³¹
- 2.91 Breach of a section 4(2) order automatically amounts to contempt, regardless of whether there is a substantial risk of serious prejudice.¹³² The necessary mental element for breach of an order is unclear. The authors of Arlidge, Eady and Smith suggest that knowledge should be required, although it is not clear whether knowledge alone will suffice or whether, in addition to knowledge of the order, it is necessary to intend to prejudice the administration of justice. The latter appears to be the preferred approach.¹³³ It is uncertain whether recklessness as to the existence of the order is sufficient, but if it is, then a failure to make checks may give rise to liability.¹³⁴ This lack of clarity is unfortunate given that the purpose of section 4(2) was to ensure “that editors should know so far as possible exactly where they stand”.¹³⁵ It also has implications for ECHR compliance.¹³⁶

Present law: section 11

- 2.92 Section 11 states:

In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

- 2.93 Section 11 does not provide a power to withhold information but a power to give directions prohibiting publication.¹³⁷ The authorities explain that section 11 should not be used to protect defendants from embarrassment or stigma, harassment or

¹³¹ Arlidge, Eady and Smith on Contempt para 7-186 and Borrie and Lowe: The Law of Contempt para 7.4. We consider that the failure to make an order should mean that publishing can occur, given the wording and purpose of s 4(1). However, this is obviously subject to other specific reporting restrictions, such as the prohibition on naming complainants in sexual offences cases under the Sexual Offences (Amendment) Act 1992.

¹³² *R v Horsham Justices ex p Farquharson* [1982] QB 762; *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 884 to 885. This seems to have been the basis on which the clause was debated in Parliament: see Appendix A on orders against disclosure.

¹³³ Arlidge, Eady and Smith on Contempt paras 7-257 and 7-262, citing *A-G v Newspaper Publishing Plc* [1988] Ch 333; *A-G v News Group Newspapers Plc* [1989] QB 110; *A-G v Newspaper Publishing Plc* [1997] 1 WLR 926 by Lord Bingham CJ.

¹³⁴ Arlidge, Eady and Smith on Contempt paras 7-246 to 7-261; *Official Solicitor v News Group Newspapers Plc* [1994] 2 Family Law Reports 174.

¹³⁵ *Hansard* (HL), 9 Dec 1980, vol 415, cols 660, 661 and 664, Lord Hailsham.

¹³⁶ See para 2.100 below.

¹³⁷ Arlidge, Eady and Smith on Contempt paras 7-110 to 7-111.

economic loss.¹³⁸ Section 11 is not engaged if the information to be withheld was not mentioned during the proceedings.¹³⁹

- 2.94 Section 11 can be used to grant anonymity to complainants, for example, in blackmail cases; to restrict the publication of evidence given mistakenly in public which should have been in private, or to grant anonymity where there are psychological or psychiatric implications of not doing so.¹⁴⁰ A real risk to an individual's right to life under article 2 would justify the making of a section 11 order (for example, in respect of an undercover police officer or a police informant), as may a threat to article 8 rights in some circumstances, although section 11 cannot be used to protect an individual's privacy at a general level.¹⁴¹ Section 11 orders can be made indefinitely.¹⁴²
- 2.95 A failure to comply with a section 11 order is not in and of itself contempt of court but is likely to be held in contempt.¹⁴³ The mental element for breach of an order appears to be that the conduct was "specifically intended to impede or prejudice the administration of justice".¹⁴⁴ Although it is not necessary to show that the order was served on those allegedly in breach of it, the Practice Direction suggests that there is a duty on the media to check whether an order exists.¹⁴⁵

Procedure

- 2.96 The procedure to be followed in respect of orders under section 4(2) or section 11 in criminal cases is detailed in the Criminal Procedure Rules, Part 16. The courts have discretion to hear from the media when making an order under

¹³⁸ *R v Westminster City Council ex p Castelli* [1996] 1 Family Law Reports 534 but compare *HM Advocate v M* 2007 SLT 462. See also *R v Evesham Justices ex p McDonagh* [1988] QB 553; *R (Harper) v Aldershot Magistrates' Court* [2010] EWHC 1319 (Admin), (2010) 174 Justice of the Peace 410; *R v Dover Justices ex p Dover District Council and Wells* (1992) 156 Justice of the Peace 433 and *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966.

¹³⁹ *R (Trinity Mirror Plc) v Croydon Crown Court* [2008] EWCA Crim 50, [2008] QB 770; *R v Arundel Justices ex p Westminster Press Ltd* [1986] 1 WLR 676.

¹⁴⁰ *R v Socialist Worker Printers and Publishers Ltd ex p A-G* [1975] QB 637; *R v Hove Justices ex p Gibbons*, *The Times* 18 June 1981 (although, compare *R v Central Criminal Court ex p Crook*, *The Times* 8 Nov 1984); *Times Newspapers Ltd* [2007] EWCA Crim 1925, [2008] 1 WLR 234; *HM Advocate v M* 2007 SLT 462. The blackmail case was precisely the situation the section was designed to address when the bill was introduced to Parliament: *Hansard* (HC) 2 Mar 1981, vol 1000, col 42.

¹⁴¹ *R v Reigate Justices ex p Argus Newspapers* (1983) 5 Cr App R (S) 181; *R (Harper) v Aldershot Magistrates' Court* [2010] EWHC 1319 (Admin), (2010) 174 Justice of the Peace 410; *Z v Finland* (1998) 25 EHRR 371 (App No 22009/93) at [95]; *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697; *R v Central Criminal Court ex p Crook*, *The Times* 8 Nov 1984; *R (Trinity Mirror Plc) v Croydon Crown Court* [2008] EWCA Crim 50, [2008] QB 770 at [32].

¹⁴² *Re Times Newspapers Ltd* [2007] EWCA Crim 1925, [2008] 1 WLR 234.

¹⁴³ Arlidge, Eady and Smith on Contempt para 7-115.

¹⁴⁴ *A-G v Newspaper Publishing Plc* [1997] 1 WLR 926, 936 to 937.

¹⁴⁵ Arlidge, Eady and Smith on Contempt para 7-122.

section 4(2).¹⁴⁶ Applications may be heard by the court sitting in private, so as not to defeat the purpose of the potential order.¹⁴⁷

2.97 The relevant Practice Direction provides that:

It is necessary to keep a permanent record of such orders for later reference. For this purpose all orders made under section 4(2) must be formulated in precise terms, having regard to the decision of *R v Horsham Justices ex parte Farquharson* [1982] QB 762, and orders under both sections [4(2) and 11] must be committed to writing either by the judge personally or by the clerk of the court under the judge's directions. An order must state (a) its precise scope, (b) the time at which it shall cease to have effect, if appropriate, and (c) the specific purpose of making the order.

Courts will normally give notice to the press in some form that an order has been made under either section of the Act and court staff should be prepared to answer any inquiry about a specific case, but it is, and will remain, the responsibility of those reporting cases, and their editors, to ensure that no breach of any order occurs and the onus rests with them to make inquiry in any case of doubt.¹⁴⁸

2.98 The making of a section 4(2) or section 11 order in the Crown Court can be appealed under section 159 of the Criminal Justice Act 1988, which was enacted to ensure compliance with the ECHR.¹⁴⁹ Section 159 gives "person(s) aggrieved", including the media, the right to appeal,¹⁵⁰ although the media may not be able to recover its costs, even if successful.¹⁵¹ The Court of Appeal can "confirm, reverse or vary the order complained of" and, therefore, can consider the matter afresh.¹⁵² The appeal procedure is covered by Part 69 of the Criminal Procedure Rules. The decision of the magistrates to make or to refuse to make an order can be challenged through judicial review.¹⁵³ The refusal of a Crown Court to make a section 4(2) or a section 11 order is challengeable only in limited circumstances.¹⁵⁴

¹⁴⁶ Arlidge, Eady and Smith on Contempt para 7-286.

¹⁴⁷ Arlidge, Eady and Smith on Contempt paras 7-118 and 7-295; *R v Tower Bridge Magistrates' Court ex p Osborne* (1987) 152 Justice of the Peace 310.

¹⁴⁸ [1982] 1 WLR 1475.

¹⁴⁹ Following *Hodgson v UK* App No 11553/85 (Commission decision). See C Walker, I Cram and D Brogarth, "The Reporting of Crown Court Proceedings and the Contempt of Court Act 1981" (1992) 55 *Modern Law Review* 647, 653 to 654.

¹⁵⁰ *Crook* [1992] 2 All ER 687 and Arlidge, Eady and Smith on Contempt para 7-304.

¹⁵¹ *Steele Ford and Newton v CPS (No 2)* [1994] 1 AC 22; *News Group Newspapers Ltd* [2002] Entertainment and Media Law Reports 9.

¹⁵² *R v Central Criminal Court ex p Telegraph Plc* [1993] 1 WLR 980; *B* [2006] EWCA Crim 2692, [2007] Entertainment and Media Law Reports 5; *R v Beck ex p Daily Telegraph Plc* [1993] 2 All ER 177, 180.

¹⁵³ *R v Felixstowe Justices ex p Leigh* [1987] QB 582; *R v Clerkenwell Justices ex p Trachtenbers* [1993] Criminal Law Review 222.

¹⁵⁴ *R v Central Criminal Court ex p Crook*, *The Times*, 8 Nov 1984 and *Saunders* [1990] Criminal Law Review 597.

2.99 It is unclear whether the jurisdiction to deal with a breach of a section 4(2) order is limited to the Divisional Court. The authors of Arlidge, Eady and Smith suggest that it would be preferable for the trial judge to refer alleged breaches to the Attorney General who can subsequently initiate proceedings in the Divisional Court.¹⁵⁵

Problems and potential solutions

2.100 Many media organisations told us they struggle to obtain information about whether an order is in existence, and if so, what its terms are, because there is no formal system for notifying the media of their existence.¹⁵⁶ This may give rise to a lack of compliance with article 7 and article 10 of the ECHR if the media are unable to regulate their conduct because they cannot find out what their legal obligations are.¹⁵⁷

2.101 Some stakeholders raised concerns about whether these orders are used unnecessarily, and/or drawn in terms that are too wide. This could fall foul of the requirements of the ECHR, which necessitates balancing articles 6 (and potentially other articles) and article 10 when making orders under section 4(2) and section 11. It was suggested that the responsibility for drafting an order could fall on the party requesting it, rather than on the court.

2.102 We understand that the Judicial College is in the process of developing a standard form for judges making section 4(2) orders, in order to ensure that such orders are in written form and consistent as to their terms. Whilst this will address some of the concerns of media organisations with regard to such orders, and help provide them with clarity and certainty, we consider that further steps could be taken. In particular, an online list of section 4(2) orders made in criminal cases is currently in operation in Scotland.¹⁵⁸ Under that system, an electronic standard form is completed by the court providing the terms of the order. A copy is then emailed to an office at the High Court of Justiciary where the case is entered onto an online list. The list provides limited details about the case (for example, an entry would read: *HMA v John Smith, Sherriff Court, Glasgow, 3 August 2012*). Those who want more information about the terms of the order can telephone the office. Alternatively, members of the media sign up to an email list to be notified each time a new order is entered onto the list, and to be sent a copy of the order. When the case is completed or the order discharged, the court will email the office to have the entry removed from the list on the website. Our understanding

¹⁵⁵ Arlidge, Eady and Smith on Contempt paras 7-269 to 7-276.

¹⁵⁶ This is the position in England and Wales. In Scotland, there is a register of s 4(2) orders with a mailing list to alert interested parties to the making of new orders. A similar system for England and Wales was recommended in *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 884 to 885, although this has not been implemented. Likewise, various circulars have been issued by what was then the Lord Chancellor's Department: see the discussion in C Walker, I Cram and D Brogarth, "The Reporting of Crown Court Proceedings and the Contempt of Court Act 1981" (1992) 55 *Modern Law Review* 647, 652 and following. Consider also the difficulties that Walker, Cram and Brogarth had undertaking this research, at 655 and following.

¹⁵⁷ Arlidge, Eady and Smith on Contempt para 7-268.

¹⁵⁸ See <http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders> (last visited 23 Nov 2012).

from preliminary discussions with media organisations is that the Scottish system works well.

- 2.103 We consider that a similar system could be developed for England and Wales. An online list could be established with individuals able to register for electronic alerts of any orders made. Registration would be contingent on provision of a valid UK address. Copies of the orders would be held by the body administering the list, and the terms would be emailed to those registered on the database. It is unlikely that such a system would be practically onerous to the court service or expensive to operate. Judges or their clerks (and in very rare cases magistrates) would need to send copies of the order to a particular body, which would add the name of the case to the website. Likewise, it would be necessary for the body to be notified of the discharge of any such order.
- 2.104 In informal consultations, some stakeholders suggested that this system has the potential to undermine the very nature of the section 4(2) order by disclosing the facts it is supposed to suppress for the duration of the trial. We do not consider that such a system would pose problems given that the order is made in open court anyway (albeit in the absence of the jury) and the purpose of a section 4(2) order is not to prevent the public from knowing information in and of itself, but to prevent a current or future jury from finding such information out prior to the return of a verdict. The names of cases in which section 4(2) orders have been made are often reported on the court list and posted in the court building. **Do consultees agree that a scheme for notifying publishers about the existence of section 4(2) orders should be created?**
- 2.105 We consider that, if such a list proves successful, there may be merit over time in expanding it to cover orders made under section 82 of the Criminal Justice Act 2003 (“CJA 2003”) (restricting publicity where there is to be a retrial of a previously acquitted person), and orders made under section 39 of the Children and Young Persons Act 1933 (providing anonymity to juveniles appearing in court). **We would welcome consultees’ views on the possible expansion of the scheme for section 4(2) orders to other types of order.**

SANCTIONS

Present law

- 2.106 The maximum penalty for contempt (either intentional, under section 2(2), under section 4(2) or under section 11) is two years’ imprisonment or an unlimited fine.¹⁵⁹ Community penalties are not available for contempt.¹⁶⁰ Additionally, an order can be imposed on a journalist or publisher requiring “the payment of costs incurred by a party to criminal proceedings” on the condition that “there has been serious misconduct (whether or not constituting a contempt of court)” by the journalist or publisher and “the court considers it appropriate” to make the order.¹⁶¹ Such third party costs orders appear never to have been made in the

¹⁵⁹ Section 14 of the 1981 Act and Arlidge, Eady and Smith on Contempt para 14-108.

¹⁶⁰ *Palmer* [1992] 1 WLR 568.

¹⁶¹ Prosecution of Offences Act 1985, s 19B. This provision was introduced following the collapse of the Leeds United footballers’ assault trial after a contempt by publication: see Written Answer, *Hansard* (HC), 5 March 2002, vol 381, col 196W.

case of contempt by publication,¹⁶² perhaps because the jurisdiction to make such order is limited to the magistrates' court, Crown Court and Court of Appeal. The Divisional Court does not appear to have the power to make such orders, perhaps because when proceedings for contempt by publication are brought in the Divisional Court, the publisher is no longer a third party. It is therefore unclear whether, following a finding of contempt, the Divisional Court could make an order against the publisher for wasted costs arising from the proceedings which were originally prejudiced or impeded.

2.107 Penalties can be imposed on both the journalist and the media organisation,¹⁶³ although it is more common for the latter alone to be held liable. A sentence of imprisonment is very rare in respect of media contempts and there has been no such sentence for over 60 years.¹⁶⁴ The penalty is normally a fine, with the level set dependent on means.¹⁶⁵

2.108 There are no sentencing guidelines for contempt by publication cases, but the following have been said to be relevant to sentencing in respect of strict liability under section 2(2):

1. The nature and seriousness of the particular error, including the context in which the publication occurred;
2. The causes of the error, with particular regard to the degree to which the contempt reflects a systemic failure or lack of due concern within the media entity in question for the administration of justice, and conversely the degree to which the defendant [the publisher] had at the time sought to have in place a system which prevents such contempt occurring;
3. The consequences of the contempt for the administration of justice, with particular reference to what steps the trial judge in fact took, whether the interference was permanent or temporary, and other inconvenience factors;
4. The promptness and terms of any apology or assistance to the court;
5. The promptness and effectiveness of any remedial action to ensure against such errors in the future;
6. The fact that the defendant [the publisher] will, bar unusual circumstances ... be ordered to bear its own costs and the costs of the Attorney General, which contributes to the overall financial penalty;

¹⁶² It is also unclear what the meaning of "serious misconduct" is in the context of contempt: Arlidge, Eady and Smith on Contempt para 14-148.

¹⁶³ As in *A-G v British Broadcasting Corporation* [2001] EWHC Admin 1202 at [40] to [41].

¹⁶⁴ *R v Bolam ex p Haigh* (1949) 93 Solicitors Journal 220 was the last case.

¹⁶⁵ *A-G v Associated Newspapers Ltd* [1998] Entertainment and Media Law Reports 711, 721 to 722.

7. Due regard to sentences imposed in analogous cases allowing for inflation and any relevant changes within the law.¹⁶⁶

2.109 As with orthodox criminal offences, the deterrent effect of sentence, the previous record of the respondent, and any guilty plea, are relevant factors in considering sentence.¹⁶⁷ Contempt committed intentionally or resulting in the collapse of a trial will be regarded as the most serious.¹⁶⁸ At the other end of the scale, very minor contempts may require no sanction beyond the finding of contempt and the requirement to pay costs. The imposition of a sanction (and costs) and the severity of it will be relevant to the proportionality assessment under article 10.¹⁶⁹

Problems and potential solutions

2.110 Stakeholders held differing views as to the appropriate punishment for contempt by publication. Some stakeholders argued that the level of fines imposed is generally low, particularly by comparison with damages awards and costs in defamation and privacy actions. Low penalties, such stakeholders argued, meant that there was a lack of deterrent effect, particularly considering the potential profits made from a publication. Furthermore, given that proceedings for contempt are now rarely brought against editors and journalists personally, this might justify higher penalties.

2.111 By contrast, other stakeholders suggested that there is no direct financial benefit from publishing material that is subsequently held in contempt, in that particular stories do not produce a related rise in sales figures. The advantage of running a particular story is to the publisher's reputation and, therefore, the risk of not reporting for fear of contempt proceedings represented a hazard to the standing of the publisher, particularly if rival organisations proceeded to publish without repercussions. Some stakeholders also cited the increasingly difficult economic climate within which the traditional print media operate and, therefore, the increased impact a substantial fine would have.

2.112 Additionally, it must be borne in mind that since the advent of the modern media, every citizen is a potential publisher.¹⁷⁰ In consequence, in the future it may become more common for proceedings to be brought against individuals who are not journalists attached to media organisations. It is obviously important that the courts have the appropriate powers to deal with all types of contemnor.

¹⁶⁶ *A-G v MGN Ltd* [2009] EWHC 1645 (Admin) at [36] to [37]. See also *A-G v Associated Newspapers Ltd* [1998] Entertainment and Media Law Reports 711, 721 to 722.

¹⁶⁷ *A-G v MGN Ltd* [2002] EWHC 907 (Admin) at [30] and [33]; *A-G v MGN Ltd* [2009] EWHC 1645 (Admin) at [45]; *A-G v MGN Ltd (No 2)* [2011] EWHC 2383 (Admin), [2012] Entertainment and Media Law Reports 10 at [8] to [9].

¹⁶⁸ An intentional contempt in 1988 attracted a fine of £75,000 (around £165,000 when adjusted for inflation) (*A-G v News Group Newspapers Plc* [1989] QB 110 as reported by *A-G v Newspaper Publishing Plc* [1989] 1 Fleet Street Reports 457 at 495) whilst the strict liability contempt which led to the collapse of the assault trial of the Leeds United footballers led to fines of £75,000 in 2002 (around £100,000 today) (*A-G v MGN Ltd* [2002] EWHC 907 (Admin) at [34]).

¹⁶⁹ G Robertson and N Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-040. See Appendix B on the margin of appreciation.

¹⁷⁰ See Ch 3 at para 3.2.

- 2.113 In respect of strict liability contempt under section 2(2), a penalty of imprisonment may appear draconian, particularly in light of the requirement for proportionality under article 10, and the discrepancy between the maximum penalty for contempt by publication and the sanctions for other types of reporting restrictions which are generally limited to a fine.¹⁷¹ Furthermore, it must be borne in mind that the power to imprison has not been exercised in this context for over 60 years.
- 2.114 In light of this, it seems illogical that sanctions for strict liability contempt under section 2(2) are restricted to a fine or imprisonment. In some cases, it may be appropriate to have the power to impose a community sentence.¹⁷² On the other hand, a term of imprisonment could be excessive and could have a “chilling effect” on publishers, particularly since liability may be established despite there being no intention to interfere with the course of justice. **Do consultees consider that the current maximum sentence for strict liability contempt is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction?**
- 2.115 In respect of contempt committed at common law, or under sections 4(2) or 11 of the Act, the argument for limiting the penalty to fines or community sentences may be diminished, because each type of contempt appears to require some form of intention to interfere with the course or administration of justice. It may, therefore, be appropriate to retain the power to imprison in order to deal with the most extreme cases. On the other hand, a penalty of imprisonment is always a serious sanction, and would need to be justified on the facts of the case in order to be article 10 compliant. **Do consultees consider that the current maximum sentence for intentional contempt by publication committed at common law, contempt under section 4(2) or under section 11 of the 1981 Act is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction?**
- 2.116 In respect of proceedings against media organisations rather than individual publishers, we consider that current powers of the courts to deal with contempt by publication may be inadequate given the disparity between the financial resources of different media organisations and the importance of ensuring a deterrent effect. We consider that it may be sensible to allow the courts to impose a fine set at a percentage of the turnover of a particular publisher. We consider that, if such system were introduced, the Sentencing Council could provide guidance to the judiciary in order to ensure that the penalties imposed are consistent. This would also provide greater clarity for media organisations.¹⁷³ Subject to the liability of the corporation having been established by appropriate means,¹⁷⁴ **do consultees agree that a sentencing power allowing the courts to impose a fine set at a percentage of the turnover of the publisher should be introduced?**

¹⁷¹ For example, offences in respect of the Children and Young Persons Act 1933, s 39; Youth Justice and Criminal Evidence Act 1999, ss 44 to 47; Children Act 1989, s 97(6).

¹⁷² A court would also need to be able to request a pre-sentence report prior to the imposition of a community penalty.

¹⁷³ We do not consider that it would be appropriate to bring contempt proceedings within the terms of the Proceeds of Crime Act 2002, given the potentially wide-ranging implications of this.

¹⁷⁴ See para 2.77 above.

- 2.117 Some stakeholders also explained that reporting becomes more restrained as the trial gets closer. This may be one of the reasons why the use of third party costs orders is rare (because juries are rarely discharged) and may demonstrate that such orders have a deterrent effect. However, the rarity of third party costs orders may also be explained by the fact that Crown Court judges prefer to refer cases to the Attorney General rather than impose third party costs themselves. This may be a sensible route to take given that it avoids the need for a hearing in the Crown Court to deal with third party costs, followed by a hearing in the Divisional Court to deal with the contempt, but does highlight the difficulty with the limited jurisdiction to order third party costs. Various stakeholders reported that the use of third party costs orders would be of greater concern to a publisher than the imposition of a fine.
- 2.118 If contempt by publication were to remain triable in the Divisional Court rather than on indictment or as if on indictment (see paras 2.64 to 2.68 above), we consider that the power to require publishers to pay for wasted costs in respect of the proceedings that were prejudiced, impeded or intentionally affected should be extended to the Divisional Court. This would allow orders to be made requiring publishers to pay for the costs of those proceedings (for example, where a jury is discharged) following a finding of contempt, rather than requiring parallel proceedings to take place in the magistrates' court or Crown Court. **Do consultees agree that the Divisional Court should have the power to make an order for wasted costs from the criminal proceedings prejudiced, impeded or intentionally affected by a contempt by publication?**

CHAPTER 3

PUBLICATIONS, PUBLISHERS AND THE NEW MEDIA

INTRODUCTION

- 3.1 This chapter assesses the extent to which the Contempt of Court Act 1981 can operate effectively in the world of digital media and communication technologies. Many people regard the creation of the internet and the World Wide Web (the “web”) as having produced as significant a change to human communication as did the invention of the printing press. The volume of material that can now be stored, the ease with which it can be communicated and redistributed, the size of the audience that can be reached, and the global accessibility of information brings many new challenges, including for the law of contempt. While prejudicial information may historically have faded with the newspaper print, as well as from our collective memory, as data it is now processed, archived and is retrievable for very much longer periods of time.
- 3.2 The manner in which people access and disclose information has changed radically over recent years. In 2012, the Office of National Statistics reported that some 84% of adults in the UK have used the internet at some time.¹ According to Ofcom, 80% of UK households have internet access, while 39% access the internet through a mobile phone.² The most popular websites in the UK are Google Search, Facebook and YouTube, enabling millions to find, share and consume information.³ UK users of Facebook alone are estimated at over 30 million,⁴ while Twitter has 10 million active users.⁵ These statistics are illustrative of the phenomenal shift that has taken place from the conditions present when the 1981 Act was passed.
- 3.3 Thus far, the modern media is an issue with which the law of contempt has had little cause to grapple. There appears to have been only one contempt by publication case involving the new media, where an incriminating photograph on a newspaper’s website was held to amount to a contempt.⁶ In other contexts, the general criminal law is also considering the impact of the modern media,⁷ but the law here too is in its infancy. In consequence, there are significant ambiguities about how the law of contempt relates to the modern media, aspects of which we consider in this chapter. In light of the impact of the internet on daily life that we have explained above, we anticipate that this is a topic which is likely to be of

¹ Office of National Statistics, *Internet Access Quarterly Update, 2012 Q2* (Aug 2012), http://www.ons.gov.uk/ons/dcp171778_276208.pdf (last visited 1 Nov 2012).

² Ofcom, *Communications Market Report 2012* (Jul 2012) at 4.2.1.

³ Ofcom, *Communications Market Report 2012* (Jul 2012) at 4.3.1.

⁴ <http://www.internetworldstats.com/europa.htm> (last visited 1 Nov 2012).

⁵ Announced on @TwitterUK, 15 May 2012.

⁶ *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097.

⁷ See eg, *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 and *Chambers v DPP* [2012] EWHC 2157 (Admin), [2012] All ER (D) 346 (Jul).

increasing significance in the future. It is, therefore, important that the 1981 Act is adequate to meet the needs of a digital age.

3.4 In this chapter we address several specific questions:

- (a) what is a publication?
- (b) when is a publication addressed to the public at large or any section of the public?
- (c) who is responsible for the publication?
- (d) when does a publication occur?
- (e) where does the publication take place?

PUBLICATION

3.5 Determining the meaning of “publication” for the purposes of the law on contempt is complicated by the fact that the word has two meanings. First, it can refer to publication in the physical sense, that is, the form in which it presents itself. Section 2(1) of the 1981 Act deals with this meaning in explaining that publication *includes* four terms: “any speech, writing, programme included in a cable programme service or other communication in whatever form”.

3.6 We examine those terms below. Lord Diplock in *Secretary of State for Defence v Guardian Newspapers Ltd*⁸ held that Parliament intended the definition in terms of the four mentioned expressions to be “complete and comprehensive”,⁹ despite the fact that the word “includes” would suggest that other terms beyond those four are not excluded if a case can be made for including them.¹⁰

3.7 Secondly, publication can also mean the *act of publication*. This meaning is dealt with under section 1 of the 1981 Act, which explains that the “strict liability rule” arises in respect of “conduct” that is treated as contempt of court. Section 2(1) states that the relevant conduct is that of “publication”. One difficulty here is that what that act of publication (the conduct) involves is not explained under the Act.¹¹ The only explanation we have is in relation to the physical form of the publication, discussed above. This is problematic when considering the question of who can be liable for a publication, because it is not clear who or what must have undertaken the act of publication (or part of that act) in order to attract liability. We consider this issue in detail below,¹² whilst this section of the chapter concentrates on “publication” in its physical form.

⁸ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

⁹ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 348.

¹⁰ The authors of Arlidge, Eady and Smith believe his Lordship to be correct, citing an earlier case in which “includes” was construed to be equivalent to “means”: *Dilworth v Commissioner of Stamps* [1899] AC 99, 105 to 106; see Arlidge, Eady and Smith on Contempt paras 4-34 to 4-36. The opposite view is held in *Borrie and Lowe: The Law of Contempt*, where it is argued that “includes” should be given its ordinary meaning: see para 4.8.

¹¹ Compare s 1(3) of the Obscene Publications Act 1959.

¹² See paras 3.30 and following below.

- 3.8 For reasons which we shall explain, we do not think there is any difficulty about including internet communications as publications under the definition in section 2(1) or that there is any prospect that a court would refuse to do so. Having said that, as will become apparent, there is limited authority in the context of contempt by publication on the definition of these four terms.

Speech

- 3.9 The term “speech” appears to be largely self-explanatory. At common law, a theatrical performance can be a publication for the purposes of contempt.¹³ By way of comparison with contempt, the Wireless Telegraphy Act 2006 defines speech to include “lecture, address and sermon”.¹⁴ There seems to be no difficulty in understanding “speech” to include, for example, spoken words that have been filmed and posted on YouTube.

Writing

- 3.10 The term “writing” plainly covers a handwritten or typed message or a newspaper article. According to the Interpretation Act 1978,

“writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.¹⁵

- 3.11 In the context of the offence of incitement to racial hatred, “written material” includes “any sign or other visible representation”.¹⁶ This has been examined by the courts recently. In *Sheppard*,¹⁷ the offending material was hosted on a web server in California, but was accessible in England and Wales. The Court of Appeal rejected an argument that the written material had to be “in visible, comprehensible form with some degree of permanence”.¹⁸ Lord Justice Scott Baker approved the view of the trial judge that what was on the computer screen was first of all “in writing” or was written and secondly that the electronically stored data which is transmitted also comes within the definition of written material because it is written material stored in another form.
- 3.12 Although the 1981 Act has no provision defining “writing” in terms of any sign or other visible representation, it appears likely that the wide approach in *Sheppard* would be adopted in the contempt context should the issue arise.

Programme included in a programme service

- 3.13 The term “programme included in a programme service” is not self-explanatory. According to the Broadcasting Act 1990, a “programme” is expansively defined and “includes an advertisement and, in relation to any service, includes any item

¹³ *Williams* (1823) 2 Law Journal Reports, Kings Bench Old Series 30.

¹⁴ Section 115(1).

¹⁵ Schedule 1.

¹⁶ Public Order Act 1986, s 19 read with s 29.

¹⁷ [2010] EWCA Crim 65, [2010] 1 WLR 2779.

¹⁸ [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [29]. See also M Dyson, “Public Order on the Internet” (2010) 2 *Archbold Review* 6 to 9.

included in that service”.¹⁹ The definition of a “programme service” is in part made up of the incorporated definition of “programme service” from the Communications Act 2003 which covers television, teletext, radio and so on.²⁰

3.14 The Broadcasting Act also provides that a programme service is:

any other service which consists in the sending, by means of an electronic communications network (within the meaning of the Communications Act 2003), of sounds or visual images or both either—

(i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service); or

(ii) for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons.²¹

3.15 For these purposes, an “electronic communications network” means “a transmission system for the conveyance by the use of electrical, magnetic or electro-magnetic energy, or signals of any description”.²² This would include networks used for radio and television, as well as telecommunications.

3.16 As Collins notes,

there can be no doubt that internet communications are conveyed by the use of electrical, magnetic, or electro-magnetic energy, and are thus transmitted by electronic communications networks within the meaning of this definition and for the purposes of ... the Broadcasting Act 1990.²³

3.17 For contempt, a television broadcast or radio show is clearly covered by these definitions.²⁴ Whether a particular internet service comprises a “programme service” will depend on the other components of the definition. So, for example, the BBC’s iPlayer would comprise a programme service because it provides sounds and visual images in response to requests taking place at different times from different users.

¹⁹ Section 202(1).

²⁰ Communications Act 2003, s 405(1). A “programme service” is (a) a television programme service; (b) the public teletext service; (c) an additional television service; (d) a digital additional television service; (e) a radio programme service; or (f) a sound service provided by the BBC.

²¹ Broadcasting Act 1990, s 201(1)(c).

²² Communications Act 2003, s 32.

²³ M Collins, *The Law of Defamation and the Internet* (3rd ed 2010) para 4.08.

²⁴ An example would be a local radio show, such as that broadcast on 26 Nov 2003 while the murder trial of Ian Huntley was active. The radio presenter said that Huntley’s testimony amounted to “almost ... the most unbelievably made up story in the world ever”, <http://news.bbc.co.uk/1/hi/england/shropshire/3346093.stm> (last visited 1 Nov 2012).

Communication in whatever form

- 3.18 The ordinary meaning of “communication” is very wide indeed, all the more so when one adds the words “in whatever form”. In contempt at common law, a wax model could be a publication, suggesting a similar breadth.²⁵ The new media exist to facilitate the intentions and desires of people to communicate in various forms, to update, educate, cement a friendship, argue, insult, edify, share experiences, insights and opinions and so on. While the media are new, the purposes of communication are familiar.
- 3.19 The term “communication” features heavily in the different statutory context of the Regulation of Investigatory Powers Act 2000. There, “communication” can include “anything comprising speech, music, sounds, visual images or data of any description” and “signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus”.²⁶ The breadth of the term is marked especially by the words “the impartation of anything between persons”. Beyond that, it also applies to communications between things. An automated “news feed” appears to be an example.²⁷ Plainly this definition from the 2000 Act is not directly applicable to contempt, but it shows a context in which the statutory understanding of communication is as wide as the ordinary meaning of the term.
- 3.20 The term “communication in whatever form” is so wide that it seems on its own to cover comprehensively or near comprehensively the new media. A random (though of course non-exhaustive) list of the new media seems always to reveal a communication in *some* form. A Facebook posting, a tweet, a Flickr photograph (with or without comments), a video on YouTube, Delicious²⁸ or Digg²⁹ or words on a website are all likely to be publications by virtue of being “communications in whatever form” and usually writing and sometimes speech as well. In what is thought to be the first (and thus far only) internet contempt by publication case in England, it was not disputed that a photograph online was a publication.³⁰
- 3.21 Parliament plainly intended the definition of publication to be as wide as the analysis above suggests.

²⁵ *Gilham* (1828) 1 Moody and Malkin 165.

²⁶ Section 81.

²⁷ According to the BBC website, “news feeds allow you to see when websites have added new content. You can get the latest headlines and video in one place, as soon as it’s published, without having to visit the websites you have taken the feed from. Feeds are generally known as RSS (“Really Simple Syndication”) ...”. See <http://www.bbc.co.uk/news/10628494> (last visited 1 Nov 2012).

²⁸ Delicious is “a social bookmarking service that enables users to tag, save, share and discover web content” through its website: see <http://delicious.com/terms> (last visited 1 Nov 2012).

²⁹ Digg is a social news website. It also allows people to vote for specific web content by “digging”. According to the website, “a digg is a thumbs-up – a positive vote – for a story”. See <http://digg.com/faq> (last visited 1 Nov 2012). See also “Once a social media star, Digg sells for \$500,000”, *The Wall Street Journal*, 13 Jul 2012, <http://online.wsj.com/article/SB10001424052702304373804577523181002565776.html> (last visited 1 Nov 2012).

³⁰ *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097 at [21]. See also *HM Advocate v Caledonian Newspapers Ltd* 1995 SLT 926.

- 3.22 In conclusion, there appears to be nothing in the nature of the novel means of communication used by the new media that necessitates new tailor-made legislation as they seem to be covered comfortably by the concept of “publication” in section 2(1) of the 1981 Act. **Do consultees agree with our conclusion that the definition of publication in section 2(1) of the 1981 Act is broad enough to cover things appearing in the new media? If not, why not?**

ADDRESSED TO THE PUBLIC AT LARGE OR ANY SECTION OF THE PUBLIC

- 3.23 A publication must be addressed to the public at large or any section of it. This clearly covers national and local newspapers and broadcasters.
- 3.24 There appears to be no definitive rule or standard that can determine whether a publication is addressed to the public or a section of it. Rather, the matter falls to be decided on a case-by-case basis. Likely relevant factors when making such assessment include the size of the group, the nature and function of the group, the means of control over access to the group or the specific publication and the context in which the publication was made.³¹ The essential contrast is with private communications.³²
- 3.25 The number of recipients is significant. It would be unlikely that a section of the public could be made up of just one person, since the phrase “addressed to ... any section of the public” implies an intention to communicate to more than a single individual. Arlidge, Eady and Smith argues that “such a limited publication would not fall within the wording of the section”.³³
- 3.26 This issue has arisen in the related context of the Public Order Act 1986. In *Sheppard*,³⁴ the question arose whether there was publication to the public or a section of the public when material was made generally accessible via the web. The court held that the judge had been correct in holding that it was sufficient that

³¹ Arlidge, Eady and Smith on Contempt para 4-54; Borrie and Lowe: The Law of Contempt para 4.9. Restrictions on reporting under the Sexual Offences (Amendment) Act 1992, s 6 and the Criminal Justice Act 2003, s 71(11) (amongst other statutes) also include the phrase “addressed to the public at large or any section of the public” but there does not appear to be authority on how this should be interpreted. The Equality Act 2010, s 29 makes it unlawful for any person concerned with the provision of a service “to the public or a section of the public” to discriminate on the grounds covered by the legislation, but we do not consider this to be a helpful comparator for contempt.

³² Which might still be caught by the common law of intentional contempt. See Ch 2 at para 2.56.

³³ Arlidge, Eady and Smith on Contempt para 4-38. Contrast, however, the decision in *GS* [2012] EWCA Crim 398, [2012] 2 Cr App R 14. The case concerned an explicit conversation concerning paedophilic sex acts which GS had with someone over internet relay chat. They were found through analysis of his home computer, and although it was common ground that the “chat logs were not themselves published”, the prosecution contended the sending of the communication to the other individual engaged in the conversation was sufficient “publication” for the purposes of an offence under the Obscene Publications Act 1959. The Court of Appeal, in allowing the prosecutor’s appeal and ordering a fresh trial, held that to publish an article to an individual was to publish it within the meaning of the Act. This decision turned on the specific wording of the definition of “publication” in s 1(3) of the Act – which can be contrasted with the words “addressed to the public at large or any section of the public” in s 2(1) of the Contempt of Court Act 1981 – and the court’s reasoning in relation to the obscenity test.

³⁴ [2010] EWCA Crim 65, [2010] 1 WLR 2779.

“the material was generally accessible to all, or available to, or was placed before, or offered to the public”.³⁵ The material in the instant case was available to the public despite the fact that the evidence went no further than establishing that one police officer had downloaded it.

- 3.27 This is consistent with the position that could arise in relation to contempt. We agree with Arlidge, Eady and Smith that a publication addressed to one person cannot be deemed to be addressed to a section of the public.³⁶ For example, an email sent from one person to one other person is not addressed to a section of the public. The material in *Sheppard* was available to the public at large – anyone in the world *could have* accessed it had they visited the website – it just so happened that only one person *did* access it (or at least, there was only proof of one such access – by a police officer).
- 3.28 Considerations of whether the use of an internet service constitutes publication to the public or a section of it will vary significantly both between the various services and depending on how a service is used. Email, for example, would generally seem analogous to private correspondence.³⁷ Social networking sites, such as Facebook and Twitter,³⁸ usually have privacy settings that enable a user to restrict access to their publications, but users may fail to utilise them.
- 3.29 We consider that the law in this area should be left to develop on a case-by-case basis since there are no hard and fast rules about what can amount to “a section of the public” and, in practice, this issue appears thus far to have generated limited litigation. **Do consultees consider that the lack of a statutory definition of “a section of the public” is creating problems in practice? If so, can they provide examples?**

WHO IS RESPONSIBLE FOR A PUBLICATION?

- 3.30 The 1981 Act focuses attention on whether there is a publication, rather than who is a publisher. The term “publisher” is not defined in the 1981 Act. The closest the Act comes to a definition of “publisher” is the statement that “publish” is to be construed in accordance with the meaning given to “publication” in section 2(1) of the Act.³⁹
- 3.31 There are many ways in which a person can be involved with a publication: it can be authored, edited, drafted, solicited, censored, approved, modified, transmitted, and retransmitted and so on. It will normally be transmitted and communicated by complex means which themselves need to be created, managed and maintained. This raises interesting questions about whether any intermediary or anyone with any involvement, however technical, is considered the publisher of a communication for the purposes of contempt of court.

³⁵ [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [34].

³⁶ Paras 4-38 to 4-39.

³⁷ This could, however, be complicated by the number of recipients of the email.

³⁸ <http://support.twitter.com/articles/14016-about-public-and-protected-tweets#> (last visited 1 Nov 2012).

³⁹ Section 19.

- 3.32 These questions have taken on an enhanced significance in the light of recent technological developments. The internet enables information to be communicated across the globe. This can be by e-mail from one sender to one or more recipients. The sender makes a connection to their own internet access provider (IAP), and sends their message through their email client/Mail User Agent (MUA). The MUA will transfer the email to a Mail Delivery Agent, which is forwarded to a Mail Transfer Agent, and then routed to the receiving MTA. The MTA on the destination server then passes the email to the MDA for delivery to the user's mailbox. The recipient will connect to his MUA utilising his access provider, and read the mail.⁴⁰ Information might also be communicated by one person to others by posting material on web pages on the web. An individual's online "blog" is an example of such a web page. Some service providers, such as Facebook and Twitter, facilitate this interaction between individuals and numerous others. Individuals who create their own websites may engage numerous service providers: they will send content through their IAP; they will register a domain name through a domain name registrar; and they may use a hosting provider to host the information on servers based abroad.
- 3.33 The manner of communication via modern media, including email and social networking sites, is different from the traditional print media that would have involved a journalist writing copy for a newspaper that is printed in hard copy by the corporate body and distributed by that body and other wholesalers and retailers to the readers of the alleged contempt. One of the most important differences is that there is much greater likelihood of the 1981 Act applying in relation to communications by individual citizens. Not only are professional journalists potential publishers for the purposes of the 1981 Act, but so is any citizen who writes a blog or posts emails or tweets to a section of the public.⁴¹ A further difference of significance is that a web-based publication is likely to be more readily available to a section of the public for a far longer period than a printed copy would be.

⁴⁰ See <http://computer.howstuffworks.com/e-mail-messaging/email.htm> (last visited 1 Nov 2012).

⁴¹ Likewise, the 1981 Act of course also applies to police and politicians who make public pronouncements.

3.34 The implications for the law of contempt by publication are obvious. For example, if a user creates a web page which appears on the web revealing seriously prejudicial information about a trial, the section 2 contempt might apply. A non-exhaustive list of those engaged in the publication process might include:

- (1) The author or user who generated the words;⁴²
- (2) The provider of internet access services,⁴³ which enable users to transmit or push content to others, either on a bilateral or multilateral basis (“Internet Access Providers”);
- (3) The providers of hosting or platform services, which store content on behalf of users and enable them to make content accessible to others, such as social networking sites like Facebook and Tumblr (“Internet Platform Providers”);
- (4) Domain name registrars and registries;
- (5) Providers that enable users to locate the content made available by others, for example, search engines such as Google.

3.35 These service providers are commonly referred to as internet or online “intermediaries” because of their role as facilitators of internet-based activities.⁴⁴ However, some of these categories are not mutually exclusive and the same individual or entity may perform more than one function.

3.36 In some other contexts, Parliament has given the term “publisher” specific definition.⁴⁵ For example, under section 1(3)(e) of the Defamation Act 1996, a person is not a publisher if he or she is merely the “operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control”. The 1981 Act by contrast is silent on whether “providers”, “operators” or those with “no control” over the content of a given publication are to be considered publishers. One possibility is that all these categories count as “publishers” under the 1981 Act. Again in the context of defamation law, this time in the common law rather than under statute, responsibility for publication has been extended widely, beyond authors, editors and proprietors, to include printers.⁴⁶

3.37 It would be possible to interpret “publisher” under the 1981 Act very broadly so that anyone with any involvement in the creation or communication of a publication would be a publisher of it. Following the meaning of publication

⁴² In some instances the material may appear in a forum where others can edit the material (eg Wikipedia). It would be a question of fact whether those editing the pages were also contributing to the contempt. It might be, for example, that a series of pages relating to a suspect include some pages authored by A that constitute a contempt, but B merely edits the punctuation on a page without a statement amounting to a contempt.

⁴³ The Communications Act 2003, s 124N defines an “internet access service” as an electronic communications service provided to a subscriber, consisting “entirely or mainly of the provision of access to the internet” and includes the allocation of an IP address to enable such access.

⁴⁴ See, eg, G Sutter, “Online Intermediaries”, ch 5 in C Reed, *Computer Law* (7th ed 2011).

⁴⁵ Examples include the Children, Schools and Families Act 2010, s 21. Little is gained by comparing use of the term in other statutory contexts.

⁴⁶ M Collins, *The Law of Defamation and the Internet* (3rd ed 2010) para 6.01.

examined above, it is clear that to publish means, at least, to speak or write and communicate.⁴⁷ Labelling the author or speaker as the publisher seems uncontroversial. The internet user, or “content generating user”, is the author, editor, approver or poster of the content of a publication. There will normally be little difficulty in classifying users as “publishers”. They have engaged in conduct, (writing, speaking, communicating and suchlike) that forms the central plank of the definition of publication. A person who places material on a webpage or “tweets” a message is clearly a publisher of it.⁴⁸

- 3.38 However, the more difficult question relating to which intermediaries are publishers is not solved by stating that a publisher is a communicator, writer or speaker. This difficulty is compounded by the position in relation to the necessary mental element for publication.
- 3.39 The law of contempt requires intention to publish, but this could have one of two meanings. It could be limited to, for example, mere intention to send or upload the material, regardless of what that material is. Or, the meaning could be broader than this, requiring intention to publish that *particular material*, with knowledge of the content of the publication.
- 3.40 The case of *McLeod*⁴⁹ is the primary authority for considering the necessary intention but is not particularly helpful in this regard. First, it dealt with the common law contempt of scandalising the court, rather than contempt by publication that we consider here and in Chapter 2. Secondly, in that case, whether knowledge of the contents of the publication was necessary appeared to depend on whether there was a duty on a person to make himself or herself aware of the contents. This seemed to relate to whether he or she was professionally involved in the production of material (for example as a printer) or whether they were a layman who, as in that case, merely handed over a copy of a document which, it turned out, contained material which was said to scandalise the court. Whilst it may be unsatisfactory to define the mental element for contempt by reference to the professional status of the publisher, in practice, it is not clear whether this would absolve the intermediaries of liability on the basis of their lack of knowledge of the contents of the publication, and in other contexts, intending to offer services allowing publication is clearly enough.
- 3.41 If such intermediaries were deemed to have the necessary intention to publish, despite not knowing the content of the publication, they may, nonetheless, be able to avail themselves of certain defences.
- 3.42 The first defence that might apply would be that in section 3(1) of the 1981 Act. Under that section no one will ultimately be liable as the publisher of any matter to which the strict liability rule applies “if at the time of the publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active”.⁵⁰ There is normally no reason to suppose that

⁴⁷ We deal with the special complexity of “programme in a programme service” at paras 3.13 to 3.17 above.

⁴⁸ In *A-G v Pelling* [2005] EWHC 414 (Admin), [2005] Family Law Reports 854 the defendant was held guilty of contempt in relation to material he had published in an online journal.

⁴⁹ *McLeod v St Aubyn* [1899] AC 549.

⁵⁰ On the definition of active proceedings, see Ch 2 para 2.9 and following.

most internet intermediaries would be aware that proceedings were active in relation to the case to which the material related.

- 3.43 Further specific defences would be available under the Electronic Commerce (EC Directive) Regulation 2002⁵¹ (regulations 17 to 19) which implements articles 12 to 14 of the Directive on Electronic Commerce.⁵² These provide an additional defence against all liability to certain activities conducted by certain intermediaries. There is, however, an acknowledged degree of “regulatory uncertainty”⁵³ about which intermediaries the defences relate to (particularly with “new services” such as hyperlinking sites). The European Commission is in the process of evaluating submissions from a public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries.⁵⁴
- 3.44 The first EC defence applies to those acting as “mere conduits”. In simple terms, mere conduits are the intermediate carriers of information sent between computers through electronic communications networks.⁵⁵ Regulation 17 provides that a service provider shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of a transmission, provided that the service provider:
- (a) did not initiate the transmission;
 - (b) did not select the receiver of the transmission; and
 - (c) did not select or modify the information contained in the transmission.
- 3.45 Some of the activity of intermediaries would qualify for the separate EC defence applying to “caching”. Caching is a process that different providers adopt in order to allow the internet to work more efficiently. Under Regulation 18, the act of “caching” is a defence to liability where the relevant information is “the subject of automatic, intermediate and temporary storage”. Caching is different from providing a “mere conduit” service, because the act of caching means the content is stored for a period that is “longer than is reasonably necessary for the transmission”.⁵⁶ However, the storage must be “for the sole purpose of making

⁵¹ SI 2002 No 2013.

⁵² Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on Electronic Commerce”), Official Journal L 178 of 17.07.2000 p 1. The EU defences are considered in detail in *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806.

⁵³ European Commission Staff Working Document, “Online Services, including E-Commerce, in the Single Market”, (11 Jan 2012) pp 25 to 26, http://ec.europa.eu/internal_market/e-commerce/communication_2012_en.htm (last visited 1 Nov 2012).

⁵⁴ http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet_en.htm (last visited 1 Nov 2012).

⁵⁵ The network providers could be BT, O2 and suchlike, and even smaller networks, like an employers’ intranet.

⁵⁶ Regulation 17(2)(b).

more efficient onward transmission of the information to other recipients of the service upon their request”.⁵⁷ The defence is lost if there is a failure to act,

expeditiously to remove or to disable access to the information [where the intermediary has] actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that the court or an administrative authority has ordered such removal or disablement.⁵⁸

- 3.46 A third EC defence, under Regulation 19, would be available if the functions of the intermediary amounted to “hosting”. This constitutes storing information provided by the recipient of the service, other than under the conditions specified in respect of “mere conduit” or “caching”. As Collins explains “intermediaries who ‘cache’ content are at least one step removed from intermediaries who host content”⁵⁹ because they are not the primary storage site for that information. Regulation 19 provides the defence, but only where the provider does not have “actual knowledge” of the unlawful activity or information, or is not aware of the circumstances from which such unlawfulness should have been apparent.
- 3.47 Although not a “publisher”, it might be argued that the intermediary should be regarded as a “distributor”. Section 3(1) provides a publisher with a defence only on the basis of a lack of knowledge or suspicion as to the status of proceedings being active; it does not create any defence⁶⁰ for a publisher on the basis of a lack of knowledge or suspicion about the contents of the publication if proceedings are active. The position is different for distributors. Under section 3(2) a “distributor” is not guilty under the strict liability rule “if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so”. Again, that would provide a defence to liability under section 2 of the 1981 Act for the intermediary which constituted a distributor.
- 3.48 A distributor may also qualify for the additional defences within the EC Regulations depending on the activity in question as described above.
- 3.49 In summary, internet intermediaries might avoid liability for contempt as publishers because of one or more of the following factors. First, they may lack the necessary knowledge or awareness in relation to either the content itself and/or the activeness of the proceedings. Second, the intermediary may fall within one or more of the EC Directive defences. There is some overlap between the lack of knowledge defence in section 3(2) and the Directive defences.

⁵⁷ Regulation 18(a).

⁵⁸ Regulation 18(b)(v).

⁵⁹ M Collins, *The Law of Defamation and the Internet* (3rd ed 2010) para 17.55.

⁶⁰ The burden under s 3 is on the publisher or distributor to prove the defence on the balance of probabilities. This contrasts with other grounds for defence under the 1981 Act, particularly the discussion of public affairs in good faith under s 5, where the burden is on the prosecution to the full criminal standard. See Ch 2 at paras 2.50 to 2.52.

THE TIME OF THE PUBLICATION

Present law

3.50 Section 2(3) of the 1981 Act provides that “the strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section *at the time of the publication*”.⁶¹ The expression is susceptible to two interpretations with very different consequences:

- (1) Publication is a continuing event that begins with the first appearance of the material. Liability under section 2 might, therefore, arise if proceedings become active during the period of continuing publication, although they were not active when publication commenced. Under this interpretation, publication might be held to take place either (a) whenever someone accesses the material available or (b) whenever the material is available; or
- (2) No liability can arise if there are no proceedings active at the time of publication, irrespective of whether proceedings become active at some later time and irrespective of whether the publisher is aware of that change of circumstance.

3.51 The interpretation of the time of publication under section 2 matters a great deal for what we assume will be a commonly occurring problem. Consider the case where P publishes a detailed online account of a crime and the offender. There are no active proceedings at that time. The material remains available online and would be revealed by use of search engines such as Google. New proceedings subsequently become active against a defendant for that crime, and the nature of the material is such that it poses a substantial risk of serious prejudice or impediment. Is P liable for contempt of court under section 2?

3.52 There is no doubt that the new media have rendered such cases more likely to occur. The astonishing capacity for storing information digitally and the ease of access to such information via any internet-enabled device anywhere in the world renders the position unrecognisable from 1981. Then, a library or newspaper archive could only store a limited number of publications and retrieval of the information was often limited to those able physically to attend the premises at which the information was stored.⁶²

3.53 Analysing the problems that arise if a publication is held to be a continuing act, we might say that P’s original conduct (publishing the publication before active proceedings commenced) was not prohibited. The relevant circumstances (the commencement of active proceedings) subsequently arose without any further conduct on P’s part and that was a matter over which P had no control. The change of circumstances generated the proscribed consequences (substantial risk of serious prejudice), again without any new further contribution from P.

⁶¹ We examine the meaning of active proceedings in Ch 2 at para 2.9 and following (emphasis added).

⁶² See the discussion on this point in Ch 4 at para 4.22.

3.54 Holding P liable for the proscribed consequences in such a case seems to be an unusual basis on which to impose liability. It might also be said to strain the language of section 2 and reference to “at the time of publication”. Nevertheless, the limited case law to date favours the broad interpretation that publication is a continuing event.

3.55 In the Scottish case of *HM Advocate v Beggs (No 2)*⁶³ it was held that the expression “at the time of publication” in section 2 “was capable of referring to a period of time during which the material was accessible on the web site, commencing with the moment when it first appeared and ending when it was withdrawn”.⁶⁴ Lord Osborne’s view was followed in England by Mr Justice Fulford at first instance in *Harwood*.⁶⁵ Similarly, in the Australian case of *Digital News Media Pty Ltd v Mokbel*⁶⁶ it was held that, for the purpose of contempt of court, the material is published at every time and place that it is available to a juror or potential juror. The decisions in *Harwood* and *Mokbel* rely heavily on *Beggs*.⁶⁷

3.56 One of the key factors that led the court in *Beggs* to decide as it did was an argument by analogy with book publishing. Lord Osborne held that:

It appears to me unrealistic to make a distinction between the moment when the material is first published on the web site and the succeeding period of time when it is available for access on demand by members of the public. It appears to me that the better view is that the situation affecting the web site may be compared with a situation in which a book or other printed material is continuously on sale and available to the public. During that whole period, I consider that it would be proper to conclude that the material was being published.⁶⁸

3.57 It is, however, arguable that this is not a precise analogy and that the conclusion on the interpretation of section 2 is weakened as a result. The printed book will usually have a publication date and that marks the point, usually the year, when it was published, whether or not it is still in print or available. The Act focuses on whether the act of publication occurred, not whether the act of publishing occurred or is occurring.

3.58 A further concern with placing too much emphasis on *Beggs*, is that the decision was made at a time before the internet had acquired the omnipresence it now has.

⁶³ 2002 SLT 139.

⁶⁴ 2002 SLT 139 at [22]. See also Arlidge, Eady and Smith on Contempt para 4-28.

⁶⁵ Fulford J in *Harwood*, judgment of 20 Jul 2012 at [37], <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/simon-harwood-judgment-20072012.pdf> (last visited 1 Nov 2012) (“*Harwood*”). See also Moses LJ in *A-G v Associated Newspapers* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097 at [28].

⁶⁶ [2010] VSCA 51.

⁶⁷ We note that similar approaches are being adopted in other jurisdictions. See, eg, *Burrell* [2004] NSWCCA 185 at [39] by Chief Justice Spigelman. See also Chief Justice Spigelman speaking extra-judicially in his address to the 6th Worldwide Common Law Judiciary Conference, “The Internet and the Right to a Fair Trial” (2005) 29 Criminal Law Journal 331, 336.

⁶⁸ [2002] SLT 139 at [22], cited with approval in *Harwood* at [11].

3.59 The broad interpretation favoured in *Beggs* has the practical advantage that the Act is capable of meeting this new challenge. This is made clear in *Harwood*, where Mr Justice Fulford rejected the appropriateness of drawing a distinction between “current” and “archived” online reports or of restricting the words “time of the publication” in section 2(3) to the former. His Lordship emphasised that anyone looking for contemporary reports of active proceedings will use search terms that are likely to reveal a mix of contemporary and earlier information:

A juror seeking contemporary information could easily have ended up viewing the reports that included references to the earlier allegations, without necessarily having set out to defy the court’s direction not to conduct research.⁶⁹

3.60 While that is certainly true, it is important to keep in mind that the focus of the present inquiry is about the culpability of the publisher. There is obviously a risk that an errant juror could access material published before and/or after proceedings became active, but of itself, that does not provide clarification concerning the relative culpability of the publisher in these two different scenarios.

3.61 In *Beggs*, reliance was also placed on the analogy with some defamation cases. In *Godfrey v Demon Internet Ltd*⁷⁰ it was held that an intermediary which continued to store a defamatory posting on its news server, after having been asked by the claimant to remove it, was responsible for the publication which occurred when that posting was later accessed. Again, these are important factors, but there are several reasons to suggest that the defamation cases do not provide conclusive support for the broad continuing act interpretation in the contempt context. First, the issues in the cases are very different, since contempt concerns quasi-criminal rather than civil liability. Secondly, there are more recent defamation cases in which a contrary interpretation has been taken.⁷¹ Thirdly, reliance on the defamation cases appears weaker still in light of the proposed reform in the Defamation Bill which adopts the opposite interpretation: that publication is a single finite event for the purposes of limitation.⁷² Fourthly, liability in a defamation context is not triggered by a change of circumstances, unlike in relation to contempt where proceedings may become active without the publisher knowing that this has occurred. This may give rise to concerns that adopting the continuing act concept from *Beggs* could require publishers to monitor continuously their archives in order to ensure that proceedings have not become active since the original date of publication. Were this to be the consequence of *Beggs*, it would impose an obligation on certain intermediaries which would seem to conflict with article 15(1) of the Electronic Commerce Directive.⁷³ For some

⁶⁹ *Harwood* at [37].

⁷⁰ [2001] QB 201, 208 to 209.

⁷¹ For example, *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1243; *Metropolitan International Schools Ltd v Designtecnica Corpn* [2009] EWHC 1765 (QB), [2011] 1 WLR 1743.

⁷² Draft Defamation Bill, cl 6. See Ministry of Justice, *Draft Defamation Bill Consultation* (2011).

⁷³ See also recital 47 of the directive and the decision of the Grand Chamber of the Court of Justice of the European Union in Case C-324/09 *L’Oréal v eBay* [2012] All ER (EC) 501 at [139].

publishers, this could be an expensive and time-consuming endeavour and may not be a proportionate restriction on their article 10 rights. Fifthly, the policy reasons influencing the interpretations of the term “publication” in defamation and contempt are also different.⁷⁴

3.62 In summary, it appears that although *Beggs* is a decision that has been followed at first instance, on close analysis we cannot be confident that it would be followed by an appellate court in England and Wales. That is clearly a concern. We anticipate that there will be a growth in cases in which prejudicial material is available online having been published before proceedings are active. The courts need an effective mechanism for minimising the risk that such material will prejudice jurors. Publishers and others need to have confidence that they know what their obligations are in relation to archived material.

3.63 **Do consultees consider that section 2 is correctly construed as applying to publications commencing before proceedings were active?**

3.64 If consultees consider that section 2(3) is limited to publications which first appear at the date when proceedings are active (that is that *Beggs* may be wrongly decided) that prompts a further question. Ought liability for contempt of court arise where a publication occurs (without intention to prejudice proceedings⁷⁵) before proceedings are active and, subsequently, when proceedings become active the content of that publication, is still available, poses a substantial risk of serious prejudice to the proceedings? It is worth emphasising here that it is the substantial risk of serious prejudice against which the law seeks to guard, including in order to protect the right to a fair trial under article 6 of the ECHR.⁷⁶ That, in turn, prompts the question of what, if any, degree of awareness there must be of the fact that proceedings have become active in order for someone to be liable. There is a further question of what responsibility ought to be imposed once the substantial risk of serious prejudice is apparent.

3.65 The need for the 1981 Act to apply in such circumstances is obvious from cases such as *Harwood*. In that case the information that was published, before proceedings were active, was prejudicial because it related to the defendant’s previous misconduct but that was, at the time it first appeared, a legitimate matter of public interest. Once proceedings were active and the trial approached, the risk of prejudice was clear. Unless such a scenario is caught by the 1981 Act there will be a major gap in the protection afforded to defendants. Furthermore, the prosecution may also be prejudiced by a defendant using the internet to publicise material which subsequently becomes relevant to their defence.

3.66 There can be no doubt that in some cases a vast amount of material that might be seriously prejudicial is likely to be found on the web. Much of that will have

⁷⁴ For example, the recent preference for the narrow interpretation in defamation cases may be to prevent “forum shopping” which can occur if claimants can pick the time and place of defamation. Defamation proceedings also reflect very different interests: defamation involves private interests whilst contempt is a public matter with the Attorney General acting on behalf of the State.

⁷⁵ Publication undertaken with intention to prejudice would be caught by common law contempt irrespective of whether proceedings were active at the time. See Ch 2 at para 2.56 and following.

⁷⁶ See Appendix B discussion on article 6 of the ECHR.

first appeared before proceedings were active. Throughout the trial that material remains available to witnesses or jurors who are prepared to look for it (the latter in breach of the judge's instruction not to do so). In Chapter 4, we propose a package of measures to deter jurors from undertaking such research.⁷⁷ Despite these measures there will remain some risk of this occurring. There are additional risks, including, that potential jurors, about to serve as such but unaware of the case they will be trying, might look on the web (perhaps by looking for information in relation to the Crown Court centre). Such individuals could quite legitimately come across extremely prejudicial material.

3.67 **Do consultees consider that section 2(3) should be amended to confirm that “time of the publication” is to be interpreted as meaning “time of first publication”?** In effect, this would be to reverse the decision in *Beggs*.

3.68 If consultees agree with this proposal, then in order to avoid the risk identified above (at 3.66) and to protect the defendant's article 6 rights, we consider that it should be a contempt of court under the 1981 Act where the following criteria are all established:

- (1) A publication was made to the public at large or any section of the public before proceedings became active.
- (2) Subsequently, proceedings become active.
- (3) The publication is still available to the public at large or a section of the public and creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
- (4) To avoid the substantial risk of serious prejudice or impediment to particular proceedings, a court has ordered the publisher to take such steps as are reasonably possible to ensure that the publication should not be available to the public at large or a section of the public.
- (5) Such order is made for a specific duration.
- (6) The person subject to the order fails without lawful excuse to comply with the terms of that order.

3.69 As noted, it is unusual to establish liability for consequences that arose because of a change of circumstances that occurred without someone's involvement and over which they had no control after their initial conduct. We consider that while there is force in such objections to an extended interpretation of section 2 as in *Beggs*,⁷⁸ the same objections do not pertain to the proposed new form of contempt as it applies to those responsible for the initial publication. The proposed new contempt imposes liability only for a failure, without lawful excuse, to comply with a specific court order. In that sense, it is very similar to many other kinds of contempt of court.

3.70 In the most straightforward and commonly occurring cases the new form of contempt would target the publisher alone. The author of the blog or the newspaper or broadcaster would be the one subject to the order to remove it temporarily from public view.

⁷⁷ See Ch 4 at para 4.77 and following.

⁷⁸ See para 3.55 and following above.

- 3.71 The scope of potential liability would be much narrower under the new form of contempt than under the present section 2, as interpreted in *Beggs*. Under the current section 2, read with the defences in section 3 of the 1981 Act, liability can arise for any publication unless the publisher had no reason to suspect that proceedings were active. Section 3(1) provides a publisher with a defence only on the basis of a lack of knowledge or suspicion as to the status of proceedings being active; it does not create any defence for a publisher on the basis of a lack of knowledge or suspicion about the contents of the publication if proceedings are active.⁷⁹ If P had actual knowledge that proceedings were active, or believed they were, or had reason to suspect they were, P could be liable. Under section 2 there is an obligation on P to show that reasonable steps have been taken to ascertain whether proceedings were active at the time of publication.
- 3.72 In contrast, under the potential new contempt, there is no possibility of liability based on a publisher's actual or imputed knowledge about the proceedings becoming active after first publication. There is no reverse burden on a publisher. Liability will only arise for a failure of a person to comply with a court order to make such material as is specified in the order unavailable to the public for the specified period. We would expect that period to be the duration of the trial in most cases but it may be longer if there are multiple, related proceedings.
- 3.73 We consider that such a provision would not place onerous and impractical burdens on publishers. They would have no obligation constantly to monitor their archives for material (which in the case of some media organisations will be vast) to ensure that proceedings have not become active in relation to a person or crime discussed in an earlier publication. Furthermore, if a party had a lawful excuse for not removing the publication that would provide a defence for not complying with the order. There is no question of imposing liability on those who are unable, through no fault of their own, to comply with the terms of the order. We suggest, however, that a publisher ought not to be able to rely on the excuse that a determined individual with sufficient technological ability might be able to acquire access by indirect means.⁸⁰ An individual who was determined to republish would commit a contempt under section 2 or at common law. A juror tracking down such material would commit a contempt as discussed in Chapter 4.
- 3.74 This proposal has many other advantages: it avoids any doubt or argument about whether a person was aware or ought to have been aware that proceedings had become active and it avoids arguments about the steps that might reasonably be expected of a person to monitor or identify such material. It also ensures that the burden is proportionate. The offending material will be specified (for example, by its URL address) in the court order so there is a limited burden in identifying it.

⁷⁹ The burden under s 3 is on the publisher or distributor to prove the defence on the balance of probabilities. This contrasts with other grounds for defence under the 1981 Act, particularly the discussion of public affairs in good faith under s 5, where the burden is on the prosecution to the full criminal standard. See Ch 2 at paras 2.50 to 2.52.

⁸⁰ Ways around internet blocks can be found: see *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806 at [192], but these do not pose a problem in the present context where the aim is to make access as difficult as possible for jurors.

The duration for which the material is made unavailable is also limited in a proportionate fashion. This ensures compliance with article 10 of the ECHR.⁸¹

- 3.75 **We propose that the courts be provided with a power to make an order when proceedings are active, to remove temporarily a publication that was first published before proceedings became active, which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.**

Such an order shall be capable of being made against any person who is a publisher within the meaning of the 1981 Act and failure to comply with such an order without reasonable excuse shall be a contempt of court.

Do consultees agree?

- 3.76 We think that the proposal is relatively uncontroversial. However, we can foresee that in some cases it may be necessary for the order to be made against persons other than the publisher. For example, it may be that the author of a blog cannot be identified or is resident abroad and not subject to the jurisdiction of the English and Welsh courts. In such a case, we think that the courts ought also to have the power to make an order in relation to anyone who has sufficient control over the accessibility of the specific publication, at the time of the order. There are numerous other instances in which the courts have been given statutory powers to order intermediaries who have not been directly responsible for the creation of offending publications, to prevent infringements.⁸²
- 3.77 We consider that “control” in this context can be left to be interpreted by the courts on a case-by-case basis. The question will be whether, in respect of material that is available to the public or a section of the public, the person has the capability to prevent that material from being available.⁸³ There may be numerous people who have sufficient control, but not all will necessarily be subject to the jurisdiction of the English courts. For example, intermediaries behind a blog (for example, the domain name registrar and hosting provider) could be based abroad.
- 3.78 It is also important to emphasise that those with control will not necessarily be “publishers” within section 2 above. For example, an internet access provider or domain name registrar might well have some “control” over the accessibility of

⁸¹ See Appendix B discussion on art 10 ECHR. By comparison with other areas of criminal law, there are offences such as ss 1 to 3 of the Terrorism Act 2006 in which criminal liability is established when a person has been put on notice of the offending nature of material over which he has control.

⁸² For example, s 97A of the Copyright, Designs and Patents Act 1988. See also *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806. Strictly, these are distinguishable since the websites exist for unlawful purposes: “it appears to be quite hard to find any content on [the offending website] that is not protected by copyright” at [55]. There is little or no prospect of publishers/owners complying with a court order to remove them, so the order has to be made against an intermediary for the site to be disabled. That would be analogous to an intentional contempt. The Digital Economy Act 2010, s 17 provides a further example of Parliament being prepared to give courts powers to impose injunctions on service providers to block or remove offending material from the internet.

⁸³ How blocks are imposed is described in *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806 at [71].

the material but not be a publisher for the reasons described above. However, we also emphasise that this proposal creates no conflict with the EC Directive discussed above.⁸⁴

- 3.79 **We also provisionally propose that a court should have the power to make an order when proceedings are active, to remove or disable access temporarily to a publication that was first published before proceedings became active, which creates a substantial risk of serious prejudice or impediment.**

Such an order shall be capable of being made against any person who has sufficient control over the accessibility of the material that they are able temporarily to remove it or disable access to it and failure to comply with such an order without reasonable excuse shall be a contempt of court.

Do consultees agree?

On what basis is the power to be ordered?

- 3.80 The court, in issuing the order, would have to have regard to the likelihood of the publication coming to the attention of potential jurors or impeding justice in some other way, such as deterring potential witnesses. The court would also have regard to the likely impact of the publication on the reader at the time of trial. Drawing analogy with courts' use of the power to issue injunctions under section 45(4), according to Mr Justice Aikens in the *HTV* case,⁸⁵ that means that the applicant, usually the defendant,⁸⁶ must demonstrate:

(1) that the court is sure that the alleged acts are going to be carried out, if not restrained;

(2) that the court is sure that if the alleged acts are carried out, then they would amount to a contempt of court. For the present case the

⁸⁴ Articles 12(3), 13(2) and 14(3) of the directive all refer to "requiring the service provider to terminate or prevent an infringement". However, for "hosts", art 14(3) also envisages the possibility of Member States establishing procedures governing the removal or disabling of access to information that is already online. There is acknowledged uncertainty in relation to this language: see European Commission Staff Working Document, "Online Services, including E-Commerce, in the Single Market", (11 Jan 2012) p 37 at 3.4.3.2, http://ec.europa.eu/internal_market/e-commerce/communication_2012_en.htm (last visited 1 Nov 2012). Further, although hosting providers would be the most pertinent intermediary to approach for removal of information, access providers, and others, could clearly also be required to "disable access to information" in order to "prevent an infringement". It is also of note that the European Commission seemed to equate disabling of access with this form of blocking: "the liability regime of the E-Commerce Directive applies to *all illegal activity or information* and it provides for *both removing and disabling access* (blocking). Blocking is of particular importance when takedown is not possible because the illegal activity or information is stored outside the European Union" p 39 at 3.4.4.1 (emphasis in original).

⁸⁵ *Ex p HTV Cymru (Wales) Ltd* [2002] Entertainment and Media Law Reports 11.

⁸⁶ Whilst s 7 of the 1981 Act provides that only the Attorney General or the court on its own motion can initiate contempt proceedings, an interested party can apply for an injunction to restrain a potential contempt: *Peacock v London Weekend Television* (1985) 150 Justice of the Peace 71.

test must be ... that the acts would create a substantial risk that the course of justice in this trial will be seriously impeded or prejudiced.⁸⁷

- 3.81 We envisage that the courts will rarely need to make such orders because only rarely will the material available pose a substantial risk of serious prejudice. As Lord Bridge explained:

It is not, of course, possible to determine in advance what kind of public comment on pending proceedings will create a substantial risk that the course of justice will be seriously impeded or prejudiced. That is one reason why it is not normally possible save in ... exceptional circumstances ... to restrain by injunction a threatened contempt in breach of the strict liability rule.⁸⁸

- 3.82 This new power to order temporary removal or disable access achieves the same result as that achieved by Mr Justice Fulford in *Harwood*, relying on *Beggs*. Sitting in the Crown Court at Southwark, Mr Justice Fulford issued an injunction against various publishers compelling the removal of prejudicial articles relating to the defendant which remained available on the web, having been uploaded several years earlier. In making this order, Mr Justice Fulford used his powers under section 45(4) of the Senior Courts Act 1981.

Who might apply to the court for such an order to be made?

- 3.83 **We propose that the application should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General. Do consultees agree?**

What penalty will follow?

- 3.84 The Crown Court has inherent power to punish a person who disobeys an order made by the court.⁸⁹ The maximum penalty is an unlimited fine and/or two years' imprisonment.⁹⁰ **Do consultees consider that the current maximum penalty is appropriate? Do consultees consider that the court should have the power to impose community penalties?**
- 3.85 If consultees agree with our proposal about creating a new contempt by publication which is triggered by the failure to comply with a court order, it is necessary to consider what the procedure for dealing with such contempt would be. Contempts in breach of section 2(2) or section 4(2) of the 1981 Act are usually dealt with by the Divisional Court under Part 81 of the Civil Procedure Rules (or, exceptionally, the court on its own motion).⁹¹ We ask consultees in Chapter 2 whether they think intentional contempt at common law and contempt in relation to section 2(2) should be tried as if on indictment by a jury. In the

⁸⁷ *Ex p HTV Cymru (Wales) Ltd* [2002] Entertainment and Media Law Reports 11 at [25].

⁸⁸ *Pickering v Liverpool Daily Post and Echo and Newspapers Plc* [1991] 2 AC 370, 425; see also Lord Donaldson MR at 381 to 382.

⁸⁹ Senior Courts Act 1981, s 45(4); *G* [2004] EWCA Crim 1368, [2004] 1 WLR 2932.

⁹⁰ See notes to Criminal Procedure Rules, r 62.9.

⁹¹ See Ch 2 at paras 2.59 and 2.99. See also the discussion in *Arlidge, Eady and Smith on Contempt* para 7-269 and following.

alternative, we ask whether the trial should be before a judge alone (with no jury), but employing the same procedures as used for a trial on indictment. We describe this as a trial “as if on indictment”.⁹² **Do consultees think that this new contempt should be tried in the Divisional Court under Part 81 of the Civil Procedure Rules or should it be tried on indictment or “as if on indictment” as we propose to try section 2(2) contempts?**

- 3.86 We anticipate that guidance from the Lord Chief Justice and the Judicial College might be necessary to ensure that Crown Court judges adopt a consistent approach in making such orders.

PLACE OF PUBLICATION

- 3.87 The criminal law of England and Wales is territorial,⁹³ although there are specific statutory exceptions to this. The problem of cross-frontier offences is one of antiquity, far pre-dating the advent of the internet.
- 3.88 Traditionally, the courts have adopted a “terminatory” approach to criminal jurisdiction.⁹⁴ Under this approach an offence with transnational elements is committed in England and Wales if the last constitutive act took place here, (that is, the crime was completed within this jurisdiction).⁹⁵ However, more recently, a “substantial measure” test has been adopted, which is complementary to the “terminatory” approach.⁹⁶ Under this approach, an offence will occur in England and Wales if a substantial measure of the crime is committed within the jurisdiction and there is no reason of comity why it should not be tried here.
- 3.89 The complexity in applying these principles of jurisdiction to crimes committed via the internet cannot be understated. At its simplest, criminal content could be created in one country, saved on servers in another country, with accessibility in numerous other countries.
- 3.90 There do not appear to be any reported cases of section 2 with a cross-frontier element. It is certainly possible to conceive of circumstances in which they might arise. For example, a US tourist might be murdered in England and Wales in such newsworthy circumstances as to be prominently featured on US news websites. These could be accessed in England and Wales and might give rise to a substantial risk of serious prejudice or impediment at trial. It is unclear whether liability for contempt might arise in such circumstances on the basis of the accessibility of the publication in England and Wales.

⁹² See Ch 2 at para 2.76.

⁹³ As Hirst notes, “misconduct committed outside the realm cannot ordinarily amount to the *actus reus* of an offence under English law”: M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) p 3.

⁹⁴ G Williams, “Venue and the Ambit of Criminal Law (Part 3)” (1965) 81 *Law Quarterly Review* 518.

⁹⁵ See M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) p 115. See also M Goode, “The Tortured Tale of Criminal Jurisdiction” (1997) 21 *Melbourne University Law Review* 411, 439 and C Ryngaert, “Territorial Jurisdiction Over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law” (2009) 9 *International Criminal Law Review* 187, 192 to 193.

⁹⁶ *Smith (Wallace Duncan) (No 4)* [2004] QB 1418 at [57].

- 3.91 Neither the 1981 Act nor any of the decisions interpreting it explain in what circumstances a publication will have occurred within the jurisdiction. The term “publication”, however, is used in the statutory definitions of other crimes which have posed similar cross-frontier problems. For example, in some of the crimes in Part III of the Public Order Act 1986, and the crime of obscene publication under section 2(1) of the Obscene Publications Act 1959. Unfortunately, the courts have not taken a consistent approach to the jurisdictional question in those offences. In some instances it has been held that publication was within England and Wales because the offending material was downloaded here. In some instances it has been held that publication was within England and Wales because the offending material was accessible here. In *Perrin*,⁹⁷ for example, “the publication relied on [was] the making available of preview material to any viewer who may choose to access it ...”.⁹⁸ This was despite the fact that there was “no evidence as to where the data files were created and posted, and there was no evidence as to the location of the server”.⁹⁹ On this interpretation, a publication would occur within England and Wales if it was accessible within this jurisdiction, irrespective of where the material was uploaded or hosted. That would give an extremely wide scope to the section 2 contempt.¹⁰⁰
- 3.92 In more recent cases it has been held that it was sufficient that a substantial measure of the publishing activity occurred in England and Wales. In the context of “publication” under the Public Order Act 1986, the Court of Appeal in *Sheppard*¹⁰¹ endorsed a “substantial measure” approach. In that case it was held that an offence under section 19 of the Public Order Act 1986 (publishing threatening, abusive or insulting material intended or likely to stir up racial hatred), was committed in England and Wales where the material had been prepared in this country, but uploaded to a server in California. Applying the “substantial measure” test, it was clear that almost everything in the case related to this country; it is where the appellants operated, where the material was generated, edited, uploaded and controlled, and the material was aimed primarily at the British public. The only foreign element was the hosting of the website on a server abroad.¹⁰²
- 3.93 There is no developed jurisprudence from the English courts on what constitutes a “substantial measure”. In *Sheppard*, the court declined to explore the theories as to when/where material is published on the web, because jurisdiction in the case was governed by the “substantial measures” principle.
- 3.94 On this interpretation, the publication could be caught by section 2 if the publication had been written here or uploaded here but it is unlikely that it would be sufficient that it was merely made accessible to individuals in England or Wales.

⁹⁷ *Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar).

⁹⁸ *Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar) at [22]. It is unclear whether liability turns on accessibility or actual access in England and Wales.

⁹⁹ *Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar) at [33].

¹⁰⁰ It is of note that in *Perrin* the court rejected a substantial measure test: [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar) at [52].

¹⁰¹ *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779.

¹⁰² *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [32] by Scott Baker LJ.

3.95 Do consultees consider that the absence of a definition of the place of publication creates problems in practice? Is a statutory definition of the place of publication necessary? If so, what form should that definition take? For example,

- (1) should it be necessary that the publication was produced within England and Wales; or**
- (2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or**
- (3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad?**

CHAPTER 4

JUROR CONTEMPT

INTRODUCTION

- 4.1 Recent cases have highlighted concerns about juror misconduct during criminal trials.¹ A variety of offences exist in statute and at common law dealing with misbehaviour arising out of participation in jury service. For example, section 20 of the Juries Act 1974 criminalises failing without reasonable cause to attend for jury service, having been duly summonsed in advance; having attended for jury service but without reasonable cause not being available when called to serve; or being unfit to serve through drink or drugs. It is also an offence under section 20 to make, cause or permit to be made any false representation with the intention of evading jury service; to refuse, without reasonable excuse, to answer any question put in respect of such offence or give an answer which is known to be false or given recklessly; or to serve on a jury knowing that one is disqualified.²
- 4.2 Jurors can of course commit other criminal offences relating to the administration of public justice.³ Additionally, jurors can be held in contempt in the face of the court, for example, for swearing at a judge.⁴ Historically, various other forms of juror behaviour have been deemed misconduct, including jurors separating without the court's permission;⁵ eating or drinking in court or "before the verdict at

¹ The cases of *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 and *A-G v Frail* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 made headlines at the time of the judgments, but there have been many other examples of appeal cases, in particular those involving allegations that research has been undertaken on the internet by jurors as in *Dallas*. See *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5; *Smith* [2005] EWCA Crim 2028; *Hawkins* [2005] EWCA Crim 2842; *Pink* [2006] EWCA Crim 2094; *Marshall* [2007] EWCA Crim 35, [2007] Criminal Law Review 562; *Fuller-Love* [2007] EWCA Crim 3414; *Thakrar* [2008] EWCA Crim 2359, [2009] Criminal Law Review 357; *White* [2009] EWCA Crim 1774; *Reynolds* [2009] EWCA Crim 1801; *Richards* [2009] EWCA Crim 1256; *Gibbon* [2009] EWCA Crim 2198; *Bassett* [2010] EWCA Crim 2453; *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200; *McDonnell* [2010] EWCA Crim 2352, [2011] 1 Cr App R 28; *Mpelenda* [2011] EWCA Crim 1235; *Morris* [2011] EWCA Crim 3250; *Yu* [2011] EWCA Crim 2089; *Starling* [2012] EWCA Crim 743; *Gul* [2012] EWCA Crim 280, [2012] 3 All ER 83. Obviously this list only includes those cases that were appealed on the ground of juror misconduct; there are likely to be others where the jury was discharged in the Crown Court (such as in *H* [2008] EWCA Crim 3321).

² These offences can be punished on summary conviction with a fine: s 20(1) and s 20(5). Failure to attend or being unfit or unavailable to serve can be treated as contempt in the face of the court as well as being tried summarily: s 20(2).

³ For example, if a juror tried to sabotage a trial because of a friendship with the defendant, this could amount to intimidating (their fellow) jurors under s 51 of the Criminal Justice and Public Order Act 1994 or to perverting the course of justice at common law.

⁴ G S Robertson, *Oswald's Contempt of Court: Committal, Attachment and Arrest Upon Civil Process* (3rd ed 1910) p 70. See Ch 5 at paras 5.17 and following.

⁵ *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 841; *Hughes v Budd* (1840) 8 Dowling's Practice Cases 315; *Ward* (1867) 31 Justice of the Peace 791; *Ketteridge* [1915] 1 KB 467; *Goodson* [1975] 1 WLR 549.

the expense of one of the parties”;⁶ determining the verdict by lot;⁷ jurors declining to participate in deliberations,⁸ or, when unable to agree, jurors “splitting the difference” to reach a verdict.⁹ This chapter is not concerned with these types of misconduct or criminal offences.¹⁰ Instead, the focus of this chapter is on the more immediate practical problem of jurors who seek information related to the proceedings beyond the evidence presented in court (which is contempt of court at common law)¹¹ or who disclose information related to their deliberations (which is prohibited by section 8 of the 1981 Act).

- 4.3 Instances of jurors improperly receiving or disclosing information related to their trials are not new.¹² There have been numerous cases of jurors undertaking private visits to the scene of the crime, conducting experiments, researching aspects of the evidence¹³ and no doubt speaking to their friends and family about the case that they are trying. As one commentator has explained,

errant jurors are not novel; independent research by jurors and their disobedience of court orders has been encountered for centuries. What is novel is the use of the internet as a means of communication, research and a mainstream news source.¹⁴

- 4.4 Thus, the advent of the internet has had a profound impact on a juror’s ability and opportunity to seek or disclose information related to their trial.¹⁵ This chapter considers the present steps undertaken to try to prevent jurors from committing

⁶ *Halsbury’s Laws of England*, vol 61 (5th ed 2010) para 841; *Welcden v Elkington* (1577) Plowden’s Commentaries or Reports 516, 518, although it may be questionable whether eating or drinking in court these days could amount to contempt unless the jurors were distracted or the proceedings disrupted: Arlidge, Eady and Smith on Contempt para 10-194; Borrie and Lowe: *The Law of Contempt* para 12.39. It should be noted that these days jurors are provided with either refreshments at court or a subsistence allowance.

⁷ *Halsbury’s Laws of England*, vol 61 (5th ed 2010) para 841; *Hale v Cove* (1725) 1 Strange’s Law Reports 642; *Harvey v Hewitt* (1840) 8 Dowling’s Practice Cases 598, although compare *Prior v Powers* (1664) 1 Keble’s King’s Bench Reports 811. For a more recent example involving jurors consulting a ouija board, see *Young* [1995] QB 324.

⁸ *Halsbury’s Laws of England*, vol 61 (5th ed 2010) para 841; *Schot* [1997] 2 Cr App R 383.

⁹ *Halsbury’s Laws of England*, vol 61 (5th ed 2010) para 841; *Hall v Poyser* (1845) 13 Meeson and Welsby’s Exchequer Reports 600.

¹⁰ For particularly historic cases, see P Lowe, “Challenges for the Jury System and a Fair Trial in the Twenty-First Century” [2011] *Journal of Commonwealth Criminal Law* 175, 181 to 182.

¹¹ *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

¹² See, eg, *Willmont* (1914) 10 Cr App R 173; *Shepherd* (1910) 74 Justice of the Peace Journal 605; *Twiss* [1918] 2 KB 853; *Brandon* (1969) 53 Cr App R 466.

¹³ For example, *Davis (No.3)* [2001] Cr App R 8 (site visit); *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (exhibits/experiments); *Cadman* [2008] EWCA Crim 1418 (handwriting analysis).

¹⁴ C Murdoch, “The Oath and the Internet” (2012) 176 (11) *Criminal Law and Justice Weekly* 149, 149.

¹⁵ Indeed, the English and Welsh jurisdiction is not the only one considering how to address this issue. For a comprehensive study of the US approach, see E Robinson, “Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media” [2011] 1 *Reynolds Court and Media Law Journal* 307, and Appendix C generally.

this type of misconduct. It then examines the problems with the present law and procedure in respect of the separate issues of inappropriate information being sought by jurors and inappropriate information being disclosed by jurors. Finally, this chapter considers the relevant evidential and procedural schemes for dealing with such conduct, and some proposed preventative measures.

JURY INSTRUCTIONS

- 4.5 In England and Wales, jurors are selected at random from the electoral register for the court's local area.¹⁶ When prospective jurors receive their summons, they are also sent a booklet entitled *Your Guide to Jury Service*, which explains, amongst other things, that during the trial jurors should not "discuss the evidence with anyone outside your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter or Myspace" and that if they "are unsure or uneasy about anything", they can write a note to the judge.¹⁷
- 4.6 Whilst every court has slightly different procedures, in general, on arrival at court on the first day of service the jury manager explains to the prospective jurors various housekeeping matters. Jurors are shown a video describing in brief terms the court process and their responsibilities as jurors.¹⁸ The video explains that "it is vital" that jurors "are not influenced by any outside factors" so they must not discuss the case with family or friends. Jurors are also told explicitly not "to post details about any aspect of ... jury service", including their deliberations, on social networking sites or to disclose their deliberations to anyone. Jurors are also warned that they "may also be in contempt of court if [they] ... use the internet to research details about any cases [they] ... hear, along with any other cases listed for trial at the court". The video further warns jurors that they are required to ensure that they and their fellow jurors obey these rules and that any concerns should be raised with court staff.
- 4.7 HM Courts and Tribunals Service guidance requires jury managers to warn jurors about the use of social networking sites, and suggests that jury managers use the following words:

¹⁶ Only those aged under 70 years can be selected, and there are certain other criteria for disqualification: *Halsbury's Laws of England*, vol 61 (5th ed 2010) para 804.

¹⁷ HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 5.

¹⁸ *Your Role as a Juror*, Ministry of Justice, <http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu> (last visited 1 Nov 2012).

The judge will tell you that you DO NOT discuss the evidence with anyone outside of your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter, or Myspace. If you do this, you risk disclosing information, which is confidential to the jury. Each juror owes a duty of confidentiality to the other jurors, to the parties and to the court. Jurors can only discuss the evidence when all 12 jurors are in the jury deliberating room at the conclusion of the evidence in the trial.¹⁹

- 4.8 We understand that although not obliged to do so, some jury managers supplement that with additional warnings about obtaining information related to the case, including by searching on the internet.
- 4.9 Different court centres appear to operate different systems in respect of jurors' personal electronic devices.²⁰ In some courts, jurors are permitted to keep such items with them in the jury assembly area, but the devices must be switched off in court, and are removed when jurors are deliberating in the jury room. We understand that in some court centres, jurors' electronic devices are removed from them for the whole time that they are at court, whilst in other courts, jurors have been able to keep their electronic devices at all times, including during deliberations.²¹ The booklet, *Your Guide to Jury Service*, explains unequivocally that "no mobile phones, laptops, iPods or any devices with the capability of connecting to the internet etc can be taken into the jury room".²²
- 4.10 We understand that the manager's speech and the jury video are not generally repeated during the period of the jurors' service, although HM Courts and Tribunals Service issues posters for display in the jury assembly area which reiterate the warnings from the video about not researching the cases and not disclosing deliberations.
- 4.11 From the pool of prospective jurors summoned to the court centre, 12 will be empanelled for each trial.²³ These jurors individually take an oath, aloud, in front of their fellow jurors, the judge, advocates and defendant(s) where they swear or affirm to "faithfully try the defendant and give a true verdict according to the evidence".²⁴ Once the jury has been empanelled, the judge will give what are colloquially known as "housekeeping directions". As part of these directions, it is

¹⁹ We are grateful to HM Courts and Tribunals Service for providing us with this (emphasis in original).

²⁰ We are concerned here in particular about devices that are capable of connecting to the internet, including mobile phones, laptops, iPads, iPods, Kindles, and other similar devices.

²¹ As apparently happened in *Barrett* [2007] EWCA Crim 1277 and *W* [2007] EWCA Crim 1781.

²² HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 7.

²³ Jurors normally serve for two weeks, and, therefore, may sit on more than one trial: HM Courts and Tribunals Service, *Your Guide to Jury Service* (2011) p 2.

²⁴ Consolidated Criminal Practice Direction, 28 Mar 2006 para IV.42.4. Jurors of certain religious faiths can swear their oath to their particular god, whilst those of other faiths and none can "solemnly, sincerely and truly declare and affirm".

essential for judges to warn jurors not to undertake their own research or communicate with others via the internet about the case.²⁵

4.12 Specifically, the Crown Court Bench Book advises judges to direct that:

Jurors should not discuss the case with anyone, not least family and friends whose views they trust, when they are away from court, either face to face, or over the telephone, or over the internet via chat lines or, for example, Facebook or MySpace [or Twitter].²⁶ If they were to do so they would risk disclosing information which is confidential to the jury. Each juror owes a duty of confidentiality to the others, to the parties and to the court. Furthermore, if they were to discuss the case with others they would risk, consciously or not, bringing someone else's views to their consideration of the evidence. If anyone should persist in trying to engage a juror in conversation about the case the matter should be reported as soon as possible to the judge.

If the case is one which has in the past or may during the trial attract media attention, the jury should remember that the report is only the author's version of past events. It is the jury alone which hears the evidence upon which they must reach their verdict. They should therefore take care to ensure that they do not allow such second-hand reporting or comment to influence their approach to the evidence.

We have a system of open justice in which the parties themselves decide what evidence to adduce at trial. It is upon that evidence alone that the jury must reach their verdict. They should not to [sic] seek further information about, or relevant to, the case from any source outside court, including the internet (for example, Google). If they were to do so it would be unfair to the prosecution and the defence because neither would be aware of the research and its results and, therefore, would be unable to respond to it.

Should any juror have concerns, at any time during the trial, including during their retirement, about any aspect of his or her jury service which are sufficiently important to draw to the judge's attention, the juror should send a note to the judge via their usher or bailiff as soon as possible. Concerns communicated after the trial is over are expressed too late for the judge to assist The jury should not visit the scene of the alleged offence (except on a view arranged by the court).²⁷

4.13 These instructions are supplemented by the Companion to the Crown Court Bench Book, which provides that:

²⁵ *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5 at [25] to [28].

²⁶ Twitter has now joined MySpace and Facebook in the first paragraph: *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 8. See also the direction provided for illustration in the *First Supplement* pp 10 to 11.

²⁷ *Crown Court Bench Book – Directing the Jury* (2010) p 9.

The jury should be reminded that they have taken an oath or affirmation to try the case upon the evidence, which is what they will all hear together in court, and told that it is the essence of the jury system that their verdicts will be based upon their common experience of the evidence and the discussions that they will have about that evidence in their deliberations at the conclusion of the case.

For this reason, the following points cannot be stressed too strongly and should be accompanied with a warning that ignoring them may well (as they have already been informed in their jury instructions) amount to a contempt of court which is an offence punishable with imprisonment:

Until the case has been completed, jurors must not discuss any aspect of it with anyone at all outside their own number or allow anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way. And, even after they have returned their verdicts, whilst they may then talk about the case with others, they must be careful only to speak about what happened in the court room; they must never in any circumstances disclose anything of their discussions or deliberations.

...

They must not carry out any enquiries or research into any aspect of the case themselves, for example by visiting places mentioned or looking up any information on the internet. They should only work on the case when they are at court.

They must take no account of any media reports about the case.²⁸

- 4.14 Following the judgment in *Thompson*,²⁹ the Consolidated Criminal Practice Direction now requires judges to emphasise the jury's collective responsibility for trying the case:

IV.42.6 Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.

IV.42.7 Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is

²⁸ *Crown Court Bench Book Companion* (2011) pp 1 to 2.

²⁹ [2010] EWCA Crim 1623, [2011] 1 WLR 200, 203.

the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.³⁰

- 4.15 At the end of each court day whilst the trial is ongoing jurors are also generally reminded in brief terms about the instructions that the judge gave when they were empanelled.³¹
- 4.16 Yet, despite the measures we have identified in this brief summary, there is still concern that the message may not be getting through, as Professor Cheryl Thomas' research highlights³² and the recent case reports show.³³ This may call into question the extent to which the directions to jurors are given consistently and the extent to which jurors understand or accept the directions that they are given.³⁴ Whilst it is not possible to know for certain the scale and nature of contempt committed by jurors, we consider that a range of measures should be considered when attempting to address these problems.

JURORS SEEKING INFORMATION

Present law

- 4.17 Jurors who seek information about the case which they are trying, in breach of the directions of the judge, may be in contempt of court.³⁵ The law in this area was explained in *Attorney General v Dallas*.³⁶ Whilst sitting as a juror, Dallas undertook internet research into the case and discovered that the defendant had previously been tried for rape (although he had been acquitted). Dallas disclosed what she had discovered to her fellow jurors, who alerted the court usher and subsequently the trial judge. The jury was discharged and there was a retrial.

³⁰ Consolidated Criminal Practice Direction, 28 Mar 2006. Both the *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 7 and following, and the *Crown Court Bench Book Companion* (2011) pp 1 to 2 reiterate this. See also *Lambeth* [2011] EWCA Crim 157 at [7].

³¹ The Consolidated Criminal Practice Direction, 28 Mar 2006 explains that “the judge should consider, particularly in a longer trial, whether a reminder on the lines of the further warning is appropriate prior to the retirement of the jury” at IV.42.8.

³² *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) pp 43 to 44.

³³ See para 4.17 and following below . See also the *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) p 9.

³⁴ It has been suggested that giving directions to jurors not to look on the internet may encourage them to consider such possibility, although there is no evidence to indicate that this is in fact the case: N Haralambous, “Juries and Extraneous Material: A Question of Integrity” (2007) 71 *Journal of Criminal Law* 520, 533.

³⁵ Such conduct is deemed contempt in other jurisdictions too: T J Fallon, “Mistrial in 140 Characters or Less? How The Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It” (2009) 38 *Hofstra Law Review* 935, 960, 967. Jurors may also be in contempt for other forms of misconduct. See, eg, Ch 5 at para 5.17 and following.

³⁶ [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

- 4.18 In proceedings before the Divisional Court, the Lord Chief Justice held that Dallas was in contempt of court because:

The defendant [Dallas] knew perfectly well, first, that the judge had directed her, and the other members of the jury, in unequivocal terms, that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it. This was because she had sought to arm and had armed herself with information of possible relevance to the trial which, although not adduced in evidence, might have played its part in her verdict. The moment when she disclosed any of that information to her fellow jurors she further prejudiced the administration of justice. In the result, the jury was rightly discharged from returning a verdict and a new trial was ordered. The unfortunate complainant had to give evidence of his ordeal on a second occasion. The time of the other members of the jury was wasted, and the public was put to additional unnecessary expense. The damage to the administration of justice is obvious.³⁷

- 4.19 In passing a sentence of 6 months' imprisonment, the Lord Chief Justice explained that:

Misuse of the internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained.³⁸

- 4.20 On informal consultation, some stakeholders criticised this decision on the basis that it is unusual to characterise a direction such as the judge's original jury instruction as a "court order". Furthermore, concerns were raised about the extent to which the current procedure used for this type of contempt protects the alleged contemnor's article 5 or 6 rights under the ECHR.³⁹ There may also be concerns that there is a lack of clarity about the definition of this contempt. Nonetheless, it is clear from *Dallas* that jurors who deliberately and knowingly disobey the direction of the judge not to undertake research on the internet are in contempt of court.

The problem

- 4.21 Jurors who seek information from outside the courtroom about the case that they are trying may act from a variety of motives. Evidence of motives can be found in the explanations jurors themselves have given when found to have improperly accessed the internet during trial. In addition, various authors speculate about

³⁷ *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [38]. See also *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [35].

³⁸ *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [43].

³⁹ See para 4.69 below.

other motives which could be relevant. There is some anecdotal evidence that jurors may do so deliberately because they are keen to find out as much about the case as possible in order to “bolster their confidence”⁴⁰ and reach the “right” verdict.⁴¹ They seek to be “good jurors” – thoroughly prepared and well-equipped with the information that will allow them to reach a verdict – but do so in a misguided manner unfortunately, ignorant of the rules of evidence and the necessity to reach a verdict based only on what they have heard in court, even where that evidence might be incomplete or unclear. In some cases, this motivation appears to be connected to the jurors’ failure to understand the trial judge’s directions on the law: for example, one juror researched joint criminal enterprise on the internet and reported his findings back to his fellow jurors.⁴² In a similar vein, some jurors may feel that information is being withheld from them by the parties in the case, and that they need a fuller picture in order properly to reach a verdict.⁴³ It may be correct that information is being withheld – for example where there is inadmissible bad character evidence – but again these jurors have not appreciated or perhaps accepted the rules of evidence and the rationale for them. Such jurors may have had insufficient explanation of the reason why research is prohibited.⁴⁴ There may be yet another group of jurors who did not understand the direction that was given prohibiting them from undertaking research or their role as finders of fact, or perhaps they were unable to translate what the direction meant in practice in terms of what is prohibited and

⁴⁰ S Grey, “The World Wide Web: Life Blood for the Public or Poison for the Jury?” (2011) 3(2) *Journal of Media Law* 199, 201.

⁴¹ R Artigliere, “Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial” (2011) 59 *Drake Law Review* 621, 639; S Macpherson and B Bonora, “The Wired Juror, Unplugged”, *Trial*, Nov 2010; M Zora, “The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights” [2012] *University of Illinois Law Review* 577, 585 to 586.

⁴² The juror discovered wholly incorrect information about the law on joint criminal enterprise: *Mpelenda* [2011] EWCA Crim 1235. There is some evidence that jurors in the UK and overseas have problems understanding the directions of the trial judge: P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Research Papers in Law, Kingston University) p 25; W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) pp 51 to 63, http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP_37Vol2.pdf (last visited 1 Nov 2012); M Comiskey, “Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the ‘Stagnant Pool’ Be Revitalised?” (2010) 35 *Queen’s Law Journal* 625, 629 to 643; L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials* (Crime and Justice Bulletin, NSW Bureau of Crime and Statistics Research, no 119, Sep 2008); W Young, “Summing Up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice” [2003] *Criminal Law Review* 665.

⁴³ P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Research Papers in Law, Kingston University) p 58; C M Morrison, “Jury 2.0” (2011) 62 *Hastings Law Journal* 1579, 1585 to 1586; C M Morrison, “Can the Jury Trial Survive Google?” (2010) 25 *Criminal Justice* 4, 6; M Zora, “The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights” [2012] *University of Illinois Law Review* 577, 585.

⁴⁴ S Macpherson and B Bonora, “The Wired Juror, Unplugged”, *Trial*, Nov 2010.

what is not.⁴⁵ Finally, there may of course be some jurors who ignore the judge's direction simply out of curiosity⁴⁶ or even in bad faith.

4.22 Historically, this may have been less problematic than it is today. In the pre-internet age, an unauthorised visit to the crime scene might have involved an inconvenient journey at the end of the court day, with the risk that the juror would be observed making the visit. These days, detailed maps and photographs of street scenes of, not only England and Wales, but almost anywhere in the world, are accessible easily, anonymously and instantly.⁴⁷ Likewise, whereas uncovering media reports of a defendant's previous convictions would previously have required a visit to the national newspaper archive at the British Library at Colindale, an internet search engine might now produce scores of results about a particular individual's past misdemeanours within seconds.⁴⁸ As we explain in chapter 3, internet access and use is widespread in the UK today.⁴⁹ In consequence, insulating the jury from irrelevant material or inadmissible evidence has become significantly more difficult.⁵⁰ Indeed, in the US, lawyers have even coined the colloquial phrase a "google mistrial" to identify cases where internet research by a juror led to a retrial.⁵¹

4.23 Evidence as to the prevalence of this problem is difficult to obtain.⁵² There is very limited reliable, empirical, research from overseas,⁵³ and only two studies in England and Wales have ever been undertaken to examine this issue. Furthermore, different studies have tended to reach very different conclusions. In England and Wales, Professor Thomas found in 2010 that in high-profile cases, 12% of jurors surveyed admitted that they had looked for information on the

⁴⁵ S Macpherson and B Bonora, "The Wired Juror, Unplugged", *Trial*, Nov 2010. See also the issues raised in R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362.

⁴⁶ M Zora, "The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights" [2012] *University of Illinois Law Review* 577, 585; E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 294; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 256.

⁴⁷ E Brickman, J Blackman, R Futterman and J Dinnerstein, "How Juror Internet Use Has Changed the American Jury" (2008) 1(2) *Journal of Court Innovation* 287, 294; N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 256.

⁴⁸ For example, *Thakrar* [2008] EWCA Crim 2359, [2009] *Criminal Law Review* 357. See also A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) p 40, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

⁴⁹ See Ch 3 at para 3.2.

⁵⁰ See para 4.17 and following above.

⁵¹ E M Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts" (2011) 46 *Valparaiso University Law Review* 43, 48.

⁵² There are various reports of jurors or whole juries being discharged because of researching the case on the internet, including in *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 6 at footnote 12; Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010) p 187 and following.

⁵³ E Brickman, J Blackman, R Futterman and J Dinnerstein, (2008) 1(2) "How Juror Internet Use Has Changed the American Jury" *Journal of Court Innovation* 287, 292.

internet about the case they were trying while it was underway, whilst in non-high-profile cases, 5% admitted doing so.⁵⁴ Perhaps equally worryingly, Thomas' study found that "when asked about whether they would know what to do if something improper occurred during jury deliberations, almost half of the jurors (48%) said they either would not know what to do or were uncertain".⁵⁵

- 4.24 These findings are not necessarily surprising when considered in the context of other earlier research in New Zealand which examined jurors' reliance on material from outside the jury room. This study, undertaken in 1998 before the widespread use of the internet, examined 49 trials and found that there were:

Five cases in which the jury made any external inquiries about factual material. These inquiries included visiting the scene of the crime and bringing into the jury room explanatory brochures about legal and factual issues.⁵⁶

- 4.25 The jurors made these enquiries despite a jury video, jury booklet and judge's summing up all explaining that a verdict must be reached by considering only the evidence that was heard in court. The New Zealand research also found cases of jurors undertaking their own research about the law, for example, through the use of a legal dictionary. As the researchers identified:

While the directions not to conduct external inquiries were adhered to in a majority of cases, there was no evidence that the directions themselves made a difference to the actions of juries in this respect. By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.⁵⁷

- 4.26 In contrast, a study of 41 trials undertaken in New South Wales, Australia between 1997 and 2000, found that only 3% of jurors deliberately looked for media coverage relevant to the case they were trying (although it did not consider whether the jurors had undertaken other forms of research).⁵⁸

⁵⁴ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43. It was also found that 26% of jurors in high profile cases and 13% in non-high profile cases admitted that "they saw media reports of their case on the internet during the trial" which may suggest that some were reluctant to admit having actively looked for such reports (our emphasis).

⁵⁵ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

⁵⁶ W Young, N Cameron and Y Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) p 59.

⁵⁷ W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand Preliminary Paper 37, vol 2, 1999) p 59.

⁵⁸ M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) p 83. Although, of course, various factors, including whether the trials examined in both studies were of equal high profile and of equal length, may account for the different results between this and the New Zealand study.

4.27 The Criminal Case Review Commission (CCRC) has provided us with anonymous data about cases which the Court of Appeal directed the Commission to investigate under section 15 of the Criminal Appeal Act 1995. This data indicates that there has been an increase in the number of directions which concern allegations involving the conduct of jurors. Between 1998 and 2005, the CCRC recorded four directions involving such allegations. From 2006 until mid-2012, the CCRC has been involved in at least 27 directions concerning such allegations. These have included allegations that jurors used mobile phones in court; that jurors had inappropriate access to certain information about the proceedings and that jurors had inappropriate contact with someone connected to the case they were trying.

4.28 We recognise that empirical studies have limitations because they often rely on jurors self-reporting such behaviour. Thomas suggests that the results of her research are likely to show the “minimum numbers of jurors”, given that others may not have admitted to such conduct if they realised that it was prohibited.⁵⁹ By the same token, the cases which result in juries being discharged or which reach the Court of Appeal are only those where the juror’s behaviour has come to light. We do not know how many jurors engage in this behaviour and go undiscovered.⁶⁰

4.29 Nonetheless, whatever the motives and numbers of those involved, jurors seeking information which goes beyond the evidence heard in court is clearly problematic. As the Lord Chief Justice has explained:

If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision-making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial.⁶¹

4.30 Indeed, whilst the principles have common law origins, there are also implications for a defendant’s article 6 rights where jurors seek external material. Article 6 of the ECHR requires a trial before an independent and impartial tribunal, which is both unbiased in fact and in appearance;⁶² a requirement which may be violated

⁵⁹ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43.

⁶⁰ G Daly and I Edwards, “Jurors Online” (2009) 173 *Criminal Law and Justice Weekly* 261, 261.

⁶¹ *Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5 at [24]. See also Chief Justice Spigelman, “The Internet and the Right to a Fair Trial” (2005) 29 *Criminal Law Journal* 331, 332.

⁶² The test is the same under the common law: *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 at [14]. See also Clayton and Tomlinson para 11.146 and following.

if a juror obtains prejudicial material about the defendant. Furthermore, article 6 includes an “implied” right to cross-examine witnesses,⁶³ and a requirement that the court “inform the parties of the evidence taken into account” in reaching its decision, allowing the parties an opportunity to make submissions on the case.⁶⁴

- 4.31 In some cases, external material which has been obtained by a jury may be insignificant – it could be innocuous and cause prejudice to neither party, or it may be related to an issue which is entirely peripheral to those raised at trial. However, where the material is prejudicial, or where the jury relies on such material in order to reach a verdict, this is likely to amount to a violation of article 6. Here, the prosecution and the defence have been denied the opportunity to challenge such evidence and to address the jury as to the weight to attach to it in their deliberations. As one commentator explained, the parties may be defending against “the unseen enemy of internet gossip and innuendo”.⁶⁵ Furthermore, the parties have a right to know the basis on which the jury reached its decision.⁶⁶ In the absence of the jury giving a reasoned verdict (as a professional judicial tribunal would), the evidence before the court and the judge’s summing up become the public record on which the jury must be assumed to have based its decision.⁶⁷
- 4.32 Whilst jurors have a right to receive information as part of their right to freedom of expression under article 10 of the ECHR, this is clearly subject to protecting the legitimate aims of “maintaining the authority and impartiality of the judiciary” (which includes the jury) and “the protection of the reputation or rights of others” including the defendant’s article 6 rights. Additionally, this problem has implications for the confidence of the public in the fair administration of criminal justice through the jury trial.⁶⁸

Proposed reforms

- 4.33 Elsewhere in this chapter, we have detailed proposals to expand the practical measures, such as information and warnings, that might be used to prevent jurors from engaging in this behaviour.⁶⁹ However, since there is no single

⁶³ Clayton and Tomlinson para 11.178.

⁶⁴ Clayton and Tomlinson para 11.180, citing *R v Deputy Industrial Injuries Commissioner ex p Moore* [1965] 1 QB 456, 490.

⁶⁵ C M Morrison, “Jury 2.0” (2011) 62 *Hastings Law Journal* 1579, 1624.

⁶⁶ S Grey, “The World Wide Web: Life Blood for the Public or Poison for the Jury?” (2011) 3(2) *Journal of Media Law* 199, 199; N Haralambous, “Juries and Extraneous Material: A Question of Integrity” (2007) 71 *Journal of Criminal Law* 520, 524; A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) p 41, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

⁶⁷ *Taxquet v Belgium* (2012) 54 EHRR 26 (App no 926/05) (Grand Chamber decision).

⁶⁸ *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [29]; N Haralambous, “Educating Jurors: Technology, the Internet and the Jury System” (2010) 19(3) *Information and Communications Technology Law* 255, 261. The public appears to have a high level of confidence in the jury system at present: J V Roberts and M Hough, “Public Attitudes to the Criminal Jury: a Review of Recent Findings” (2011) 50(3) *Howard Journal of Criminal Justice* 247. For more on the human rights aspects of juror misconduct, see Appendix B on contempt by jurors.

⁶⁹ See para 4.77 and following below.

solution to this problem, it is necessary to consider what the legal response should be where preventative measures fail, and jurors do undertake research about the case that they are trying. Indeed, some have questioned whether it is realistic to seek to prevent jurors from researching aspects of the case that they are trying on the internet. Preventative measures can only assist those jurors “who are willing to abide by” the judge’s directions.⁷⁰ The Law Commission in 2002 explained that there were clearly difficulties with preventing jurors from accessing the internet, describing finding information on the web as “characteristic of society today”.⁷¹

- 4.34 In some ways, this risk can be partially mitigated by imposing restrictions on the media, limiting the information that they have on their internet archives and, therefore, making it less likely that jurors will be able to uncover prejudicial material. Such restrictions were imposed recently through an injunction granted by Mr Justice Fulford in the case of *Harwood*.⁷² The injunction ordered certain publishers temporarily to remove material from their websites which had first appeared in advance of active proceedings commencing (and, therefore, at the time, would not have amounted to strict liability contempt by publication) but which had remained on the website once proceedings were active. We consider this issue in more detail in our chapters on modern media and contempt by publication.⁷³
- 4.35 Whilst there may be concerns about the compatibility of such mechanisms with the media’s article 10 rights, using such mechanisms in respect of specific webpages, for the limited duration of the trial, would make it more difficult for jurors to find prejudicial material. Such orders are not on their own a panacea. They could not, for example, limit jurors’ access to other material on the internet, such as maps, legal dictionaries, scientific explanations, or background material about the parties to the case, nor access to websites run outside of the jurisdiction. Nonetheless, whilst neither warnings to the jury nor orders to remove material from the internet are foolproof, both together could reduce the risk of prejudice.⁷⁴
- 4.36 A further legal response is to create a specific criminal offence for this type of juror misconduct. This would also help to remedy some of the areas of uncertainty about juror contempt, since any statutory offence would clarify the existing law. Various overseas jurisdictions, such as Queensland, New South

⁷⁰ N Marder, “Two Weeks at the Old Bailey: Jury Lessons from England” [2011] *Chicago-Kent Law Review* 537, 572 to 573. See also G Asquith, “Criminal Procedure: Jury Deliberations – Jury Irregularities – Use of Internet” (2011) 16 *Coventry Law Journal* 67, 73.

⁷¹ Defamation and the Internet (2002) Law Commission Scoping Paper, para 5.26. See also Ch 3 at paras 3.1 and 3.2.

⁷² *Harwood*, judgment of 20 Jul 2012, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/simon-harwood-judgment-20072012.pdf> (last visited 1 Nov 2012). Compare the Irish case of *Byrne v DPP* [2011] IESC 213, [2011] IR 346.

⁷³ See Ch 2 at para 2.14 and following and Ch 3 at para 3.55 and following.

⁷⁴ See the Australian case of *Perish* [2011] NSWSC 1102, where it was held that making an order and giving appropriate warnings to jurors on their own may not eliminate prejudice but undertaking both together increases the likelihood of the trial being fair.

Wales, Victoria, and Western Australia, have done so.⁷⁵ One typical example is the law in New South Wales, which prohibits jurors from making an inquiry about their case, including:

- (a) asking a question of any person;
- (b) conducting any research, for example, by searching an electronic database for information (such as by using the internet);
- (c) viewing or inspecting any place or object;
- (d) conducting an experiment;
- (e) causing someone else to make an inquiry.⁷⁶

4.37 Likewise, the Irish Law Reform Commission has recommended the criminalisation of “inquiries about matters arising in the course of a trial beyond the evidence presented”.⁷⁷

4.38 If our proposed preventative measures do not have the desired effect, and jurors nonetheless undertake research on the internet, there may be an argument for employing the ultimate deterrent, namely introducing a specific offence of juror research, instead of adopting the contempt jurisdiction as in the *Dallas* case. Whilst clearly a last resort, a discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded. It may also have other benefits, such as providing greater clarity about what is and is not permitted than the present law.⁷⁸

4.39 We doubt that such an offence would engage jurors’ article 8 and 10 rights, given that a specific offence would fall a long way short of a prohibition on using the internet in and of itself. We of course recognise that such a prohibition would be impossible to enforce and wholly inappropriate, given that access to the internet has, for many, become an essential part of every day living. The offence would only be a prohibition limited in time (the period of jury service) and content (information related to the case the juror is trying). Furthermore, we consider that our proposals in many ways would enhance jurors’ confidence in their use of the internet, because there would be greater clarity about what is permitted.⁷⁹ In any event, if the prohibition does engage articles 8 and 10, we consider that such a limited prohibition would be a proportionate measure, necessary to protect the

⁷⁵ S Grey, “The World Wide Web: Life Blood for the Public or Poison for the Jury?” (2011) 3(2) *Journal of Media Law* 199, 203 and P Lowe, “Challenges for the Jury System and a Fair Trial in the Twenty-First Century”, [2011] *Journal of Commonwealth Criminal Law* 175, 193. California has also introduced legislation regulating the use of social media by jurors: C Murdoch, “The Oath and the Internet” (2012) 176 (11) *Criminal Law and Justice Weekly* 149, 150. See Appendix C on juror misconduct.

⁷⁶ Jury Act 1977, s 68C(5).

⁷⁷ Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010) p 206.

⁷⁸ It may also clarify the anomaly raised by A T H Smith in relation to the *Dallas* case, namely whether Dallas’ contempt was an offence within the meaning of s 8(2) of the 1981 Act, making admissible the evidence of what occurred in the jury deliberating room: *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

⁷⁹ See also preventative measures, at para 4.77 and following below.

rights and freedoms of others.⁸⁰ We also consider that the prosecution of such conduct would be made fairer, and less likely to be subject to challenge on the ground of ECHR incompatibility, by the use of the normal criminal process, instead of the contempt jurisdiction, which we propose below.⁸¹

- 4.40 On the other hand, on informal consultation, some stakeholders raised with us concerns that creating such an offence would make jurors more reluctant to admit their misconduct and their fellow jurors more reluctant to report any concerns, which would actively work against uncovering cases of miscarriages of justice. The criminalisation of research by jurors may, therefore, work against the precise interest that the offence seeks to protect, namely the right to a fair trial and the risk of wrongful conviction, if it is more difficult for the courts to discover that the misconduct occurred.⁸² Moreover, in jurisdictions that have introduced offences, their success has been doubted. For example, in New South Wales some commentators have argued that it does not appear to have deterred jurors from undertaking their own research.⁸³ **Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced?**

JURORS DISCLOSING INFORMATION

Present law

- 4.41 Historically, it was assumed that jury deliberations were confidential. Some took the view that this meant that a breach of confidentiality would be contempt at common law,⁸⁴ although this was by no means a unanimous opinion.⁸⁵ However, following the New Statesman's disclosure of the jury's deliberations in the Jeremy Thorpe trial, which was held not to be in contempt,⁸⁶ a specific contempt was introduced as section 8 of the Contempt of Court Act. This provides:

⁸⁰ For more on this, see Appendix B on jurors seeking information.

⁸¹ See para 4.69 below.

⁸² This was an issue circumvented in *Mpelenda* [2011] EWCA Crim 1235 where "in light of the fact that none of the jurors was being interviewed under caution, the [Criminal Cases Review] Commission explained to juror number four that his answers were being obtained in order to assist the Court of Appeal and could not be used in evidence against him in the course of any criminal proceedings" at [26].

⁸³ New South Wales Law Reform Commission, *Consultation Paper 4: Jury Directions* (2008), para 5.34.

⁸⁴ See Appendix A on confidentiality of jury deliberations.

⁸⁵ See the examples in the report of the Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 and E Campbell, "Jury Secrecy and Contempt of Court" (1985) 11 *Monash University Law Review* 169, 169 to 176.

⁸⁶ *A-G v New Statesman and Nation Publishing Co* [1981] QB 1. See also the House of Lords debate on the Phillimore Report and contempt of court: *Hansard* (HL), 7 May 1980, vol 408, cols 1723 to 1757; G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 452; P Robertshaw, "A Human Rights Conflict: Freedom of Expression versus Non-Disclosure of Jury Deliberations" [2003] *Civil Justice Quarterly* 265, 266; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 8.

8.— Confidentiality of jury's deliberations.

(1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosure of any particulars—

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,

or to the publication of any particulars so disclosed.

4.42 Clause 8, as originally introduced in the Contempt of Court Bill, only prohibited disclosure of deliberations which identified either the case itself or the juror, and, therefore, would allow “bona fide” research.⁸⁷ That proposal did not survive the Parliamentary debates.⁸⁸

4.43 Various terms within the section are ambiguous. The section only applies to “deliberations” and, therefore, some have argued that it has no application where no deliberations have occurred, for example, if the jury is discharged at the end of the prosecution case.⁸⁹ It is not clear whether the limited case law supports such an interpretation.⁹⁰ It has been held that “disclose” under section 8 should be given its ordinary English meaning, and that, therefore, it covers both direct and indirect disclosure.⁹¹ The word “solicit” meanwhile is “directed to persons who seek to obtain the information from anyone else who is in possession of it”.⁹² The mental element for breach of section 8 is intention.⁹³ However, it remains unclear

⁸⁷ See the House of Lords debate on the Contempt of Court Bill: *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

⁸⁸ G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 453. See Appendix A on the need for jury research.

⁸⁹ G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 455. It has also been suggested that the section would not apply to fabricated disclosures: J Jaconelli, “Some Thoughts on Jury Secrecy” (1990) 10 *Legal Studies* 91, 95.

⁹⁰ Arlidge, Eady and Smith on Contempt para 11-376.

⁹¹ *A-G v Associated Newspapers Ltd* [1994] 2 WLR 277. A subsequent application to the ECtHR was declared inadmissible by the Commission: *Associated Newspapers Ltd v UK* App No 24770/94 (Commission decision). It is not an offence to offer to disclose: Arlidge, Eady and Smith on Contempt para 11-375.

⁹² *Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [86].

⁹³ *A-G v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867 at [12]; Arlidge, Eady and Smith on Contempt para 11-388 and following; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 228.

whether specific “intention to interfere with the course of justice” is required, or merely intentional disclosure or soliciting.⁹⁴

4.44 Human rights challenges have been made to section 8. In *Attorney General v Scotcher*⁹⁵ it was argued that a defence of uncovering a miscarriage of justice by protecting the right to a fair trial should be read into section 8 in order for it to be article 10 compliant. The House of Lords held that such a defence was unnecessary because disclosure to a court (even after a verdict) was not prohibited⁹⁶ and, therefore, had the juror written to the court or judge, the section would not be breached.⁹⁷ Furthermore, section 8 did not preclude the judge from inquiring into concerns which had been disclosed to the court before the verdict was delivered.⁹⁸ In consequence, the law was held to be ECHR compliant because the interference through section 8 with the juror’s article 10 right was proportionate on account of the importance of the secrecy of jury deliberations in the criminal justice system.⁹⁹

4.45 At the ECtHR, the recent case of *Seckerson v UK and Times Newspapers Ltd v UK*¹⁰⁰ considered section 8. Both applicants were fined following publication in the newspaper of Seckerson’s concerns about a trial on which he had sat as a juror. The court held that section 8 as an “absolute rule cannot be viewed as being unreasonable or disproportionate” given the importance of promoting “free and frank discussion” through the confidentiality of deliberations.¹⁰¹ In consequence, there was no violation of article 10. However, notably, the court observed that it was:

⁹⁴ Arlidge, Eady and Smith on Contempt para 11-389 to 11-394. In the New Zealand case of *Solicitor-General v Radio New Zealand Ltd* it was held that no specific intention was required: [1993] NZHC 423, [1994] 1 NZLR 48.

⁹⁵ *A-G v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867.

⁹⁶ Their Lordships held that disclosure to a court via a third party, such as a lawyer or Citizens’ Advice Bureau, would be permitted if it was by sealed letter which “asked them to forward it unopened to the appropriate court authorities” at [27] by Lord Rodger.

⁹⁷ This finding was made despite the fact that the juror had never been told he was permitted to disclose his concerns to the court: H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 232.

⁹⁸ In consequence, the Consolidated Criminal Practice Direction instructed judges to direct jurors to raise any concerns that they had before the verdict: H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 232.

⁹⁹ [2005] UKHL 36, [2005] 1 WLR 1867. It was subsequently held in *Charnley* [2007] EWCA Crim 1354, [2007] 2 Cr App R 33 that a court can investigate concerns by jurors which are raised after the verdict, provided they were raised “at a sufficiently proximate time and place to the events in court”, such as with the usher immediately after the verdict has been delivered and the jurors left court, at [28].

¹⁰⁰ *Seckerson v UK and Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10).

¹⁰¹ *Seckerson v UK and Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [43] to [44].

Not called upon in the present case to assess the compatibility with article 10 of section 8 in circumstances involving a conviction for research into jury methods. Nor is the court concerned with a case where the interests of justice could be said to require the disclosure of the jury's deliberations.¹⁰²

4.46 The interpretation of section 8 is closely related to the issue of the common law inadmissibility of jury deliberations. The inadmissibility rule was explained in *Smith*:

(1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room

(2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all

(3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible

(4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences¹⁰³

4.47 Therefore, in essence, evidence of jury deliberations is inadmissible in any subsequent proceedings subject to the exception under section 8(2)(b), explained above, and to situations where the jury has been influenced by external material. Clearly, the issue of admissibility of evidence is separate to that of liability of jurors for disclosure, but nonetheless, the two are obviously closely related because the existence of evidence depends on there having been such disclosure.

4.48 In *Mirza*¹⁰⁴ it was held that section 8 did not affect the Court of Appeal's jurisdiction to hear evidence relevant to an appeal (because a court cannot be in contempt of itself), subject to the common law rule on inadmissibility. That rule was held to be article 6 compliant on the basis of the importance of jury secrecy to the legal process and because the trial court can investigate allegations of

¹⁰² *Seckerson v UK and Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45].

¹⁰³ [2005] UKHL 12, [2005] 1 WLR 704 at [16]. See C Gale, "Juries: Scrutiny of Deliberations" (2005) 69 *Journal of Criminal Law* 397. This principle was recently reiterated in *Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 and *Hewgill* [2011] EWCA Crim 1778, [2012] *Criminal Law Review* 134, although the term "extraneous" has been criticised: see Arlidge, Eady and Smith on Contempt para 11-370 and R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362, 364.

¹⁰⁴ [2004] UKHL 2, [2004] 1 AC 1118.

misconduct or bias before a verdict is returned.¹⁰⁵ This decision was strongly criticised for its reasoning that the “residual possibility of a miscarriage of justice was ... the necessary price to be paid for the preservation and protection of the jury system”.¹⁰⁶

- 4.49 Breach of section 8 is punishable by a fine or imprisonment for up to two years.¹⁰⁷ In the recent case where a juror (Fraill) and one of the defendants in the trial (Sewart) had discussed the jury’s deliberations on the social networking site Facebook, Fraill was sentenced to eight months’ imprisonment, whilst Sewart received a sentence of two months’ imprisonment, suspended for two years.¹⁰⁸

The problem

- 4.50 Section 8 has been criticised on a number of levels. It appears that the section may have gone beyond what was necessary to fill the lacuna in the common law uncovered in the *New Statesman* case.¹⁰⁹ In that case, Lord Chief Justice Widgey suggested that some restrictions on disclosure were needed but not that the restrictions had to be absolute. His Lordship acknowledged that there had previously been many unproblematic disclosures where the individuals involved were not identified.¹¹⁰
- 4.51 Additionally, it has been argued that, despite the case law, section 8 may be incompatible with article 10 because its “absolute nature” makes it a disproportionate interference with freedom of expression.¹¹¹ This, it is suggested, is particularly so when the disclosure seeks to uncover a miscarriage of justice.¹¹²
- 4.52 Aside from concerns about miscarriages of justice, there is an important public interest in subjecting the jury system to scrutiny by the media.¹¹³ Fenwick and

¹⁰⁵ This reiterated the position previously established by *Qureshi* [2001] EWCA Crim 1807, [2002] 1 WLR 518 which held that allegations could only be investigated before the jury returned their verdicts.

¹⁰⁶ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 231. Lord Steyn recognised this concern in his dissenting judgment. It is unclear whether the Strasbourg court would reach the same decision. In *Miah v UK* (1998) 26 EHRR CD199 App No 37401/97 (Commission decision), a complaint based on the secrecy rule was rejected, but on the basis that there was insufficient evidence of bias by the jury (and therefore there was no requirement that the domestic court investigate it in any event).

¹⁰⁷ Contempt of Court Act 1981, s 14.

¹⁰⁸ *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [57] and [60].

¹⁰⁹ *A-G v New Statesman and Nation Publishing Co* [1981] QB 1.

¹¹⁰ *A-G v New Statesman and Nation Publishing Co* [1981] QB 1, 11. Consider also the proposal to reform New Zealand law on the prohibition on disclosing jury deliberations by focusing on the mischief caused by the disclosure: J Tunna, “Contempt of Court: Divulging the Confidences of the Jury Room” (2003) 9 *Canterbury Law Review* 79, 109 to 110.

¹¹¹ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 229.

¹¹² See para 4.44 above. G Robertson and A Nicol argue that it is “absurd” that disclosure to uncover miscarriages of justice is prohibited: *Robertson and Nicol on Media Law* (5th ed 2007) p 454; see also A Ashworth, “Juries: Contempt of Court Act 1981, s 8” [2004] *Criminal Law Review* 1041, 1044.

¹¹³ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 239 to 240.

Phillipson have even gone so far as to suggest that, in some circumstances, there may be a public interest justification in allowing jurors to disclose details of their deliberations, for example, if a defendant were acquitted of rape because of jurors' sexist attitudes.¹¹⁴ Allowing for greater public scrutiny of the jury system could lead to its improvement.¹¹⁵ Robertson and Nicol argue that section 8 is designed to prevent "informed criticism of the jury system, which is precisely why" it offends article 10.¹¹⁶

- 4.53 There is also a public interest in research being undertaken into the system of trial by jury.¹¹⁷ Academic views on the impact of section 8 on jury research differ, with some arguing it makes such research "impossible"¹¹⁸ whilst others consider that section 8 "does not in fact prevent most research about juries".¹¹⁹ Nonetheless, it seems clear that section 8 "has created confusion about what jury research can and cannot be conducted and has contributed to an information vacuum about juries in this country".¹²⁰
- 4.54 The ECtHR has thus far not needed to address whether section 8 is compatible with article 10 when it comes to disclosure in the public interest, whether in respect of miscarriages of justice or for academic research. However, it has implied that there may be concerns about compatibility.¹²¹ Nonetheless, it has been argued that in an era when the openness and accountability of the judicial system has come to be highly regarded, the secrecy of jury deliberations looks increasingly out of step.¹²²
- 4.55 Various justifications have been put forward in support of section 8. First, it has been argued that jurors must feel that they can express their views, without fear

¹¹⁴ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 236 to 238. Although, see the *Crown Court Bench Book – Directing the Jury* (2010) ch 17, which explains the judicial direction to juries not to bring stereotypes into the deliberating room.

¹¹⁵ "Jury Room Deliberations" (1981) 131 *New Law Journal* 101. See also G Daly and I Edwards, "Jurors Online" (2009) 173 *Criminal Law and Justice Weekly* 261.

¹¹⁶ G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) pp 453 to 454.

¹¹⁷ Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 5, para 82.

¹¹⁸ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 228.

¹¹⁹ C Thomas, "Exposing the Myths of Jury Service" [2008] *Criminal Law Review* 415, 415 at footnote 4.

¹²⁰ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 1.

¹²¹ *Seckerson v UK and Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45]; *Associated Newspapers Ltd v UK* App No 24770/94 (Commission decision). There are authorities establishing that a prohibition exceeding that which is necessary will be disproportionate, eg, *Open-Door Counselling Ltd v Ireland* (1993) 15 EHRR 244 (App Nos 14234/88 and 14235/88).

¹²² Arlidge, Eady and Smith on Contempt para 11-366.

of ridicule or recriminations.¹²³ Additionally, the jury's verdict should be final. Prohibiting the disclosure of deliberations prevents the reopening of cases¹²⁴ and a subsequent "retrial" by media, especially following an acquittal.¹²⁵ The privacy and security of jurors also needs to be protected (in particular, where the media may try to contact them).¹²⁶ It may also be argued that the fact that a juror can raise concerns with the court, without breaching section 8, is sufficient to establish ECHR compatibility. Finally, there is a risk that jurors could be induced or intimidated into making false disclosures if such evidence were admissible on appeal.¹²⁷ It is also notable that the prohibition in section 8 has the support of jurors: Thomas' study found that 82% "felt it was correct that jurors should not be allowed to speak about what happens in the deliberating room".¹²⁸

4.56 Leaving aside whether in principle section 8 should be maintained, there may be concerns that the section is being increasingly flouted. The internet and social media may make it easier for friends, families and others to identify and communicate with jurors to solicit information about their jury service.¹²⁹ Likewise, it may be easier for jurors to contact parties relevant to the trial and to

¹²³ *A-G v Frail* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [33]; N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 415; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 2 to 3, although, as Lord Reed highlights at p 3, there are some situations in which a jury cannot legitimately expect confidentiality to be maintained. See also Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 5, para 79.

¹²⁴ N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 416; N Haralambous, "Protecting the Secrecy Laws Surrounding Jury Deliberations: The Ongoing Saga" (2008) 172 *Justice of the Peace* 97; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4; G Daly and R Pattenden, "Racial Bias and the English Criminal Trial Jury" (2005) 64 *Cambridge Law Journal* 678, 703.

¹²⁵ *Hansard* (HC), 2 Mar 1981, vol 1000, col 41 by the Attorney General; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4. Although it has been argued that there are, in any event, many instances of the media reconsidering verdicts and suggesting they were wrongly decided, such as the BBC television series *Rough Justice*: J Jaconelli, "Some Thoughts on Jury Secrecy" (1990) 10 *Legal Studies* 91, 99 to 100.

¹²⁶ Although this seems to confuse the issues of the confidentiality of deliberations and the anonymity of the jurors: P Ferguson, "The Criminal Jury in England and Scotland: The Confidentiality Principle and the Investigation of Impropriety" (2006) 10 *International Journal of Evidence and Proof* 180, 186 to 187. See also N Haralambous, "Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?" [2004] *Journal of Criminal Law* 411, 416; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 3; P W Ferguson, "Jury Secrecy and Criminal Appeals" (2004) 8 *Scots Law Times* 43.

¹²⁷ See the House of Commons debate on the publication of jury deliberations: *Hansard* (HC), 16 Jun 1981, vol 6, col 934; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4.

¹²⁸ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

¹²⁹ M Zora, "The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights" [2012] *University of Illinois Law Review* 577, 588.

communicate anonymously and instantly with them and others.¹³⁰ In the USA one study found that nationally a tweet referring to “jury duty” was posted almost every three minutes.¹³¹ Empirical research about the nature and scope of the problem in England and Wales is very limited. A similar survey by The Times “claimed to have found more than 40 examples of public postings and statements that appeared to be in breach of the law”,¹³² although another study appeared to find fewer cases.¹³³

Proposed reforms

- 4.57 We ask consultees their views about the appropriateness of section 8, dealing first with the issue of miscarriages of justice. In 2005, the Department for Constitutional Affairs consulted on whether the common law on the inadmissibility of jury deliberations as evidence should be relaxed to allow investigations into jury impropriety.¹³⁴ Although the consultation only received 41 responses, the majority supported the view that the common law should be left to develop and, therefore, section 8 should not be modified.¹³⁵
- 4.58 We recognise that reforming section 8 to allow jurors to disclose aspects of their deliberations in order to uncover a miscarriage of justice would necessarily require reform of the admissibility of such evidence. Disclosure would be fruitless if the court were unable to consider it in assessing the safety of the conviction. We consider, despite the finding of the majority of the House of Lords in *Mirza*,¹³⁶ that there may be merit in reforming section 8 in order to protect against the risk of a miscarriage of justice. Indeed, as we have explained, it may be necessary in order to render the law ECHR compliant.¹³⁷ As Lord Steyn argued when dissenting in *Mirza*:

There is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. In the world of today enlightened public opinion would accept nothing less. It would be contrary to the spirit of these developments

¹³⁰ Although in *Frail* it was said that the problem is not the internet in and of itself but jurors who disregard the defendant’s right to a fair trial: [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [29].

¹³¹ B Grow, *As Jurors Go Online, US Trials Go Off Track*, Reuters, 8 Dec 2010. A tweet is a short statement available to the public on the website Twitter: see Ch 3 at para 3.2. See also A J St Eve and M A Zuckerman, “Ensuring an Impartial Jury in the Age of Social Media” [2012] *Duke Law and Technology Review* 1.

¹³² Editorial, “Jurors and the Internet” [2011] *Criminal Law Review* 591.

¹³³ M Bromby, “The Temptation to Tweet – Jurors’ Activities Outside the Trial”, paper presented at the Jury Research Symposium, 25 to 26 Mar 2010, Institute for Advanced Studies, Glasgow, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (last visited 1 Nov 2012).

¹³⁴ Department for Constitutional Affairs, *Jury Research and Impropriety: Consultation CP 04/05* (2005).

¹³⁵ Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 11.

¹³⁶ *Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

¹³⁷ *Seckerson v UK and Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45]. See para 4.51 above.

to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.¹³⁸

4.59 It has been argued that in order to prevent a disproportionate interference with article 10, no criminal penalty should be applied to a juror who discloses deliberations in breach of section 8 (that is, disclosure to a party other than a court) in the honest belief that such disclosure will uncover a miscarriage of justice.¹³⁹ Fenwick and Phillipson suggest that, so long as the disclosure was to a person who was “a reasonable one to choose in the circumstances” – a defence solicitor perhaps – the juror should not be liable, unless they had been told that any disclosure must be to the court.¹⁴⁰ This would ensure protection for both the juror’s article 10 rights, and the defendant’s article 6 rights.¹⁴¹ A defence based on the juror’s perception of who it was reasonable to approach may be too vague. A defence could, however, be available if disclosure was to a court official or other specified organisation.

4.60 We have concerns about the extent to which it is clear to jurors at present that they can disclose such matters after the verdict only to a court.¹⁴² Providing more outlets for disclosure could protect well-meaning jurors who disclose their concerns to parties other than a court. It could also act as a further safeguard against miscarriages of justice since jurors would be less likely to keep their concerns to themselves for fear of disclosing to the wrong person in error, and thereby incurring criminal liability. Whilst clearly it is important that the rationale for section 8 is not undermined by a “proliferation” of jurors disclosing their deliberations at will,¹⁴³ it is also problematic that such disclosure is currently criminalised, which has the effect of preventing the discovery of wrongful convictions, with all of its serious consequences for the defendant, the victim of the offence and society at large. **Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice?**

4.61 In respect of undertaking jury research, the same Department for Constitutional Affairs consultation asked for views about whether section 8 should be modified to allow academic research into jury deliberations. A majority of respondents thought that some form of research should be allowed, but that such research

¹³⁸ *Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [4]. See also J Spencer, “Did the Jury Misbehave? Don’t Ask, Because We Do Not Want To Know” (2002) 61 *Cambridge Law Journal* 291.

¹³⁹ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 234; N Haralambous, “Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?” [2004] *Journal of Criminal Law* 411, 420 to 421.

¹⁴⁰ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 234.

¹⁴¹ H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 243.

¹⁴² G Daly, “The Complaining Juror: Attorney General v Scotcher” (2006) 10 *International Journal of Evidence and Proof* 70, 74.

¹⁴³ G Daly, “The Complaining Juror: Attorney General v Scotcher” (2006) 10 *International Journal of Evidence and Proof* 70, 74; E Finch, “Juries: Secrecy of Deliberations” (2005) 69 *Journal of Criminal Law* 484, 488.

would need to be regulated.¹⁴⁴ Suggestions were made that an ethics panel be appointed to oversee the research; that research should only be undertaken in consultation with, or with the consent of, the Lord Chief Justice; that the consent of the jurors would need to be obtained and they would need to be granted anonymity; and that there should be a code of conduct for jury research.¹⁴⁵ However, a majority of respondents thought that researchers should not be allowed access to the jury deliberating room and that there should be a financial penalty for researchers who breach any of the safeguards.¹⁴⁶ The Department responded that it supported the view that more research into juries should be undertaken, but said that section 8 would not be amended until it was clear that there are research questions which cannot be answered without legislative amendment.¹⁴⁷

- 4.62 This consultation built on the previous proposals put forward by both the Royal Commission on Criminal Justice in 1993¹⁴⁸ and a House of Commons Select Committee in 2004-5¹⁴⁹ that section 8 be reformed to allow more academic research. Likewise, the Law Reform Commission of Canada proposed an exception to jury secrecy for research authorised by the Chief Justice.¹⁵⁰ **Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research?**

EVIDENCE AND PROCEDURE

Present procedure

- 4.63 The procedure for dealing with jurors who seek external information about the case that they are trying or who disclose information in breach of section 8 is necessarily complicated. There needs to be consideration of what should be done about the initial trial itself before considering what should be done about a particular juror's misconduct.
- 4.64 Where concerns arise during the trial that may affect the jury's ability to fulfil their oath, the Crown Court Bench Book explains that:

¹⁴⁴ Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) pp 8 to 9; Department of Constitutional Affairs, *Jury Research and Impropriety: Consultation CP 04/05* (2005) pp 30 to 32.

¹⁴⁵ Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 8. H Fenwick and G Phillipson agree that there is a need to preserve the anonymity of jurors: *Media Freedom under the Human Rights Act* (2006) p 242.

¹⁴⁶ Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) pp 6 to 8, 11.

¹⁴⁷ Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005) p 16.

¹⁴⁸ Report of the Royal Commission on Criminal Justice (1993) Cm 2263 (1993) para 8.

¹⁴⁹ *Forensic Science on Trial* (Seventh Report of Session 2004 - 2005) para 166.

¹⁵⁰ M Comiskey, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the 'Stagnant Pool' Be Revitalised?" (2009 - 2010) 35 *Queen's Law Journal* 625, 663.

Jurors are customarily provided with comprehensive warnings against discussing the case with others and against seeking information about the case from extraneous sources. A disregard of those warnings will amount to misconduct.

The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.¹⁵¹

- 4.65 We understand that a protocol is being prepared by the President of the Queen's Bench Division, explaining the procedure to be followed if the trial judge becomes aware of an irregularity concerning the jury, including a possible contempt.
- 4.66 As with some other forms of contempt, the Attorney General can bring proceedings against the juror or the court can proceed on its own motion.¹⁵² The current procedure falls under Civil Procedure Rule 81 and the related Practice Direction. Proceedings will normally be brought before the Divisional Court's summary jurisdiction.¹⁵³ In consequence, the civil rules of evidence apply (for example, evidence is served by affidavit). However, the proceedings are deemed criminal for the purposes of article 6 so the defendant is entitled to the enhanced provisions of article 6(2) and 6(3) (which protect the presumption of innocence and establish certain minimum standards for criminal proceedings).¹⁵⁴ It is unclear whether legal aid is available for contempt by jurors.¹⁵⁵ The only right of appeal is to the Supreme Court.¹⁵⁶

Problems

- 4.67 The difficulty with the current procedure is that it is hard to see the justification for treating these forms of conduct differently from other forms of criminal behaviour which interfere with the administration of justice, such as intimidating witnesses or jury tampering. Furthermore, there may be questions about the extent to which the current procedure complies with the requirements of articles 6 and 7 of the ECHR. On informal consultation, some stakeholders raised with us concerns that the Order 52 procedure does not allow the defendant to know the case against which they must defend themselves adequately, because there is no charge

¹⁵¹ *Crown Court Bench Book – Directing the Jury* (2010) p 383.

¹⁵² The 1981 Act, s 8(3).

¹⁵³ Arlidge, Eady and Smith on Contempt para 11-361.

¹⁵⁴ *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29]. See Appendix B discussion on whether contempt is civil or criminal.

¹⁵⁵ Criminal legal aid is available for proceedings for an offence (Access to Justice Act 1999, s 12), but it is unclear whether this would include juror contempts. Civil legal aid is available if "the client may be subject to orders or penalties which are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6" of the ECHR, subject to an interests of justice test (Legal Services Commission, *Funding Code: Criteria*, s 14).

¹⁵⁶ Administration of Justice Act 1960, s 13. Sections 1 and 2 set out procedural aspects.

sheet or indictment. Such stakeholders also had concerns about whether the civil disclosure procedure is appropriate to deal with what is, for article 6 purposes, a criminal penalty carrying a potential prison sentence. Additionally, there may be concerns that, where the trial judge needs to question a juror in order to decide whether to discharge the juror or jury, the juror should be entitled to exercise the privilege against self-incrimination, and/or take legal advice before answering the judge's questions.¹⁵⁷ Finally, it is not clear that the protections of the Bail Act 1976 apply to contempt proceedings before the Divisional Court, which may have implications for a defendant's right to liberty under article 5.¹⁵⁸

Proposed reforms

- 4.68 We consider that there may be merit in reforming the law so that breaches of section 8, and (if adopted) a statutory offence of searching for information, are both tried only on indictment. As with the current position, the Attorney General could maintain responsibility for such prosecutions in order to avoid any problems with conflicts of interest if the CPS were to prosecute. One of the advantages of trying such matters on indictment would be that the existing, well-established and familiar rules of evidence and procedure would apply, without needing significant amendment. If both breach of section 8 and seeking information related to the case being tried were classed as criminal offences, the normal criminal procedure would apply as a matter of course. In consequence, police powers of arrest, detention, investigation and charge under the Police and Criminal Evidence Act 1984, the criminal legal aid regime, bail under the Bail Act 1976, the procedure for sending cases from the magistrates' court to the Crown Court under section 51 of the Crime and Disorder Act 1998, the system of disclosure under the Criminal Procedure and Investigations Act 1996, and the criminal rules of evidence would all be applicable.

¹⁵⁷ For example, in Australia, s 55DA of the Jury Act 1977 of New South Wales allows a judge to examine a juror on oath to determine whether there has been misconduct, but such evidence is not admissible in subsequent proceedings against the juror.

¹⁵⁸ It depends on whether contempt proceedings are "proceedings for an offence" under s 1(1) of the Act. If the Act does not apply, the common law of bail may do so, but the lack of legal clarity here could give rise to a breach of article 5. See the Appendix B on article 5 and also the discussion in Ch 5 at paras 5.33 to 5.35.

- 4.69 The advantage of amending the procedure in this way would be to ensure that those accused of inappropriately disclosing or seeking information would benefit from rules and procedures which fully protect their article 5 rights in respect of bail, and their article 6 rights in respect of the trial process. In respect of the statutory offence of juror research, it would be significantly easier to define this as a criminal offence and employ the existing rules of evidence and procedure, than to try to amend the rules of evidence and procedure to apply to this aspect of the contempt jurisdiction.¹⁵⁹ On the other hand, adopting such a procedure would be a considerable change from the current regime for dealing with such contempts. It would require those prosecuting and defending such cases to adopt criminal procedures which are different to those currently used, and which could be more onerous. **Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury?**
- 4.70 However, if such cases were tried on indictment with a jury there may be concerns that trial by jury is not the most appropriate mechanism for dealing with such conduct. One obvious difficulty is that if jurors themselves do not understand or accept the prohibition on searching for or disclosing information they may be unwilling to convict other jurors of such offences. The reluctance of jurors to convict could undermine the deterrent effect of criminalising these forms of conduct, which in turn could affect public confidence in the criminal justice system. On the other hand, this concern may prove unfounded given that, as mentioned previously, jurors are very supportive of section 8. One alternative proposal to deal with this concern would be to adopt a trial process incorporating the protections inherent to trial on indictment, such as rules of evidence and procedure, but presided over by a judge alone.
- 4.71 There are arguments against such a hybrid trial “as if on indictment”. It would be a novel and unique step given that, currently, no other criminal offences are automatically tried as if on indictment without a jury.¹⁶⁰ Whilst legislation allows for trial without jury in exceptional cases where there is a danger of jury tampering, these provisions require the danger to be shown in the specific case, and are not activated by virtue of the offence with which the defendant has been charged, as would be the case here.¹⁶¹ Conviction after a trial by jury may also carry more stigma than by a judge alone. On the other hand, trial by judge alone could be quicker and cheaper than with a jury.

¹⁵⁹ In particular, the latter course would require a technical bill amending almost every rule of evidence and procedure that would need to apply to juror contempt, whereas creating a statutory offence of juror research triable on indictment would ensure that the related rules of evidence and procedure apply automatically.

¹⁶⁰ Criminal Justice Act 2003, s 43, allowing for trial without jury in certain fraud cases, was never brought into force. It was repealed by the Protection of Freedoms Act 2012, s 113.

¹⁶¹ Criminal Justice Act 2003, s 44.

- 4.72 **Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?**
- 4.73 **Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?**
- 4.74 **If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in *Dallas* be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected?**
- 4.75 At present, sanctions for breach of section 8 are limited to a fine or imprisonment for up to two years. There is clearly a need for the courts to have the appropriate powers to deal with this conduct depending on the circumstances of the offence. It seems illogical for the penalty to be restricted to a fine or imprisonment when in some cases it may be appropriate to have the power to impose a community sentence. On the one hand, a potential sentence of imprisonment for up to two years may be regarded as harsh for breach of section 8 where the defendant's article 10 rights will be engaged. On the other hand, the consequences of committing this offence could be serious, both for the defendant in the original trial and for the public's confidence in the system of trial by jury. **Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8?**
- 4.76 **Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years' imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)?**

PREVENTATIVE MEASURES

- 4.77 We also consider that there are further practical measures which could be taken to discourage jurors from misconduct during their jury service and help prevent the problems that have been detailed above. It may be important to give jurors more information about what they can and cannot do whilst undertaking jury service, and to explain the reasons behind such restrictions. This is particularly

so given the varying motives for inappropriately seeking information about the trial that we discussed earlier.¹⁶²

Education and pre-trial information

- 4.78 In general, there may be concerns that incidents of misconduct by some jurors may arise from ignorance about the court process and procedure. This may reflect a general lack of knowledge amongst the public about the operation of the criminal justice system. Whilst steps have been taken in recent years to open up the system to greater transparency and accountability, nonetheless, it is possible that more could be done. In particular, we consider that education in schools could provide greater focus on the role and responsibility of jury service. Whilst the National Curriculum on citizenship currently provides for teaching about the justice system, the programme of study does not specifically mention jury service.¹⁶³ **Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service?**
- 4.79 We would recommend that all jurors should be told clearly, specifically, repeatedly and consistently that they must not undertake research or seek out information about any matters related to the trial. Jurors should also be told why this is so.¹⁶⁴ Likewise, jurors should be told that they should not disclose information related to the case, in accordance with the requirements of section 8, and the reasons for this. The warning should be regularly updated in order to take account of technological developments¹⁶⁵ and in a manner which is detailed and gives specific examples in order to help jurors to understand the boundaries of acceptable conduct.¹⁶⁶ Jurors should also be told that failure to adhere to the warnings could result in them being imprisoned. Additionally, jurors should be informed of “what to do about improper behaviour, including when and how to

¹⁶² See para 4.21 and following above.

¹⁶³ See, eg, Qualifications and Curriculum Authority, *Citizenship: Programme of Study for Key Stage 3 and Attainment Target* and *Citizenship: Programme of Study for Key Stage 4* (2007).

¹⁶⁴ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50; S Macpherson and B Bonora, “The Wired Juror, Unplugged”, *Trial*, Nov 2010; N Haralambous, “Educating Jurors: Technology, the Internet and the Jury System” (2010) 19(3) *Information and Communications Technology Law* 255, 260.

¹⁶⁵ Warnings in the US appear to be more technologically comprehensive: M Zora, “The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights” [2012] *University of Illinois Law Review* 577, 591. We acknowledge that any such warning will need to include a “catch all” provision, to guard against the risk of being too specific and missing out certain social networking sites, websites or software.

¹⁶⁶ L Whitney Lee, “Silencing the ‘Twittering Juror’: The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age” (2010) 60 *DePaul Law Review* 181.

report it”¹⁶⁷ and that jurors have a duty to report such conduct by their fellow jurors.¹⁶⁸

4.80 To this end, the appropriately drafted warning to jurors should be delivered:

- (1) In the guide sent to jurors with their summons;¹⁶⁹
- (2) In the jury video which is shown on the jurors’ first day;
- (3) In the speech by the jury manager on the jurors’ first day;
- (4) On eye-catching, memorable and well-designed posters situated around the court building and in the jury box, assembly area and deliberating room;¹⁷⁰
- (5) On conduct cards which jurors should carry with them to use as a reminder.¹⁷¹

4.81 We do not consider that introducing such procedures would be significantly more expensive or time-consuming than those already put in place by HM Courts and Tribunals Service.

In-trial procedures and judicial directions

4.82 We consider that the terms of the warning should be repeated in directions given by judges to jurors. It is a matter for the Judicial College and the Lord Chief Justice to consider how best to achieve this. However, we again recommend that jurors should be warned against undertaking research and disclosing their deliberations. The rationale for the prohibitions should be explained. The warning should be technologically up to date, give detail *and specific examples*, and warn of the potential criminal consequences for failure to abide by the prohibitions. We recognise that it is a delicate task to combine two messages, namely that there is a good reason for the prohibitions and they are not imposed unreasonably, but that, even if jurors are unpersuaded of the merits, the prohibition is nonetheless binding. Again, jurors should also be informed about their obligation to report concerns about their fellow jurors, and about appropriate mechanisms for doing this. We consider that judges should issue this warning at the start of the trial and then repeat it in summary at the end of every court sitting day for the duration of the trial.

¹⁶⁷ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

¹⁶⁸ E Brickman, J Blackman, R Futterman and J Dinnerstein, “How Juror Internet Use Has Changed the American Jury” (2008) 1(2) *Journal of Court Innovation* 287, 298; N Haralambous, “Educating Jurors: Technology, the Internet and the Jury System” (2010) 19(3) *Information and Communications Technology Law* 255, 264.

¹⁶⁹ A similar suggestion has been made in the US: American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 1, <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213> (last visited 1 Nov 2012); see also L Lee, “Silencing the ‘Twittering Juror’: The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age” (2010) 60 *DePaul Law Review* 181, 215.

¹⁷⁰ See, eg, the mobile phone poster used in some Californian courts, http://www.courts.ca.gov/documents/Jury_Posters_11x17.pdf (last visited 1 Nov 2012).

¹⁷¹ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

- 4.83 Although some judges may be concerned that “there is a tension between making a jury feel at ease at the commencement of the trial on the one hand and delivering a strict warning as to their conduct on the other”,¹⁷² it is unfair to hold jurors criminally accountable for their conduct without warning them of those consequences first.¹⁷³ **Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do?**
- 4.84 At present, jurors undertake an oath where they swear or affirm to “faithfully try the defendant and give a true verdict according to the evidence”.¹⁷⁴ Reform proposals in the USA have included asking jurors to sign a written declaration agreeing not to use social networks to disclose information about the case that they are trying.¹⁷⁵ This could help to ensure that jurors understand what their responsibilities are and also that – much like when signing a contract – they have entered into an agreement which imposes obligations on them. On the other hand, there may be concerns that such procedures would be too formal,¹⁷⁶ and could also be time-consuming at the start of every trial. We consider that there may be merit in both amending the oral oath, to include wording which commits jurors to abide by the terms of section 8 and not to undertake research about the case,¹⁷⁷ and to have the oath provided in written form, which jurors can sign after they have spoken it out loud in the usual manner. **Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud?**
- 4.85 We also consider that jurors should be given greater encouragement to ask questions during the proceedings about the evidence in the case, in order to

¹⁷² *Crown Court Bench Book – Directing the Jury: First Supplement* (2011) pp 9 to 10. For similar concerns in the US, see M Zora, “The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights” [2012] *University of Illinois Law Review* 577, 605.

¹⁷³ We do not consider that judges should go as far as one judge in the United States who is reported to have threatened jurors with sequestration should they fail to abide by his directions not to use the internet: R Artigliere, “Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial” [2011] *Drake Law Review* 621, 642.

¹⁷⁴ Consolidated Criminal Practice Direction, 28 Mar 2006 para IV.42.4. See para 4.11 above.

¹⁷⁵ E M Janoski-Haehlen, “The Courts Are All A ‘Twitter’: The Implications of Social Media Use in the Courts”, (2011) 46 *Valparaiso University Law Review* 43, 49; American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 6, <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213> (last visited 1 Nov 2012); L Whitney Lee, “Silencing the ‘Twittering Juror’: the Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age” (2010) 60 *DePaul Law Review* 181, 218 to 219.

¹⁷⁶ T Hoffmeister, “Google, Gadgets and Guilt: Juror Misconduct in the Digital Age” (2012) 83 *University of Colorado Law Review* 409, 457.

¹⁷⁷ N Haralambous, “Educating Jurors: Technology, the Internet and the Jury System” (2010) 19(3) *Information and Communications Technology Law* 255, 260 to 261.

discourage them from trying to find the information on their own initiative.¹⁷⁸ Clearly there is a risk that if jurors ask too many questions, the trial will be prolonged and distracted. HM Courts and Tribunals Services and the Judicial College could look at ways of informing jurors through information and judicial direction about how they can raise questions during the proceedings. **Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so?**

- 4.86 Various stakeholders raised with us concerns about jurors using internet-enabled devices at court, including mobile phones. On the one hand, it was felt that there could be a symbolic value in prohibiting all jurors from having mobile phones at court at all times, given that it reinforces the message to jurors that they can only consider the evidence they hear in court. That would also reduce the opportunities for jurors to search for information related to their trial or inappropriately to contact friends, family or those associated with the proceedings.¹⁷⁹
- 4.87 On the other hand, concerns were raised that removing internet-enabled devices could be frustrating for jurors, particularly as they may spend periods of the day waiting whilst other matters in their trial are dealt with in their absence. Those who have caring responsibilities, particularly for children or the elderly, might also be concerned about being out of touch, and, therefore, would at least require an emergency number for the court to be provided so that they could be contacted.¹⁸⁰ The removing and returning of mobile phones could also be time consuming for jury managers, not least because courts would need to ensure that such items were stored securely when not with the jurors. Additionally, such procedures would do nothing to stop jurors from accessing the internet or speaking to friends and family at home in the evening and at weekends. In consequence, it appears that it may be unwise to adopt a standard practice of removing all internet-enabled devices from all jurors for the duration of their day at court, particularly as mobile phones will be turned off (or at least turned to silent) in the courtroom itself. Some have described such procedures as “too drastic”,¹⁸¹ although all electronic devices have been prohibited from some US

¹⁷⁸ See S Macpherson and B Bonora, “The Wired Juror, Unplugged”, *Trial*, Nov 2010; R Artigliere, “Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial” [2011] *Drake Law Review* 621; E Brickman, J Blackman, R Futterman and J Dinnerstein, “How Juror Internet Use Has Changed the American Jury” (2008) 1(2) *Journal of Court Innovation* 287, 298 to 299.

¹⁷⁹ As happened in *Mears and Mears* [2011] EWCA Crim 2651, [2011] All ER (D) 78 (Nov).

¹⁸⁰ American College of Trial Lawyers, *Jury Instructions Cautioning against Use of the Internet and Social Networking* (2010) p 4, <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213> (last visited 1 Nov 2012).

¹⁸¹ M Zora, “The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights” [2012] *University of Illinois Law Review* 577, 579.

courthouses or removed daily from jurors by the judge.¹⁸²

Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court?

- 4.88 Even if such devices are not automatically removed, there may be times when it is appropriate to remove internet-enabled devices from jurors for short periods. During our discussions with stakeholders, it was brought to our attention that there were concerns that court staff may not have the power to remove jurors' electronic devices. Whilst, to our knowledge, the matter appears not to have arisen in practice, the question was raised about what would happen if a juror refused to surrender their electronic devices on entering the deliberating room, or at any other time. Whilst the refusal could arguably be contempt in the face of the court,¹⁸³ we consider that judges should be empowered to order the surrender of jurors' internet-enabled devices for the time that jurors are present at court (whether in the deliberating room or otherwise).¹⁸⁴ **Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices?**
- 4.89 We consider that it should be standard practice to prevent jurors having access to internet-enabled devices in the jury room whilst they are deliberating. It is at this time that jurors are away from the trial judge and the court proceedings and may be most tempted to undertake research on the internet in order to fill what they may perceive as gaps in the evidence. **Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room?**
- 4.90 There may of course be other circumstances where the judge considers that it is necessary to go beyond merely removing internet-enabled devices whilst the jury is deliberating, for example, for the duration of the time that the jurors are at court. We consider that such instances are best left to judicial discretion. **Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge?**
- 4.91 Some stakeholders raised concerns that whistle-blowing procedures for those who feel uneasy about the conduct of their fellow jurors may not be apparent to all jurors. In addition, some jurors may feel intimidated about using them, particularly because they will usually be kept in close proximity to their fellow jurors and, therefore, it may be difficult for them to find the opportunity to report their concerns in private. Peer pressure or a lack of confidence may, therefore,

¹⁸² M Zora, "The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights" [2012] *University of Illinois Law Review* 577, 595; E M Janoski-Haehlen, "The Courts Are All A 'Twitter': The Implications of Social Media Use in the Courts", (2011) 46 *Valparaiso University Law Review* 43, 62 to 63; M Dunn, *Jurors' Use of Social Media During Trials and Deliberations* (Federal Judicial Center, 22 Nov 2011) p 8 to 9.

¹⁸³ See Ch 5 at paras 5.5 and 5.6.

¹⁸⁴ Such power could be similar to that which allows the removal from those attending court of items such as knives (even if lawfully held) under the Courts Act 2003, s 54 and following.

work against some jurors speaking out, despite their concerns.¹⁸⁵ Whilst, under our proposals (above) jurors will have been informed about how to report their concerns, we consider that all courts should take steps to facilitate such reporting. This might include, for example, having drop boxes into which jurors can place notes for their trial judge,¹⁸⁶ placed in locations that jurors can access in the absence of their 11 colleagues. **Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns?**

- 4.92 Additionally, we ask consultees for their views about whether other preventative measures should be put in place to assist jurors. These could include, for example, a helpline – whether by phone or email. Jurors could contact the helpline to ask questions about their jury service and to raise any confusion that they have about what is and is not permitted or what they should do if they are made aware of misconduct. A website with jurors' frequently asked questions, established by HM Courts and Tribunals Service, could be another option for helping jurors understand their responsibilities and to clear up any confusion. **Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be?**

¹⁸⁵ R Pattenden, "Investigating Jury Irregularities: United Kingdom (England and Wales)" (2010) 14 *International Journal of Evidence and Proof* 362, 365; G Asquith, "Criminal Procedure: Jury Deliberations – Jury Irregularities – Use of Internet" (2011) 16 *Coventry Law Journal* 67, 73.

¹⁸⁶ Jurors would need to be informed that such notes could not be anonymous, in order to allow the judge to investigate the matter properly and to prevent mischievous false reports from being made.

CHAPTER 5

CONTEMPT IN THE FACE OF THE COURT

- 5.1 This chapter examines criminal contempts in the face of the court committed in the Crown Court or in the magistrates' courts when exercising criminal jurisdiction.

PRESENT LAW

What amounts to contempt in the face of the court

- 5.2 Contempt in the face of the court concerns "some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court".¹

The proscribed conduct

- 5.3 The case law does not contain any comprehensive list of all forms of conduct which may amount to contempt in the face of the court,² but in essence it is "conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself".³
- 5.4 The conduct must be a voluntary act.⁴
- 5.5 Examples of conduct amounting to contempt in the face of the court include: assault on anyone in open court;⁵ insulting the judge in court; throwing a missile at the judge;⁶ throwing a dead rat at the court clerk;⁷ directing insults at the jury; distributing leaflets in the public gallery; insults or threats to any officer or official of the court; wearing offensive clothing; not wearing any clothing at all;⁸ refusing to answer a question when ordered to do so;⁹ refusing to stand where directed; and disruptive behaviour. Disruptive behaviour could include calling out or applauding in the public gallery, conducting a protest in court, lying down in the

¹ Arlidge, Eady and Smith on Contempt para 10-2.

² "Its meaning is, I think, to be ascertained from the practice of the judges over the centuries": *Balogh v St Albans Crown Court* [1975] QB 73, 84 by Lord Denning. The Phillimore Committee did not propose a definition of what amounts to contempt in the face of the court.

³ *Robertson v HM Advocate* [2007] HCJAC, 2007 SLT 1153 at [29], relying on *HM Advocate v Aird* (1975) JC 64, (1975) SLT 177. See B J Cavanaugh, "Civil Liberties and the Criminal Contempt Power" (1976 - 1977) 19 *Criminal Law Quarterly* 349, 350.

⁴ *Re de Court*, *The Times* 27 Nov 1997, (1998) 17 *Civil Justice Quarterly* 183, 183 to 184.

⁵ *Parashuram Detaram Shamdasani v The King Emperor* [1945] AC 264, 269, by Lord Goddard CJ. And see para 4.23 in Miller and para 12.9 in Borrie and Lowe: *The Law of Contempt*.

⁶ *Balogh v St Albans Crown Court* [1975] QB 73, 84.

⁷ A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 531, 533.

⁸ *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153 at [74].

⁹ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347, unless the witness is protected by privilege. See also s 10 of the 1981 Act.

courtroom,¹⁰ and creating a disturbance in adjacent parts of the building such that the court proceedings are disturbed.¹¹

- 5.6 Failure to comply with an order from the judge or bench designed to control conduct in court may amount to contempt in the face of the court because, as the Court of Appeal has stated:

It is axiomatic that any judge in any court, not least a Crown Court, has to act appropriately to control proceedings to see that they do not get out of order.¹²

The proscribed circumstance: “in the face of the court”

- 5.7 The notion of what counts as being “in the face of the court” has, for the Crown Court, been construed broadly,¹³ so that contempts not witnessed by the judge are treated “as being constructively within the sight and hearing of the court itself”.¹⁴ This is so, it appears, even where the contempt in the face of the court consists in not appearing at court.¹⁵

The proscribed consequence: interference with the administration of justice

- 5.8 Conduct which threatens or interferes with the course of justice is contempt;¹⁶ this includes conduct which disrupts the proceedings.¹⁷ In a leading case, Lord Justice Salmon explained, “the sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented”.¹⁸

¹⁰ *R v Pateley Bridge Justices ex p Percy* [1994] Crown Office Digest 453.

¹¹ *R v Selby Justices ex p Frame* [1991] 2 All ER 344.

¹² *Atkinson* [2011] EWCA Crim 1766. See, eg, *R v Pateley Bridge Justices ex p Percy* [1994] Crown Office Digest 453. See also *Chandler v Horne* (1842) 174 ER 338. See Arlidge, Eady and Smith on Contempt para 10-112.

¹³ See *Balogh v St Albans Crown Court* [1975] QB 73; *Purdin v Roberts* (1910) 74 *Justice of the Peace Journal* 88, cited by Arlidge, Eady and Smith on Contempt para 10-18; *A-G v Butterworth* [1963] 1 QB 696; *Curtis* [2012] EWCA Crim 945 at [11] where the two convicted of contempt had followed jurors onto a bus, sat behind them and intimidated them. The appeal was against sentence, but the Court of Appeal explicitly approved the finding of contempt.

¹⁴ Arlidge, Eady and Smith on Contempt para 10-15 (emphasis omitted). The Criminal Procedure Rule Committee (“CPRC”) refers, in the Criminal Procedure Rules (“CrimPR”), r 62.5(1)(a) to conduct “in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings”.

¹⁵ See para 5.20 below.

¹⁶ *Morris v Crown Office* [1970] 2 QB 114, 122 by Lord Denning. See also *Jales* [2007] EWCA Crim 393, [2007] *Criminal Law Review* 800 at [7].

¹⁷ The CPRC refers, in the CrimPR, r 62.5(1)(a) to “obstructive, disruptive, insulting or intimidating conduct”.

¹⁸ *Morris v Crown Office* [1970] 2 QB 114, 129.

The mental element

- 5.9 As Arlidge, Eady and Smith on Contempt states, “It is difficult to extract from the authorities the precise nature of the state of mind required”.¹⁹ There is no definitive statement in the case law and what judicial statements there are have been made in the context of what was undoubtedly a contempt, but not so clearly a contempt in the face of the court.²⁰
- 5.10 While it is clear that the conduct itself must be intentional, it is not clear whether that is sufficient to prove the contempt,²¹ or whether the contemnor must have intended the consequence,²² or foreseen the consequence without necessarily intending it.²³ In many of the cases, an intention to disrupt the proceedings or to show disrespect can easily be inferred from the act itself,²⁴ or at least is inferred by the court.²⁵ This may be an explanation for the statement in *Huggins* that “an intention to disrupt proceedings was not necessary for conduct to be a contempt” which is otherwise not consistent with other authorities.²⁶

Recording proceedings

- 5.11 Taking a photograph or making a portrait or sketch may amount to a contempt²⁷ as well as to an offence contrary to section 41(1) of the Criminal Justice Act 1925.²⁸ The statutory provision is little used.²⁹ There is a discrepancy between the penalty for the statutory offence (a level three fine, in other words, £1,000) and

¹⁹ Arlidge, Eady and Smith on Contempt para 10-214.

²⁰ For example, *Giscombe* (1984) 79 Cr App R 79 in which the conduct consisted in approaching a juror and making possibly threatening comments as the juror left the court building, and *Connolly v Dale* [1996] QB 120 in which there had allegedly been interference with witnesses by a police officer prior to the trial.

²¹ As seems to be the case in *Huggins* [2007] EWCA Crim 732, [2007] Criminal Law Review 798 at [14].

²² As in *Giscombe* (1984) 79 Cr App R 79 in which the court held, “the test for contempt was whether the appellant knowingly did an act which he intended, and which was calculated, to interfere with the course of justice and was capable of having that effect”.

²³ *Schot and Barclay* [1997] 2 Cr App R 383 by Rose LJ. This was a case of juror contempt.

²⁴ Such as where the contemnor shouts abuse at the judge or throws something at him or her. See *Schot and Barclay* [1997] 2 Cr App R 383, 395.

²⁵ See, eg, *Jones* [2011] EWCA Crim 3179.

²⁶ *Huggins* [2007] EWCA Crim 732 at [14], [2007] Criminal Law Review 798.

²⁷ Borrie and Lowe: The Law of Contempt para 12.13.

²⁸ Section 41(2)(c) of the 1925 Act provides that the photograph, portrait or sketch shall be deemed to be taken or made in court if it is taken or made in the courtroom, the building or in the precincts of the building, or made or taken of the person while he is entering or leaving the courtroom or building or precincts.

²⁹ N Parpworth, “Taking Photographs in the Courtroom: A Criminal Contempt?” (2004) 168 *Justice of the Peace* 908.

that for contempt (maximum of two years' imprisonment) but this will not prevent the court dealing with photographing by way of contempt.³⁰

- 5.12 Section 9 of the 1981 Act³¹ proscribes the use in court, or bringing into court for use, "any tape recorder or other instrument for recording sound ... except with the leave of the court". Breach of this provision is a contempt of court.³²
- 5.13 Section 41(1) of the 1925 Act and section 9 of the 1981 Act are supplemented by Practice Guidance³³ and the Consolidated Practice Direction I.2.2. The overall effect is that no one may take photographs or make a sound recording (except with permission) but text-based communications are permitted, in specified circumstances.³⁴

Particular kinds of contemnor

- 5.14 WITNESSES: Courts have both statutory and common law powers for dealing with misconduct by witnesses. If a witness disobeys a Crown Court summons without "just excuse", section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965 ("the 1965 Act") provides that the witness is guilty of contempt of court "and may be punished summarily by that court as if his contempt had been committed in the face of the court". The maximum penalty is three months' imprisonment.³⁵
- 5.15 By virtue of section 97(4) of the Magistrates' Courts Act 1980, a witness in the magistrates' court who refuses to be sworn, to give evidence or to produce any document or thing, may be committed to custody for up to one month, and/or required to pay a fine of up to £2,500. Section 97(4) does not create a criminal offence, but gives the court power to treat the witness in a way similar to if he or she had committed a contempt of court.³⁶

³⁰ As in *D (Vincent)* [2004] EWCA Crim 1271, *The Times* 13 May 2004. This was a high security trial, including witness protection. D was the brother of the accused. D leant forward from the public gallery and took a picture of his brother in the dock with his mobile phone. Three pictures had been taken. It was treated as a contempt of court to which D pleaded guilty. He was sentenced to 12 months' imprisonment. The Court of Appeal held that taking of photographs, "has the potential gravely to prejudice the administration of criminal justice" and dismissed his appeal against sentence.

³¹ See Borrie and Lowe: *The Law of Contempt* para 12.15 for difficulties with this provision generally. In particular, the authors note that the mental element required for the offence was left open in *Re Hooker* [1993] Crown Office Digest 190, but that there is potential for injustice.

³² Both provisions will be subject to possible exceptions as provided by the Lord Chancellor with the concurrence of the Lord Chief Justice: *Crime and Courts Bill 2012*, cl 22.

³³ *Civil Court Practice 2012 Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting*.

³⁴ Clause 22 of the *Crime and Courts Bill* will enable the Lord Chancellor to disapply this provision: see n 32 above.

³⁵ *Criminal Procedure (Attendance of Witnesses) Act 1965*, s 3(2). See *Abbott* [2004] EWCA Crim 91, [2004] All ER (D) 154 (Feb).

³⁶ Subsection (5) provides that any such fine "shall be deemed ... to be a sum adjudged to be paid by a conviction".

- 5.16 Refusal to be sworn or to answer questions may, alternatively, be treated as a contempt in the face of the court.³⁷ The maximum penalty is set by section 14 of the 1981 Act. Thus, as Miller and Borrie and Lowe point out,³⁸ in the Crown Court the penalty is considerably higher (two years' imprisonment) for the witness who attends but then refuses to answer questions than for the witness who disobeys a summons and does not attend,³⁹ while in the magistrates' courts the penalty is the same in both situations.
- 5.17 JURORS: Where juries have reached a verdict other than according to the evidence, a contempt may have been committed.⁴⁰ Thus, leaving the verdict to chance (such as drawing lots,⁴¹ or tossing a coin⁴²) will be a contempt. It is not a contempt for jurors to decline to reach a verdict, or to reach a verdict which is perverse,⁴³ providing that it is due to insufficiency of the facts, although, as pointed out by the Court of Appeal in *Schot and Barclay*,⁴⁴ a "contumacious"⁴⁵ refusal to reach a verdict may be capable of being a contempt.⁴⁶

³⁷ Arlidge, Eady and Smith on Contempt para 10-167. See, eg, *Phillips* (1984) 78 Cr App R 88, *Lewis* (1993) 96 Cr App R 412. Note the special position of journalists under s 10 of the 1981 Act. It may be possible for the witness to plead duress if he or she will not give evidence out of fear: *K* (1984) 78 Cr App R 82.

³⁸ Borrie and Lowe: *The Law of Contempt* para 12.31; Miller para 4.46.

³⁹ See *Montgomery* [1995] 2 All ER 28 in which Potter J said at 33 that "whilst it is legitimate in the case of a witness refusing to testify, to have regard to the fact that the maximum sentence for failing to comply with a witness order is three months, that should not inhibit the court from imposing a sentence substantially longer than three months for a blatant contempt in the face of the court ...".

⁴⁰ According to Miller para 4.43, a juror will commit an offence if he or she consents to embracery, namely an attempt to persuade him or her to reach a verdict otherwise than on the basis of evidence adduced in open court. Arlidge, Eady and Smith on Contempt para 10-187 speculates that there would be a clear case of contempt if a juror tried to sway the opinion of his or her fellow jurors corruptly or improperly as in the Irish case of *MM and HM* (1933) 1 Irish Reports 299. See the recent case of Danielle Robinson: "Teenager almost wrecked two trials by texting gossip about defendant to fellow juror", *The Daily Mail*, 15 Jul 2010 (unreported), <http://www.dailymail.co.uk/news/article-1294570/Juror-Danielle-Robinson-texted-paedo-lies-court-wrecking-2-trials.html> (last visited 1 Nov 2012).

⁴¹ *Langdell v Sutton* (1736) Barnes 32, 94 English Reports 791, 791, where jurors were publicly admonished for "determining their verdict by hustling half-pence in a hat"; *Foster v Hawden* (1676) 2 Levinz's King's Bench and Common Pleas Reports 205, 83 English Reports 520.

⁴² *Vaise v Delaval* (1785) 1 Turner and Russell's Chancery Reports 11, 99 English Reports 944.

⁴³ *Bushell's Case* (1670) 6 State Trials 999, 1014, 89 English Reports 2.

⁴⁴ *Schot and Barclay* [1997] 2 Cr App R 383.

⁴⁵ Stubbornly or wilfully disobedient to authority: Oxford dictionaries online, <http://oxforddictionaries.com/definition/contumacious> (last visited 1 Nov 2012).

⁴⁶ The need to keep jurors' deliberations confidential in accordance with s 8 of the 1981 Act requires a court to proceed with care if it needs to inquire into any irregularity in the way decisions have been made. The approach to be adopted is set out in *Smith* by Lord Carswell: *Smith* [2005] UKHL 12, [2005] 2 All ER 29 at [16]. See Ch 4 at para 4.46.

- 5.18 It is an offence of both contempt and interference with the course of justice to impersonate a juror, and act in his or her stead.⁴⁷
- 5.19 Juror misconduct may also amount to a statutory offence.⁴⁸ If a juror fails to attend following a summons, that may be dealt with as a contempt, or as a breach of the statutory provision.⁴⁹
- 5.20 LEGAL REPRESENTATIVES: The way a representative conducts the case can amount to contempt if it amounts to more than rudeness, incompetence or discourtesy.⁵⁰ Doing something which hinders or aborts a trial, with the intention of having that effect, such as deliberately failing to attend court or mentioning prejudicial evidence before the jury, would amount to contempt.⁵¹ It seems odd to treat a failure to be at court as contempt *in the face of* the court, although Miller does so.
- 5.21 Punishment of an advocate for what he or she says in court, whether a criticism of the judge or a prosecutor,⁵² amounts to an interference with his or her rights under article 10 of the ECHR, and so that interference must be prescribed by law, pursue a legitimate aim and be proportionate in pursuit of that aim, and be necessary in a democratic society. The ECtHR has held that, “It is ... only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel’s freedom of expression can be accepted as necessary in a democratic society”.⁵³
- 5.22 The legitimate aim in question may be that of maintaining the authority of the judiciary.⁵⁴ The issue is not the protection of individual judges or prosecutors from criticism, but the protection of the justice system.⁵⁵

⁴⁷ *Levy* (1916) 32 TLR 238; see also *Clark* (1918) 82 *Justice of the Peace* 295, where a farmer paid one of his farm labourers to impersonate him.

⁴⁸ On statutory offences which may be committed by jurors, see Ch 4 at para 4.1.

⁴⁹ Borrie and Lowe: *The Law of Contempt* para 12.38. They write that “as with advocates’ absence it is a nice point whether a juror’s absence is properly classifiable as a contempt in the face of the court”.

⁵⁰ *Weston v Central Criminal Courts Administrator* [1977] QB 32. The representative may well also then become the subject of disciplinary proceedings before his or her professional body.

⁵¹ “If a solicitor deliberately fails to attend – with intent to hinder or delay the hearing, and doing so – he would be guilty of a contempt of court. He would be interfering with the course of justice”: *Weston v Central Criminal Courts Administrator* [1977] QB 32, 43 by Lord Denning. See Miller para 4.38.

⁵² *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [38].

⁵³ *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [55].

⁵⁴ See the terms of art 10(2): “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for maintaining the authority and impartiality of the judiciary”. See also *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [168].

⁵⁵ *Sunday Times v UK (No 1)* (1979) 2 EHRR 245 (App No 6538/74) at [55].

- 5.23 It follows from the principle of protecting the system of justice that a distinction will be made between criticism and insult.⁵⁶ The court will take into account the nature of the criticism (whether personal or directed to the professional function of the person who has been criticised or insulted), the forum in which it is made,⁵⁷ the fairness of the proceedings, the procedural guarantees, and the nature and severity of the penalties.⁵⁸
- 5.24 Interference with an advocate's freedom of expression during trial could also potentially entail breach of the accused's right to a fair trial under article 6.⁵⁹ The ECtHR has highlighted the potential "chilling effect" of punishing an advocate for criticism made in the course of a trial, even if the penalties imposed are relatively minor.⁶⁰

How contempt in the face of the court may be dealt with

Action by the court itself or application to the Divisional Court

- 5.25 Some courts and tribunals may take action themselves in respect of contempts in their face. This may be as a matter of their inherent jurisdiction,⁶¹ or by virtue of specific statutory provisions.⁶² Other courts and tribunals may not take action directly, but an application for an order of committal for contempt may be made by the Attorney General to the Divisional Court.⁶³
- 5.26 Uncertainty as to which courts or tribunals would be able to exercise jurisdiction in respect of contempts was anticipated when the 1981 Act was debated in

⁵⁶ "A clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of art 10 of the Convention": *Žugić v Croatia* App No 3699/08 at [45]. See also *Kovač v Croatia* (2011) 53 EHRR SE21 (App No 49910/06) and *Skatka v Poland* (2004) 38 EHRR 1 (App No 43425/98). Compare with *Re Anwar* in which, although the advocate's comments outside court contained "angry and petulant criticism" of the outcome of the trial, they did not amount to conduct that challenged the authority of the law, and so no contempt was found: *Re Anwar* [2008] HCJAC 36, 2008 SLT 710 at [44].

⁵⁷ It is possible for a statement to the media to be made in the court or its precincts and so be a contempt in the face of the court, but if the statement is made away from the court and does not disrupt proceedings it would not be contempt in the face of the court.

⁵⁸ *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [171].

⁵⁹ "Equality of arms' and other considerations of fairness ... also militate in favour of a free and even forceful exchange of argument between the parties": *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [49].

⁶⁰ *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [54]. The court noted that "a relatively light criminal sanction may already serve to chill even appropriate and measured criticism" at [23]. And see *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [175] and [181] in which it was held that the defence advocate's art 10 right had been violated.

⁶¹ This is the case for, amongst others, the Court of Appeal and the Crown Court. Details are set out in Appendix E.

⁶² Statutory provisions confer powers to deal with contempt in the face of the court on particular courts, such as the county courts, "qualifying service courts" and the magistrates' courts. Details are set out in Appendix E.

⁶³ SI 1998 No 3132, Rules of the Supreme Court Ord 52, r 1(2). Order 52 is due to be replaced by a new Civil Procedure Rule 81, and related Practice Direction: see Ch 2 at para 2.59.

Parliament⁶⁴ and it remains.⁶⁵ This chapter addresses the position of the Crown Court and the magistrates' courts only.

Other than by contempt proceedings

- 5.27 The court's response to an apparent contempt will depend on the circumstances.⁶⁶ A minor disruption can, of course, be ignored.⁶⁷ If it cannot be ignored, the court may simply accept an apology from the person and take no further action.
- 5.28 Judges may warn a person not to continue with the abusive or disruptive behaviour. A person disrupting the proceedings may be removed from the court, even if that person is the accused, and in extreme cases the trial may proceed in his or her absence.⁶⁸ Courts are likely to be alert to attempts to disrupt the proceedings to the benefit of a defendant (or another) by causing it to be delayed.
- 5.29 Some kinds of behaviour will amount to criminal offences as well as to a contempt of court.⁶⁹ It is in the discretion of the court as to whether to proceed by way of contempt or to let the prosecuting authority take over the matter.⁷⁰ The court in *S*⁷¹ listed factors relevant to the exercise of the discretion. A prosecution might be swiftly initiated but a separate prosecution will almost always be a more drawn-out way of proceeding.
- 5.30 If the judge does not deal with the contempt in one of the ways described above, he or she may refer the matter to the Attorney General for the Attorney to decide whether to apply to the High Court for an order of committal for contempt of

⁶⁴ *Hansard* (HL), 9 Dec 1980, vol 415, cols 672 and 677; *Hansard* (HL), 15 Jan 1981, vol 416, cols 222 and 223.

⁶⁵ According to *A-G v BBC* [1981] AC 303, whether the court or tribunal has jurisdiction to act in respect of contempts depends on the purpose of the forum.

⁶⁶ One District Judge confiscated a person's sandwiches when he started eating them in court.

⁶⁷ For example, the Court of Appeal approved a judge's decision to take no action in relation to an outburst from the public gallery in *Linnell* [2009] EWCA Crim 2920. Some District Judges have told us that they find selective deafness useful.

⁶⁸ This course of action does not preclude taking action against the defendant for contempt. See *Baker* [2008] EWCA Crim 334, [2008] All ER (D) 201 (Apr).

⁶⁹ Other statutory offences which might be committed might be general criminal offences, especially public order offences or perverting the course of justice, and/or offences which are specific to participants in court proceedings (such as jurors or witnesses – see paras 5.14 to 5.19 above), or intimidating a potential or actual witness or juror contrary to s 51(1) or (2) of the Criminal Justice and Public Order Act 1994. An alternative offence may fail to reflect the true nature of the wrongdoing.

⁷⁰ *S* [2008] EWCA Crim 138 [17], [2008] Criminal Law Review 716. HHJ Tain notes that in cases of witness intimidation the Court of Appeal seems willing to give a wide discretion to the trial judge as to which course to take: P Tain, "Crown Court Contempt" (2008) 152(7) *Solicitors' Journal* 16.

⁷¹ [2008] EWCA Crim 138, [2008] Criminal Law Review 716.

court.⁷² The issue of how to deal with the alleged contempt can be put back until, for example, the end of the trial.⁷³

By contempt proceedings in the Crown Court

- 5.31 The Crown Court has an inherent jurisdiction to deal itself with contempts in the face of the court. The procedure for dealing with contempt in the face of the Crown Court is governed by the Criminal Procedure Rules Part 62, section 2, “Contempt of Court by Obstruction, Disruption, etc”.⁷⁴ These rules allow the Crown Court to take no further action (following explanation and possible apology), to enquire into the alleged contempt “there and then”, or to postpone the enquiry. The court may, at any stage, decide not to pursue the matter. Whichever route is chosen, the defendant must be treated fairly and his or her rights under article 6 of the ECHR respected.⁷⁵ In either case, contempt needs to be proved to the criminal standard:⁷⁶ the judge must be sure beyond reasonable doubt that C committed the contempt.
- 5.32 **A survey of 100 Crown Court judges in 2012, of whom 43 responded, revealed that they had dealt with only eight cases of contempt in the face of the Crown Court within the preceding 12 months.⁷⁷ In consultees’ experience, is this representative of the true prevalence of contempt in the face of the Crown Court?**

POWER TO REMAND ON BAIL OR IN CUSTODY PRIOR TO A FINDING OF CONTEMPT

- 5.33 The court has inherent powers to control proceedings.⁷⁸ It is stated or assumed in many cases that the judge may order the alleged contemnor to be detained until he or she is brought back before the court for the contempt to be dealt with.⁷⁹ If such a power exists, it must be by virtue of the court’s inherent jurisdiction. Nevertheless, the alleged contemnor might have a right to bail in that intervening period. The starting point must be that the alleged contemnor is entitled to

⁷² See s 45(4) of the Senior Courts Act 1981; Rules of the Supreme Court Ord 52, rr 5 and 1(2). The High Court has concurrent jurisdiction over contempts in the face of the Crown Court.

⁷³ The Court of Appeal considered the deferment of the issue of whether a contempt was committed in *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24. See also *S* [2008] EWCA Crim 138, [2008] All ER (D) 131 (Feb).

⁷⁴ SI 2011 No 1709.

⁷⁵ *S* [2008] EWCA Crim 138, [2008] All ER (D) 131 (Feb). Article 6 rights are discussed at paras 5.73 and following below.

⁷⁶ *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92); *Re Bramblevale Ltd* [1970] Ch 128, 137. This latter was a case of civil contempt. The standard of proof can be no less in criminal contempt.

⁷⁷ See the results of the survey of the Crown Court which we conducted, at Appendix D.

⁷⁸ *Atkinson* [2011] EWCA Crim 1766 at [23]. See also paras 5.6 and n 12 above.

⁷⁹ See, eg, the Criminal Procedure Rules, rr 62.5 and 62.6; *Griffin* (1989) 88 Cr App R 63; *Hill* [1986] Criminal Law Review 457, CA; *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254; *Jales* [2007] EWCA Crim 393, [2007] Criminal Law Review 800 at [8]; and *Archbold* 28-118. See also the Civil Court Practice 2012 (the Green Book): “in cases of criminal contempt (which include contempt in the face of the court ...), the superior courts have an inherent power of detention until the rising of the court on the day of the alleged contempt (see *Delaney v Delaney* [1996] QB 387, CA, by Bingham MR at 401)”: III COT 21.2C.

liberty,⁸⁰ and that there is always a right at common law to apply for bail. (If domestic law did not allow the possibility of bail, the court would then be acting within its powers to remand a person in custody (and indeed could not do otherwise) but there would be a breach of article 5 by the very fact that the law required it to do so).

- 5.34 The Court of Appeal assumed there is the possibility of bail in *Jales*,⁸¹ and we think this must be the case. There is no case law directly on point, but our view is that the right to liberty may only be denied in accordance with the Bail Act 1976.⁸² There is a right of appeal against a refusal of bail in contempt proceedings.⁸³
- 5.35 In any event, detention must comply with article 5 of the ECHR:⁸⁴ it must be ordered by a court which has power to make the order, in accordance with the applicable law, and on a ground which is compatible with the exceptions to the right to liberty under article 5.⁸⁵ The purpose of article 5 is to guard against arbitrary detention. If, therefore, a court makes an order arbitrarily,⁸⁶ there could well be a breach of article 5.⁸⁷ Further, if it can be shown that the contemnor might not have been detained but for breaches of article 6 in the contempt proceedings, then his or her detention may breach article 5.⁸⁸

HEARSAY EVIDENCE

- 5.36 Questions arise as to what evidence the court may hear when enquiring into an alleged contempt in the face of the court, whether immediately or following a

⁸⁰ “It is fundamental in English law that any individual is entitled to his liberty unless there is a proper and recognised legal justification for depriving him of it. This right of the individual can be traced back to art 29 of Magna Carta (25 Edw 1 (1297)) and the Petition of Right (3 Car 1, c 1 (1627)). There is no arbitrary power of arrest or detention. The circumstances under which a person may be deprived of his liberty are various but they must all be based upon some clear legal authority”: Hobhouse LJ in *In Re B (Child Abduction: Wardship: Power to Detain)* [1994] 2 Family Law Reports 479, 486.

⁸¹ *Jales* [2007] EWCA Crim 393, [2007] Criminal Law Review 800 at [8].

⁸² Either because contempt proceedings are “proceedings for an offence” within the meaning of s 1(1) of the Bail Act 1976, or because s 2 of the Habeas Corpus Act 1679 applies. When s 90 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is brought into force, the likelihood of the alleged contemnor receiving a custodial sentence will be relevant to the question of bail.

⁸³ *Serumaga* [2005] EWCA Crim 370, [2005] 1 WLR 3366.

⁸⁴ There is a right to compensation for breach of art 5, unlike for breach of other articles of the ECHR: s 9(3) of the Human Rights Act 1998.

⁸⁵ The specific paragraph of art 5 which will apply will be art 5(1)(c) which allows for “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”: *Weston v UK* (1981) 3 EHRR 402 (App No 8083/77). This must be read in conjunction with art 5(3): *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 (App No 332/57) at [14].

⁸⁶ For example, if the judge is seeking to punish C for his or her conduct before there has been a finding of contempt.

⁸⁷ See *Benham v UK* (1996) EHRR 293 (App No 19380/92); *McC (A Minor) v Mullan* [1985] AC 528; *Weston v UK* (1981) 3 EHRR 402 (App No 8083/77) (Commission decision).

⁸⁸ *Ratra v Department for Constitutional Affairs* [2004] EWCA Civ 731 at [26] and [27].

postponement.⁸⁹ The questions are whether hearsay evidence is admissible at all, excluded at all, or, if prima facie excluded, admissible under the Civil Evidence Act 1995, the CJA 2003, or on some other basis. There is no definitive statement of law which answers these questions.⁹⁰

- 5.37 The hearsay provisions in the CJA 2003 apply to criminal proceedings to which the strict rules of evidence apply.⁹¹ Dealing first with the issue of whether proceedings for contempt in the face of the court are civil or criminal, it is clear that the alleged contemnor must be dealt with in a way which respects his or her rights under article 6 of the ECHR,⁹² but this does not settle the question of whether proceedings for contempt are civil or criminal.⁹³ Nor does it settle the question of whether civil or criminal rules of evidence apply.⁹⁴
- 5.38 When the Crown Court and the magistrates' courts are exercising their criminal jurisdictions, the following factors⁹⁵ point to proceedings for contempt in the face of the court being criminal proceedings: they arise in the course of criminal proceedings; they are not initiated by a party to the proceedings; the criminal standard of proof applies; the protections of article 6 of the ECHR apply; and punishment can result.⁹⁶
- 5.39 If the proceedings for contempt are criminal, there remains the question whether the strict rules of evidence apply. In *Chal*, following a finding that the accused was unfit to plead and to stand trial, the judge had to determine whether he had

⁸⁹ See para 5.31 above.

⁹⁰ Neither *Shokoya*, (1993) 57(1) *Journal of Criminal Law* 66, nor *H* [2005] EWCA Crim 2083, [2006] 1 Cr App R 4 at [7] is directly on point. In the former, a case which pre-dated the current rules on hearsay in criminal proceedings contained in the CJA 2003, the evidence to prove the contempt would not even be admissible under the CJA 2003. In the latter, the court ruled as to the applicability of the hearsay regime in the CJA 2003 to preparatory hearings which had started before the CJA regime came into force and took a purposive approach which is not necessarily relevant to the issue here.

⁹¹ CJA 2003, s 134(1) and s 114.

⁹² *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) and see para 5.31 and n 75 above. The defendant is entitled to the enhanced provisions of arts 6(2) and 6(3): *Daltel Europe Ltd and others v Makki and others* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

⁹³ Contempt in the face of the court may be dealt with in the course of civil proceedings but this does not thereby make the proceedings criminal: *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704. If they were obviously criminal proceedings then s 3(2)(f)(iii) of the Prosecution of Offences Act 1985 would be unnecessary because they would be covered by s 3(2)(a).

⁹⁴ In civil contempt proceedings, the civil rules of evidence in the 1995 Act apply, even though the proceedings are criminal for the purposes of art 6: *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704.

⁹⁵ Lloyd LJ identified some of these factors when concluding that contempt proceedings in different circumstances were civil: "in a case such as the present, where a committal application is brought by a party to litigation, in the proceedings in or in relation to which the contempts are said to have been committed, the forum and the procedure are strong indications that the application is rightly characterised as a civil proceeding": *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [38].

⁹⁶ We note, however, that the mere fact that there may be penal consequences does not necessarily make proceedings criminal: *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 67, [2012] 3 All ER 999 at [26].

done the act charged. The possible consequences were a hospital order, a supervision order, an absolute discharge or an acquittal, but did not include a conviction or any punishment. In considering whether the hearsay rules in the CJA 2003 applied, the Court of Appeal concluded that the same rules of evidence should be applied “as if this were a criminal trial in the strict sense”.⁹⁷ This may be contrasted with the conclusion in *Clipston*⁹⁸ where it was held that confiscation proceedings, being part of the sentencing process following conviction, are criminal in nature, but not criminal proceedings to which the strict rules of evidence apply.⁹⁹

5.40 Given that a conviction and punishment may follow a finding of contempt in the face of the court, in our view it follows that proceedings for contempt in the face of the court are criminal proceedings, and that, although there is no authority directly on point, our view is that courts would be likely to interpret them as criminal proceedings to which the strict rules of evidence apply. As such, the rules contained in the CJA 2003 would apply, and, in light of recent case law, a statement admitted in accordance with those rules will comply with article 6(3)(d) of the ECHR even if it is central evidence against the accused.¹⁰⁰

5.41 **Do consultees agree that proceedings for contempt in the face of the court are criminal proceedings to which the strict rules of evidence apply?**

IMMEDIATE ENQUIRY

5.42 Immediate enquiry into an alleged contempt used to be referred to as a “truly summary” procedure, and it operated as described by Lord Justice Mustill.¹⁰¹ The courts stated many times that this summary procedure should only be used as a matter of last resort.¹⁰² This procedure now needs to be read subject to the procedure laid down in Part 62 of the Criminal Procedure Rules. Part 62 requires the court to explain to the alleged contemnor what he or she is said to have done, that legal advice is available, what the court’s powers are, that he or she may explain and/or apologise. The court must also allow the person a reasonable opportunity to reflect and take advice.¹⁰³ Thus, even where the court proceeds to deal with the contempt immediately, various protections are afforded to the

⁹⁷ *Chal* [2007] EWCA Crim 2647, [2008] 2 Cr App R 48 at [26] (emphasis added).

⁹⁸ [2011] EWCA Crim 446, [2011] 2 Cr App R (S) 101.

⁹⁹ *Clipston* [2011] EWCA Crim 446, [2011] 2 Cr App R (S) 101 at [45]. At para [56] the court said: “the demanding evidential requirements for the proof of guilt are not generally transposed to such post-conviction proceedings”.

¹⁰⁰ On the impact of art 6(3)(d) on the rules in criminal trials see *Al-Khawaja v UK* (2012) 54 EHRR 23; *Horncastle* [2009] UKSC 14, [2010] 1 Cr App R 17; *Ibrahim* [2012] EWCA Crim 837, [2012] 2 Cr App R 32; and *Riat* [2012] EWCA Crim 1509.

¹⁰¹ *Griffin* (1989) 88 Cr App R 63, 67.

¹⁰² The procedure by which the court dealt with an alleged contempt immediately used to be referred to as the “truly summary” procedure. See, eg, *Moran* (1985) 81 Cr App R 51 by Lawton LJ, *Griffin* (1989) 88 Cr App R 63 by Mustill LJ, *R v Tamworth Justices ex p Walsh* [1994] Crown Office Digest 277 by McCowan LJ. For an example of a recent case where use of this procedure was justified, see *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1.

¹⁰³ CrimPR, rr 62.5(2) and 62.8.

alleged contemnor. Further protections are provided if the enquiry is postponed.¹⁰⁴

SANCTIONS

- 5.43 Once there has been a finding of contempt in the face of the court¹⁰⁵ there is no power to defer sentence, or to remand pending sentence,¹⁰⁶ though there is a power to remand for a report on the contemnor's mental condition.¹⁰⁷
- 5.44 The sanctions available to the Crown Court are imprisonment for a maximum of two years¹⁰⁸ and/or a fine.¹⁰⁹ The sentence of imprisonment may be concurrent or consecutive to a period of custody imposed following a conviction.¹¹⁰ There is no power to impose a community sentence or non-custodial punishment other than a fine,¹¹¹ though the court may make a hospital order.¹¹² A custodial sentence may be suspended.¹¹³ As to proportionality, there is no formal rule or guide, but in the case law it is clear that the courts have the proportionality of the punishment to the features of the case in mind.¹¹⁴ The statutory early release provisions apply to contemnors.¹¹⁵
- 5.45 It seems that a finding of contempt will be recorded on the Police National Computer¹¹⁶ and that it will be disclosed in some circumstances by the Criminal Records Bureau.¹¹⁷

¹⁰⁴ See CrimPR, rr 62.7 and 62.8.

¹⁰⁵ When making a finding of contempt, the court should state its findings of fact, and the process of reasoning behind them: *Goult* (1983) 76 Cr App R 140.

¹⁰⁶ *Re Stevens and Holness* (21 May 1997) QBD (unreported). This concerned interference with a witness.

¹⁰⁷ Mental Health Act 1983, s 35 and 1981 Act, s 14(4A).

¹⁰⁸ 1981 Act, s 14(1).

¹⁰⁹ Except that if the contemnor is under 17 the only sanction possible is a fine: s 14(2A) of the 1981 Act. If the contemnor is 18, 19 or 20, then s 108 of the Powers of Criminal Courts (Sentencing) Act 2000 applies.

¹¹⁰ *Stredder* [1997] 1 Cr App R (S) 209.

¹¹¹ The Court of Appeal has expressed regret that there is no power to make a probation order, and hope that Parliament would consider creating such a power: *Palmer* [1992] 1 WLR 568, [1992] 3 All ER 289. From 1 Dec 2012 the Criminal Records Bureau is merging with the Independent Safeguarding Authority (ISA) to become the Disclosure and Barring Service (DBS): see part 5 of the Protection of Freedoms Act 2012.

¹¹² 1981 Act, s 14(4).

¹¹³ *Morris v Crown Office* [1970] 2 QB 114, 125.

¹¹⁴ See *Montgomery* [1995] 2 All ER 28 and, eg, *Hardy* [2004] EWCA Crim 3397, [2005] 2 Cr App R (S) 48 at [12] by Rose LJ.

¹¹⁵ CJA 2003, s 258.

¹¹⁶ The PNC records convictions, as defined by s 1(4) of the Rehabilitation of Offenders Act 1974: "any finding ... in any criminal proceedings ... that a person has committed an offence or done the act or made the omission charged". See also *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [25].

5.46 In civil proceedings, the contemnor may have the right to purge his or her contempt¹¹⁸ – in other words, to have an order of committal discharged by apologising to the court and, possibly, making good the wrong done by the contempt of court. So, for example, where the contempt consists in failing to obey a court order, the contemnor can comply with the order. It is less clear whether contempts in the face of the court in criminal proceedings can be “purged” in this way after the finding of contempt and imposition of a punishment.¹¹⁹ The appropriate route seems to be, where the contempt proceedings were conducted very promptly after the contempt and, in effect, the contemnor has thought better of his or her behaviour and decided to apologise to the court, to apply to the court to have the sentence varied or rescinded.¹²⁰ The application must be to the court as it was constituted when the punishment was imposed,¹²¹ which seems right in the case of contempt in the face of the court.

APPEALING FROM THE CROWN COURT

5.47 A person who has been found in contempt in the face of the court in the Crown Court may appeal against that finding, and/or against the sentence, to the Court of Appeal as of right.¹²² The Court of Appeal may reverse or vary the Crown Court order, or make any order as seems just. Appeal from the Court of Appeal lies to the Supreme Court.¹²³ As this statutory right of appeal exists, challenge by way of judicial review is not available.

Contempt proceedings in the magistrates’ courts¹²⁴

5.48 As magistrates’ courts are not courts of record, they may only exercise the powers given to them by statute.¹²⁵ That said, there is necessarily an inherent jurisdiction to protect the court’s own processes from abuse.¹²⁶

¹¹⁷ The Police Act 1997 (Part 5) makes provision for the Home Secretary to issue certificates to applicants containing details of their criminal records and other relevant information. In England and Wales this function is currently exercised on behalf of the Secretary of State by the Criminal Records Bureau.

¹¹⁸ *Delaney v Delaney* [1996] QB 387. See Civil Procedure (Amendment No 2) Rules 2012, r 81.31.

¹¹⁹ *Delaney* does not apply to contempts in the face of the court: *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1 at [9]. But see *Deeney* in which S was dealt with for contempt by refusing to give evidence, and the trial judge “directed that Mr Stephenson be brought back to court on each day of the trial, in order that he should have a chance to purge his contempt” – in other words, to change his mind and give evidence: *Deeney* [2011] EWCA Crim 893 at [24] by Rix LJ. Where the court does have power to discharge an order of committal, CrimPR, r 62.4 applies.

¹²⁰ Under s 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000: *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1 at [11].

¹²¹ Section 155(4) of the Powers of Criminal Courts (Sentencing) Act 2000.

¹²² Under s 13(2)(bb) of the Administration of Justice Act 1960.

¹²³ *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 901, [2012] 3 All ER 1017.

¹²⁴ Our survey of 145 District Judges, of whom 52 replied, revealed that 31 had dealt with at least one incident of contempt in the face of the court in the 12 months in 2011/2012. See Appendix D.

¹²⁵ This point was made in the Phillimore Report, which noted that the magistrates’ courts had no power to punish disruptive conduct in court: paras 25, 36 and 37.

5.49 The powers of magistrates' courts to deal with contempt in the face of the court are contained in section 12 of the 1981 Act.¹²⁷ Because the magistrates are constrained by the terms of the statute, they may not deal with people for "constructive" contempts,¹²⁸ but section 12(1)(a) itself has a wider reach than behaviour in the courtroom. Section 12(1) reads:

A magistrates' court has jurisdiction under this section to deal with any person who—

- (a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court;¹²⁹ or
- (b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

5.50 It creates two offences; both require that the contemnor committed the act in question "wilfully". "Wilfully" has been held to mean, in this context, intentionally and recklessly.¹³⁰ Oddly, it has been held that "insults" in subsection (1)(a) does not include threats.¹³¹ As regards the offence in subsection (1)(b) the proceedings must actually be interrupted, but the interruption can come from outside the courtroom.¹³²

5.51 The court may deal with the contemnor by committing the offender to custody for a specified period not exceeding one month or imposing a fine not exceeding £2,500, or both.¹³³ There is no power at common law, or in the statute, to suspend an order committing the contemnor to custody under this provision.

¹²⁶ *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42.

¹²⁷ Section 12 is modelled on the County Courts Act 1959, s 157, the predecessor to s 118 of the County Courts Act 1984. In respect of witnesses there are separate statutory powers at s 97(4) of the Magistrates' Courts Act 1980, on which see para 5.15 above.

¹²⁸ Namely contempts which are not "in the face of the court" in the sense of being within the perception of the court itself, but which are nevertheless treated as being contempts in the face of the court. See para 5.7 above, and Blackstone's para B14.74.

¹²⁹ "Officer of the court" includes a reference to any court security officer assigned to the court house in which the court is sitting: see the Criminal Justice Act 1991, s 100, sch 11, para 29 (vol 12 of Halsbury's Statutes).

¹³⁰ *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397.

¹³¹ *R v Havant Justices ex p Palmer* (1985) 149 *Justice of the Peace* 609. A different Divisional Court had to decide whether "insults" included threats in an identical provision which applies to the county courts (s 118(1) of the County Courts Act 1984). It was held that "insults" did encompass threats: "if the [county] court could deal with 'insults' but not 'threats', the court would not be able to give immediate protection to those who need it most. It would risk failing its users, whose cases have been sent to that court by the system": *Manchester City Council v McCann* [1999] QB 1214, 1224.

¹³² *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397. If it is alleged that the contempt was committed by misbehaviour in court (s 12(1)(b)), must the misbehaviour occur in the courtroom itself? See Borrie and Lowe: *The Law of Contempt* para 13.50.

¹³³ The 1981 Act, s 12(2). As with contempt in the Crown Court, if the offender is under 17, the only sanction is a fine: s 14(2A) of the 1981 Act. If the contemnor is 18, 19 or 20, then s 108 of the Powers of Criminal Courts (Sentencing) Act 2000 applies.

- 5.52 **Our survey of 145 District Judges, of whom 52 replied, revealed that 31 respondents had dealt with at least one instance of contempt in the face of the court in a 12 month period in 2011/2012.¹³⁴ In consultees' experience, is this representative of the true prevalence of contempt in the face of the magistrates' courts?**

PROCEDURE

- 5.53 The relevant procedure is governed, as in the Crown Court, by the Criminal Procedure Rules Part 62, section 2, "Contempt of Court by Obstruction, Disruption, etc".¹³⁵
- 5.54 The courts have the power to have the alleged contemnor brought before them and to inquire into the circumstances of the alleged contempt as incidental powers necessary to the exercise of those contained in section 12.¹³⁶ There has been a suggestion that there is an inherent power to adjourn proceedings for contempt beyond the "rising of the court",¹³⁷ but we are not aware of any case establishing that this power exists. There is no power of remand in such a situation.
- 5.55 Section 12(4) of the 1981 Act gives the magistrates power to revoke an order of committal and to order that a contemnor be discharged from custody.¹³⁸

BAIL PROCEDURES IN MAGISTRATES' COURTS

- 5.56 As with the position of the Crown Court, the question arises whether an alleged contemnor is entitled to bail, and if so, on what grounds, and whether the law is compliant with article 5 in this regard. As there is no power of detention beyond the rising of the court,¹³⁹ any order which purported to remand the alleged contemnor beyond that time would be unlawful, and in breach of article 5. The question must arise whether the court should address the issue of bail during even the time between ordering detention and the rising of the court (when the alleged contemnor must be released).

¹³⁴ See Appendix D for the results of the survey of District Judges which we conducted.

¹³⁵ SI 2011 No 1709. See *Stones' Justices' Manual 2012* para 1.117 and following, Blackstone's B14.77, Archbold 28-117. Principles also found in *Moran* (1985) 81 Cr App R 51. Part 62 supersedes guidance in Practice Direction (Criminal Consolidated) [2002]: *Stone's Justices' Manual 2012* para 1.117.

¹³⁶ *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397 by Beldam LJ. Draycott suggests that the incidental power could go so far as to allow the bench to issue a Bench Warrant for the contemnor's arrest where the contemnor has absconded before being dealt with: A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 548, 550.

¹³⁷ A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 548, 550.

¹³⁸ The early release provision in s 258 of the CJA 2003 applies too.

¹³⁹ What the Criminal Procedure Rules call "immediate temporary detention": r 62.5(2)(a)(iii).

APPEALING FROM THE MAGISTRATES' COURTS

- 5.57 Appeal is to the High Court by way of case stated or judicial review,¹⁴⁰ or to the Crown Court.¹⁴¹ Between them, these routes of appeal allow a contemnor to appeal as of right against the finding of contempt, and/or against the sentence and against the manner in which the finding or sentence was made.

THE MAIN PROBLEMS WITH THE PRESENT LAW

- 5.58 The problems with the law may be summarised as follows.

Definition of the offence

- 5.59 Commentators have noted the lack of clarity about what amounts to contempt in the face of the court.¹⁴² In particular, the law is not settled as to what mental element is required to commit contempt in the face of the court in the Crown Court,¹⁴³ while in the magistrates' court it must be committed "wilfully" which is not a word which members of the public will readily understand in this context. Some writers have suggested that a narrower definition of contempt in the face of the court is desirable.¹⁴⁴ The law needs to be clear in order to be compatible with article 7 of the ECHR.¹⁴⁵ Practically speaking, it is when the court's powers are limited to dealing with particular kinds of behaviour that it has been important to determine which behaviour amounts to contempt in the face of the court.¹⁴⁶
- 5.60 It could be argued that section 12 contains more than one offence, and it would be better if the different ways in which a contempt in the face of the court could be committed were clearly separated out.
- 5.61 It could also be argued that the exclusion of threats from section 12¹⁴⁷ is an obvious defect which needs to be remedied.

Procedural difficulties

- 5.62 There may be questions of consistency over how different courts deal with an alleged contempt. A judge sitting in the Crown Court can refer an alleged contempt to the Attorney General for an application to be made to the Divisional Court, or to the CPS for it to consider whether there should be a prosecution for a criminal offence, or deal with it him or herself. A bench or District Judge in the

¹⁴⁰ *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888. There is no appeal under s 13 Administration of Justice Act 1960.

¹⁴¹ Section 108 of the Magistrates' Courts Act 1980 and s 12(5) of the 1981 Act. See *Scarth* [2011] EWCA Crim 2228.

¹⁴² *Borrie and Lowe: The Law of Contempt* para 12.5; *Arlidge, Eady and Smith on Contempt* para 10-11.

¹⁴³ See paras 5.9 and 5.10 above.

¹⁴⁴ *Miller* para 4.120.

¹⁴⁵ The law should be "sufficiently clear and certain to enable him to know what conduct is forbidden before he does it" and to be compatible with art 7: *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [33] and [34]. "Gradual clarification" may occur through case law: *SW and CR v UK* (1995) 21 EHRR 363 (App No 20166/92). See also Appendix B.

¹⁴⁶ See the White Book para 3C-6.

¹⁴⁷ See paras 5.49 and 5.50 above.

magistrates' court can refer the matter for prosecution or proceed under section 12 of the 1981 Act.

- 5.63 Referring a matter to be prosecuted as another offence if the conduct amounts to such an offence (such as assault) has obvious merits. The fairness of the trial of an accused in a criminal prosecution is guaranteed by a range of rules and practices,¹⁴⁸ whereas there may be a risk, if a contempt is dealt with summarily, that summary justice "appears to be rough justice".¹⁴⁹ Thus, it could be argued, that where behaviour can be dealt with by a criminal prosecution, it should be. This argument may be especially strong where the penalty for the contemnor if prosecuted as a normal criminal offence is less than if he or she is dealt with by the court for contempt.
- 5.64 There are, however, good reasons for a court not to refer a matter for prosecution as a normal offence even where possible, but to deal with it itself. It enhances the status of the court, and thus of the rule of law, for the court to have summary powers to deal with contempt in its face.¹⁵⁰ A flexible, swift and efficient response is needed, to enable the court to control its own proceedings,¹⁵¹ especially where the contempt was perceived by the court itself.¹⁵² A prompt, effective response may deter further contempts.¹⁵³
- 5.65 If the court decides to deal with the matter itself and, before dealing with it, seeks to detain the alleged contemnor, the question arises of the extent of the court's powers to order detention and the contemnor's right to bail. There is an associated risk of breach of article 5 of the ECHR.
- 5.66 In the magistrates' courts there is no power to adjourn the contempt hearing beyond the rising of the court, and no power to remand the alleged contemnor on bail to a subsequent hearing.
- 5.67 It is not clear which rules of evidence apply to a contempt hearing.
- 5.68 The powers of punishment are restricted to custody and/or a fine.

¹⁴⁸ See Ch 4 at para 4.68.

¹⁴⁹ *Balogh v St Albans Crown Court* [1975] QB 73, 90.

¹⁵⁰ See M Chesterman, "Disorder in the Court: The Judge's Response" (1987) 10(1) *University of New South Wales Law Journal* 32, 43 to 44.

¹⁵¹ ALRC, *Report on Contempt* (1987) para 95; Arlidge, Eady and Smith on Contempt para 2-27 and following.

¹⁵² As in, eg, *Jones* [2011] EWCA Crim 3179 at [8] by Pitchford LJ: "the judge addressed his remarks to the appellant on three occasions. He saw for himself the appellant's contemptuous reaction. No further enquiry was required or indeed was appropriate. This was a contempt in the face of the court The appellant's response to the judge's request to desist was plainly contemptuous as that word is in ordinary use, and was not a technical breach of the requirement for good order in court".

¹⁵³ See the discussion in *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24, and see *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153 at [67].

- 5.69 It is unclear whether the magistrates' courts have the power to suspend an order for committal made under section 12 of the 1981 Act, but more likely that they do not.¹⁵⁴
- 5.70 The process by which a contemnor may "purge" his or her contempt in the Crown Court is unclear.¹⁵⁵
- 5.71 We now address the fairness of the immediate enquiry procedure in detail.

The immediate enquiry procedure for dealing with contempt in the face of the court

- 5.72 Courts have emphasised in a number of cases that the purpose of having power to deal with contempt is to protect the course of justice.¹⁵⁶ If, however, the procedure by which the court seeks to impose its authority lacks the basic features of justice which apply to criminal proceedings, then it undermines rather than enhances the rule of law.¹⁵⁷
- 5.73 The summary process may also involve a breach of article 6 of the ECHR. A failure to comply with a requirement of article 6 may be resolved by the availability of appeal, with the result that there is ultimately no violation of article 6.¹⁵⁸ However, a detention which would not have occurred if article 6 had not been breached could entail a violation of article 5. We therefore consider what article 6 requires.
- 5.74 Article 6(3)(a) requires the contemnor to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her.¹⁵⁹ Part 62 of the Criminal Procedure Rules caters for this: 62.5(2) and 62.6(3).
- 5.75 The requirement under article 6(3)(b) of adequate time and facilities for the preparation of a defence is one of the main reasons that a court should be very wary of proceeding too summarily, and even if the court deals with a contempt

¹⁵⁴ Arlidge, Eady and Smith on Contempt write at para 14-47 that, "so far as magistrates are concerned, since s 12 of the Contempt of Court Act 1981 creates a criminal offence, there is no reason to suppose that the general law regarding suspension of sentences should not apply". The CPRC, however, thought it unclear whether the power to suspend in these circumstances exists: *A Proposal to Make Further Rules about Contempt* (2010) para 41 and following.

¹⁵⁵ See para 5.46 above. Reliance on s 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000 does not fit well with s 14 of the 1981 Act. Compare also with s 12(4) of the 1981 Act which seems to put a contemnor in the magistrates' courts in a better position.

¹⁵⁶ See, eg, *Morris v Crown Office* [1970] 2 QB 114, *Balogh v St Albans Crown Court* [1975] QB 73, *Powell* [1994] 98 Cr App R 224.

¹⁵⁷ See ALRC, *Report on Contempt* (1987) para 115.

¹⁵⁸ "There will be no breach of the Convention if matters can be rectified on appeal": *Dodds* [2002] EWCA Crim 1328, [2003] 1 Cr App R 3 at [13] by Hedley J, relying on *Edwards v UK* (1993) 15 EHRR 417 (App No 13071/87). However, if a custodial penalty has already been fully served before the appeal is dealt with, then there may still be a breach of art 6 even though the domestic law provides for an appeal: see *Lewandowski v Poland* (App No 66484/09).

¹⁵⁹ See *Schot and Barclay* in which Rose LJ said that the nature of the contempt must be clearly defined: [1997] 2 Cr App R 383.

immediately, this right must be respected.¹⁶⁰ It is allowed for at Criminal Procedure Rules 62.5(2)(b) and 62.6(3)(b).

5.76 Article 6 may require legal representation,¹⁶¹ possibly publicly funded.¹⁶² It has been held that legal representation may be dispensed with, but the compatibility of this view with article 6 has not been tested in the courts.¹⁶³ It may be particularly important for the alleged contemnor to be legally represented on a contempt allegation if he or she was an unrepresented defendant at the time of engaging in the behaviour alleged to be a contempt.¹⁶⁴

5.77 Article 6 requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Lewandowski v Poland*¹⁶⁵ the contemnor had included insults directed against the judge personally in his appeal notice. That same judge made a finding of contempt and imposed the most severe sanction possible. The ECtHR found a violation of article 6(1).

5.78 The absence of bias or the appearance of bias is required also by the common law.¹⁶⁶ The special procedure for dealing with contempt in the face would be seen as unjust if applied to any ordinary criminal allegation. As Kirby P put it:¹⁶⁷

When a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines the matter in dispute and imposes punishment.

The presumption of innocence in article 6(2) is evidently at risk in this arrangement.¹⁶⁸

¹⁶⁰ In a large court centre it is usually possible for the judge to make arrangements for legal representation almost immediately. However, this is not the position elsewhere.

¹⁶¹ Appeals against findings of contempt have succeeded on the grounds that the judge did not give the contemnor the opportunity to have legal advice or representation or to prepare his defence: eg, *Brommell* 94/4066/Y5, CA, *R v Selby Justices ex p Frame* [1991] 2 All ER 344, *Haslam* [2003] EWCA Crim 3444, [2003] All ER (D) 195 (Nov) at [22].

¹⁶² Articles 6(1) and 6(3)(c) may require this: *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92) at [64]. See also *Steel and Morris v UK* (2005) 41 EHRR 22 (App No 68416/01). Public funding for representation in proceedings for contempt in the face of the Crown Court is currently governed by s 12(2)(f) of the Access to Justice Act 1999. That section has been prospectively repealed, and ss 14(g) and 15 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will provide for advice and representation for contempt in the face of any court.

¹⁶³ In *R v Newbury Justices ex p Du Pont* (1984) 78 Cr App R 255, 260 by May LJ, the court distinguished between cases where an adjournment was appropriate, which allowed for legal advice, and cases where the court needed to deal with “a disruption obstructing the process of the court’s business” and held that this distinction justified dispensing with legal representation in the latter kind of case. We do not think the same approach would necessarily be taken now.

¹⁶⁴ It seems reasonable to expect the numbers of unrepresented defendants to increase in the Crown Court in light of the introduction of means-testing.

¹⁶⁵ App No 66484/09 at [45] to [50].

¹⁶⁶ The test is as stated in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] by Lord Hope: “the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

¹⁶⁷ *European Asian Bank v Wentworth* (1986) 5 NSWLR 445, 452.

- 5.79 One of the more difficult issues for the courts has been that of whether an alleged contempt should be dealt with by a different judge or bench.¹⁶⁹ It can be argued that if the alleged contempt is disputed, the issue should be heard by another court. Some would argue that it is necessary even if there is no dispute,¹⁷⁰ but the courts have held otherwise.¹⁷¹ The Law Reform Commission of Western Australia thought this criticism overstated.¹⁷² It is possible that, even if the contempt is heard by another court, that court would be seen as pre-disposed to believe the evidence of the judge or bench in whose court the contempt was said to have happened. District Judges have commented that referring a case to another court causes delay and disruption.¹⁷³ In this regard, the absence of any power for the magistrates to adjourn the matter to another day becomes particularly important.
- 5.80 The Criminal Procedure Rules now provide that where there is an enquiry into an alleged or admitted contempt, “the court that conducts an enquiry – (a) need not include the same member or members as the court that observed the conduct; but (b) may do so, unless that would be unfair to the respondent”.¹⁷⁴ There is no specific guidance on what would amount to unfairness in this context.
- 5.81 One circumstance in which it might be unfair to the respondent for the same court to conduct the enquiry into the contempt is when the alleged contempt is particularly personal to the judge or magistrate.¹⁷⁵ While it is reasonable to expect

¹⁶⁸ See ALRC, *Report on Contempt* (1987) para 110. In *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01), the Chamber held unanimously that there had been a violation of art 6(2) but the Grand Chamber, having found a violation of art 6(1), did not think the complaint about breach of art 6(2) needed separate consideration. In a dissenting judgment Judge Costa thought this violation self-evident where the court had offered the contemnor the choice between a plea of mitigating circumstances or retraction of his statement: para [O-IV6].

¹⁶⁹ See *Haslam* [2003] EWCA Crim 3444; *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254; *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01); *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153; *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

¹⁷⁰ Emilianides argues that *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254 is wrongly decided and that it follows from *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) that “the practice, whereby the judge deals with contempt in the face of the court ... himself, must be completely abandoned, since it violates art 6(1) ...”: A Emilianides, “Contempt in the Face of the Court and the Right to a Fair Trial” (2005) 13(3) *European Journal of Crime, Criminal Law and Criminal Justice* 401, 411.

¹⁷¹ Where there is no dispute as to the essential facts it is open to the judge to deal with the matter himself or herself since a fair-minded observer would not conclude there is a real possibility of bias: *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254.

¹⁷² Law Reform Commission of Western Australia, *Review of the Law of Contempt* (2003) p 72.

¹⁷³ The Supreme Court of New Zealand has referred to “the need for speed” as a justification for the truly summary procedure: *Solicitor General v Siemer* [2010] NZSC 54 at [34], relying on Borrie and Lowe: *The Law of Contempt* (3rd ed 1996) para 473. See A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) para 5.6, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

¹⁷⁴ CrimPR, r 62.8(5).

¹⁷⁵ Compare the situation where the judge has not observed the alleged contempt, in which case he or she may safely be regarded as an independent and impartial tribunal for the purposes of the contempt proceedings: *MacLeod* [2001] *Criminal Law Review* 589.

a greater degree of resilience and objectivity from the judge/magistrate than from a lay person to abuse and insults, by virtue of training and the role, personally directed insults or threats might cause an observer to doubt that the person abused could be impartial.¹⁷⁶

5.82 **Should there be specific guidance to courts on when an enquiry into an alleged contempt in the face of the court should be passed to another court, and if so, what factors would consultees identify as making that step desirable? Such factors might be:**

- (1) **when the alleged contempt is directed at the judge or magistrate personally; and/or**
- (2) **when there are issues of fact to be resolved.**

CONTEMPT IN THE FACE OF THE COURT AS A UNIQUE FORM OF PROCEEDINGS

5.83 Proceedings for contempt in the face of the court have a hybrid nature: part disciplinary and part criminal, and this fact lies behind some of the problems referred to above. The link between these aspects of the proceedings is the use of punitive measures to enforce the discipline, and to deter behaviour which the courts will not tolerate. For example, in *Santiago*¹⁷⁷ the Court of Appeal accepted that the threat of summary proceedings for contempt was likely to be more effective in preventing disruption than referring an alleged assault to the Crown Prosecution Service for later prosecution.¹⁷⁸

5.84 Contempt in the face of the court is not a typical criminal offence. A finding of contempt may not be treated as a conviction for some purposes,¹⁷⁹ but it may for others,¹⁸⁰ and it will lead to a sentence. A person who is imprisoned for contempt is treated differently in law from other prisoners.¹⁸¹ It is questionable whether proceedings for contempt in the face of the court are criminal proceedings.¹⁸²

¹⁷⁶ Decisions as to bail also engage the right to an independent and impartial tribunal, so there may be cases where the bail decision should be passed to another court.

¹⁷⁷ [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

¹⁷⁸ The Hong Kong Law Reform Commission made this point in its report: *Contempt of Court* [1987] HKLRC 1 para 4.2.

¹⁷⁹ See *R v Newbury Justices ex p Du Pont* (1983) 148 *Justice of the Peace* 248. Section 12(2A) of the 1981 Act would not be needed if proceedings under s 12 were proceedings for an ordinary criminal offence. The right of appeal provided by s 13 of the Administration of Justice Act 1960 would not be needed if a finding of contempt were a criminal conviction.

¹⁸⁰ See para 5.45 above and *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [25].

¹⁸¹ Section 258 of the CJA 2003 is a provision allowing for early release of prisoners. Section 258(1) states that it applies to those committed to prison for failing to pay a fine which was a penalty following conviction, and to those committed to prison for contempt of court. (The early release provision which applies to the majority of prisoners, ie to "fixed-term prisoners" other than those who have an extended term, is s 244.) The fact that it was necessary to include it indicates that s 244 does not apply. Special rules apply once he or she is imprisoned for contempt: Prison Rules 1999, r 7(3). Prisoners committed for contempt of court do not lose the right to vote.

¹⁸² See paras 5.37 to 5.41 above.

- 5.85 It is not always evident which of the standard rules and procedures which apply to ordinary criminal offences apply to contempt proceedings.¹⁸³ The speed with which a court may need to deal with contempt in the face of the court in order to maintain control of proceedings means, in our view, that it is not helpful to create a new criminal offence which attracts all standard criminal processes and procedures, nor to deem contempt in the face of the court to be a criminal offence for all purposes.

PROVISIONAL PROPOSALS FOR REFORM

Crown Court

- 5.86 We put three options forward for consultees' consideration. The first is to leave the law as it is, and leave the common law to resolve difficulties if they arise.
- 5.87 The second option is to abolish the common law power for the Crown Court to deal with contempts in the face of the court itself and to create a new, statutory, power for the Crown Court to deal with such contempt. That new power could be modelled on section 12 of the 1981 Act and section 118 of the County Courts Act 1984.¹⁸⁴ This option would bring about a large degree of consistency across magistrates' courts, county courts and the Crown Court. The statutory power would apply to the Crown Court in all its jurisdictions: there is no justification for the court's powers to differ depending on whether the case before it is a rehearing from the magistrates' courts, a trial, or a civil matter.
- 5.88 The third option is for a new statutory power applicable to both the Crown Court and the magistrates' courts,¹⁸⁵ similar to, but clearer, than the existing powers of the magistrates' and county courts, and without the defects of section 12.¹⁸⁶ It would replace the existing magistrates' power in section 12 of the 1981 Act. We are not at this stage engaged in drafting, but **we provisionally propose a statutory power to deal with intentional threats or insults to people in the court or its immediate precincts and misconduct in the court or its immediate precincts committed with the intention that proceedings will or might be disrupted.**

¹⁸³ See, eg, the discussion about hearsay rules at para 5.36 and following and para 5.101 and following. See also *Jones* [1996] Criminal Law Review 806. There is "no question of pleading in the normal sense of the word": *R v Newbury Justices ex p Du Pont* (1984) 148 *Justice of the Peace* 248, (1984) 78 Cr App R 255, 259 by May LJ. See Arlidge, Eady and Smith on Contempt para 3-60.

¹⁸⁴ Another possibility that has been suggested is to limit the truly summary procedure to contemnors who cannot simply be removed from the court; see Miller para 4.120. However, this does not seem workable, as it is always open to a court simply to have the person disrupting proceedings removed from the courtroom (see para 5.28 above). A case can proceed even in the absence of the accused in extreme cases.

¹⁸⁵ We note that the New Zealand Law Commission has proposed a generic provision dealing with contempt in the face of the court: *Review of the Judicature Act 1908* (2012) IP29 para 5.17, and the Law Reform Commission of Western Australia has made a similar recommendation in *Review of the Law of Contempt* (2003) p 61.

¹⁸⁶ See paras 5.49 and 5.50 above.

5.89 The proposed power would:

- (a) make clear where this kind of contempt of court can be committed;
- (b) extend to cases of threats by C (unlike section 12 of the 1981 Act);
- (c) make clear what mental element C must have when engaging in the conduct which amounts to the contempt; and
- (d) extend the protection of the court to any person engaged in official business in the administration of justice in the court, which would include an officer of the court (such as a constable or security officer, an interpreter, probation officer), legal advisors, and friends and relations of witnesses and the accused.

Detention of the alleged contemnor

5.90 The Criminal Procedure Rules refer to the power of “immediate temporary detention”, and this power is inherent in the Crown Court and statutory in the magistrates’ courts.¹⁸⁷ We do not seek to interfere with the existence of this important power, which has the purpose of restoring order.

5.91 However, we believe that once detained, some minimum rights ought to be afforded to the alleged contemnor. It would be appropriate if something akin to rights available to a person who has been arrested and held in custody (to have someone told of the detention and to seek legal advice, under sections 56 and 58 of the Police and Criminal Evidence Act 1984) clearly applied. C will probably have been advised by the court, according to rule 62.5(2)(vi), that he or she may seek legal advice, but there should, in our view, be statutory rights of this kind for a person detained.¹⁸⁸

5.92 We, therefore, **provisionally propose that where the Crown Court or the magistrates’ court order C’s immediate temporary detention, C shall be entitled, if he or she so requests, to have one friend or relative or other person told, as soon as is practicable, that he or she is being detained, and, if he or she so requests, to consult a legal representative in private at any time.**

5.93 The alleged contemnor will be brought back to court. Under the current law, in the magistrates’ court this must be before the court rises that day. In the Crown Court this must be no later than the next business day. At this point the court will review the case. The next business day could, in the theoretical worst case, be five days later. This is far too long a period for a person to be detained without review of that detention; even detention without review over a bank holiday weekend, which is not unlikely, is too long in our view.¹⁸⁹ We propose that C’s temporary immediate detention should be reviewed no later than the end of the day on

¹⁸⁷ CrimPR, r 62.5.

¹⁸⁸ Including a right to free legal advice at this stage.

¹⁸⁹ The Court of Appeal held in *Wilkinson* that bringing C back to court on the Monday following detention on the Thursday was “the very limit of what could be either lawful or acceptable”: *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254 at [22] by Hale LJ.

which the detention is first ordered. At that review the Bail Act 1976 would apply, with a right to bail in the usual way,¹⁹⁰ and a right of appeal against a refusal of bail.¹⁹¹ As one of the grounds on which bail may be withheld is that “the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him”,¹⁹² the court could put the bail aspect of the case over to the next day if necessary.

5.94 When detention is reviewed, if the Crown Court postpones dealing with the case, it must then order C’s release.¹⁹³ We do not see the need for an additional power to detain beyond that point.

5.95 **We provisionally propose that the Crown Court should have the following specific statutory powers:**

- (1) to require an officer of the court or a constable to take C into custody for the purposes of immediate temporary detention;**
- (2) following a finding of contempt, to impose a fine and/or a term of imprisonment;**
- (3) to suspend an order of committal; and**
- (4) to revoke an order of committal and to order the discharge of C.**

5.96 **We provisionally propose that if the Crown Court orders C’s immediate temporary detention then C should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out.**

5.97 When making a finding of contempt, the court is required to state its findings of fact, and the process of reasoning behind them.¹⁹⁴ **Are there other powers which consultees think courts need or duties the court should have in relation to sentencing for contempt in the face of the court?**

5.98 **For example, do consultees think there is a need for a power to remand a person after a finding of contempt but before sentence, for reports to be provided to inform sentence?**

5.99 We note above¹⁹⁵ that the judge has a discretion as to how to deal with behaviour which appears to be contempt of court. In some cases the behaviour may amount to an offence which could be prosecuted in the ordinary way. Where the judge decides to deal with it as a contempt and there is a finding of contempt, the question arises whether the likely level of punishment which would have followed

¹⁹⁰ If it appears at that point that, even if the contempt is admitted or proved, the contemnor would not receive a custodial sentence, then, once s 90 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is in force, bail may not be refused.

¹⁹¹ See para 5.34 above. Part 19 of the Criminal Procedure Rules would apply.

¹⁹² Sch 1, Part 1, para 5 to the Bail Act 1976.

¹⁹³ CrimPR, r 62.6(4)(c)(ii).

¹⁹⁴ *Goult* (1983) 76 Cr App R 140.

a prosecution is relevant to the punishment for the contempt. It may be a legitimate consideration,¹⁹⁶ but **should the court be required to have regard to the likely penalty which would have followed a conviction?**

The maximum penalty

- 5.100 The maximum penalty in the Crown Court under the current law is two years' imprisonment,¹⁹⁷ whereas the maximum penalty for the same behaviour in the magistrates' courts is one month's imprisonment. This is a large discrepancy. In addition, there will be few cases in which the conduct amounting to a contempt in the face of the court would merit two years' imprisonment. **Do consultees consider that there is any need to reduce the maximum sentence? If so, what maximum sentence would consultees suggest is appropriate?**

Hearsay evidence

- 5.101 We now turn to the question of which rules should apply in relation to the admission of hearsay evidence to prove an alleged contempt in the face of the court. The Criminal Procedure Rules currently permit evidence to be adduced at an enquiry into a contempt in the face of the court without any specified restriction or notice period.¹⁹⁸
- 5.102 The essential features of the rules applicable to hearsay evidence at a contempt enquiry are, in our view, that the alleged contemnor has a fair hearing, that the rules comply with the ECHR, and that the enquiry should be able to proceed promptly. In any event, we think that the position should be the same in the Crown Court and in the magistrates' courts, as it is now under the Criminal Procedure Rules.
- 5.103 One particularly important aspect of the ECHR rules is the requirement that the accused (in this case, the alleged contemnor) should be able to examine or have examined witnesses against him or her.¹⁹⁹ As we state above,²⁰⁰ it appears that the hearsay rules contained in the CJA 2003 are applicable to an enquiry into an alleged contempt in the face of the court and that, as interpreted in the case law, those rules are compatible with article 6(3)(d) of the ECHR.
- 5.104 In consequence, evidence from the judge or magistrate who is, in effect, the complainant will be relevant evidence and there could be some cases where the judge or magistrate could be required to give oral evidence at the contempt hearing (unless one of the grounds for admitting his or her statement as hearsay

¹⁹⁵ See paras 5.27 to 5.31 above.

¹⁹⁶ See *Montgomery* [1995] 2 All ER 28.

¹⁹⁷ See para 5.44 above.

¹⁹⁸ See CrimPR, r 62.8(3). Compare with CrimPR, r 62.11 which applies where the contempt is not a contempt in the face of the court and under which notice of hearsay evidence must be given. Compare also with CrimPR, Part 34 which applies to hearsay evidence in criminal proceedings.

¹⁹⁹ By art 6(3)(d).

²⁰⁰ See para 5.40 above.

applied)²⁰¹ and be subject to cross-examination by the alleged contemnor. Such cases will, in our view, be rare as the alleged contempt might not be disputed, and even if it is disputed, it is likely that evidence of the alleged contempt can be given from a different source (such as evidence from a court usher or other person present at the time).

- 5.105 **Do consultees think that it should be put on a statutory basis that enquiries into alleged contempts in the face of the court are criminal proceedings to which the strict rules of hearsay evidence apply?**

Other aspects of criminal procedure

- 5.106 We conclude above²⁰² that, in the case of contempt in the face of the court, it is not appropriate for it to be deemed to be a criminal offence. We have considered whether any of those rules which apply to ordinary criminal charges (such as the disclosure regime under the Criminal Procedure and Investigations Act 1996, a formal charge or indictment, mode of trial procedures, or rules about the admissibility of evidence other than hearsay) should nevertheless be incorporated into an enquiry into contempt in the face of the court.

- 5.107 It is important that an enquiry into a contempt in the face of the court should proceed fairly but promptly. We have taken account of the requirements imposed by Part 62 of the Criminal Procedure Rules.²⁰³ It seems to us that, apart from the specific requirements covered separately in this chapter, there is no need to import any of the other rules which apply to ordinary criminal charges into a contempt enquiry.²⁰⁴

- 5.108 **Do consultees think that other aspects of the rules and procedures which apply to criminal proceedings ought to apply to an enquiry into a contempt in the face of the court, and if so, why?**

²⁰¹ Such as the grounds contained in s 116(2) of the CJA 2003, namely, that the witness is dead; is unfit; is outside the UK and it is not reasonably practicable to secure his or her attendance; cannot be found despite reasonable steps to find him or her; or is in fear.

²⁰² See para 5.85 above.

²⁰³ See paras 5.31, 5.42, 5.53 and 5.74 above.

²⁰⁴ We have considered in this chapter the concerns raised by the Criminal Procedure Rule Committee which relate to contempt in the face of the court.

Magistrates' courts

Power to suspend an order of committal

- 5.109 Unlike the Crown Court, the magistrates' courts do not currently have power to suspend an order of committal for contempt in the face of the court. It seems to us that the position should be the same in both courts, unless there is a good reason for their powers to differ. A power to suspend an order of committal could be useful, say as a deterrent to repeated contempts, and so **we provisionally propose that magistrates should have power to suspend an order of committal made under section 12 of the 1981 Act. Do consultees agree?**

Power to adjourn the enquiry into the contempt and power to remand into custody pending the contempt hearing

- 5.110 If it is right for the Crown Court to be able to defer the enquiry into the contempt, but to be required to review the bail position at the end of the day on which the immediate temporary detention is first ordered, the question arises why the situation should not be the same in the magistrates' courts.
- 5.111 Under the current law, magistrates may not put the case off beyond the rising of the court. This has already been mentioned to us by District Judges as causing difficulty. Allowing magistrates to adjourn the case to another day (and another court) could ameliorate difficulties in relation to impartiality of the tribunal.²⁰⁵ These two considerations and the linked issue of the need for temporary immediate detention to be reviewed lead to the following questions.
- 5.112 **Do consultees think magistrates should have the power to adjourn the hearing for contempt beyond the rising of the court to the next business day? If so, should they have power to order that C be detained until that time but be required to review the alleged contemnor's bail position no later than the end of the court day; or should they have power to grant bail (conditional or unconditional) to C to attend the adjourned hearing but no power to remand C in custody?**

²⁰⁵ See para 5.79 above.

CHAPTER 6

PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSULTEES

- 6.1 In this chapter, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this consultation paper. It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of the consultation paper in which the issue was raised.

CONTEMPT BY PUBLICATION

Contempt under the 1981 Act

Active proceedings

- 6.2 Do consultees agree that the current triggers of active proceedings as contained in the 1981 Act should remain?

[paragraph 2.19]

- 6.3 Do consultees agree that there should be a consistent policy adopted by police forces about whether to release information about arrestees, with appropriate safeguards?

[paragraph 2.20]

- 6.4 Do consultees agree that the issue of an arrest warrant should trigger the active period in extradition cases?

[paragraph 2.22]

- 6.5 Do consultees agree that active proceedings under the 1981 Act should be amended to end at the delivery of the final verdict in the case?

[paragraph 2.24]

Substantial risk of serious prejudice or impediment

- 6.6 Do consultees consider that the right relationship between the degree of prejudice or impediment and the degree of risk is achieved in the current section 2(2) test?

[paragraph 2.45]

- 6.7 Do consultees consider that the relationship between the terms “prejudice” and “impede” warrants clarification?

[paragraph 2.46]

- 6.8 Do consultees think that section 2(2) should be split into two provisions, one dealing with prejudice, and the other with impediment?

[paragraph 2.47]

- 6.9 Do consultees agree that the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2) should remain distinct?

[paragraph 2.49]

Section 5

- 6.10 Do consultees agree that section 5 should be retained in its current form?

[paragraph 2.54]

Intentional contempt by publication

- 6.11 Do consultees consider that the common law of intentional contempt by publication should be defined in statute?

[paragraph 2.57]

Evidence and procedure

- 6.12 Do consultees consider that a list of the factors considered by the Attorney General when deciding whether to bring proceedings should be published?

[paragraph 2.63]

- 6.13 Do consultees consider that contempt by publication under section 2(2) should be tried subject to these procedural safeguards associated with a trial on indictment? If not, why not?

[paragraph 2.68]

- 6.14 Do consultees consider that intentional contempt by publication should be tried subject to the procedural safeguards associated with a trial on indictment? If not, why not?

[paragraph 2.71]

- 6.15 Do consultees agree that it would be beneficial to clarify through legislation, for the avoidance of doubt, that the jurisdiction of the Divisional Court to deal with strict liability and intentional contempt by publication had been ousted?

[paragraph 2.72]

- 6.16 Do consultees consider that contempt by publication (under section 2(2) and intentional contempt at common law) should be tried on indictment by a judge and jury in the usual way or should it be tried as if on indictment by a judge sitting alone? If consultees consider that trial should be by a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?

[paragraph 2.76]

- 6.17 Do consultees consider that it would be necessary to set out in statute the basis for corporate liability if intentional contempt and contempt under section 2(2) were tried on indictment or as if on indictment?

[paragraph 2.77]

Reporting restrictions under the 1981 Act

- 6.18 Do consultees agree that a scheme for notifying publishers about the existence of section 4(2) orders should be created?

[paragraph 2.104]

- 6.19 We would welcome consultees' views on the possible expansion of the scheme for section 4(2) orders to other types of order.

[paragraph 2.105]

Sanctions

- 6.20 Do consultees consider that the current maximum sentence for strict liability contempt is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction?

[paragraph 2.114]

- 6.21 Do consultees consider that the current maximum sentence for intentional contempt by publication committed at common law, contempt under section 4(2) or under section 11 of the 1981 Act is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction?

[paragraph 2.115]

- 6.22 Do consultees agree that a sentencing power allowing the courts to impose a fine set at a percentage of the turnover of the publisher should be introduced?

[paragraph 2.116]

- 6.23 Do consultees agree that the Divisional Court should have the power to make an order for wasted costs from the criminal proceedings prejudiced, impeded or intentionally affected by a contempt by publication?

[paragraph 2.118]

MODERN MEDIA

Publication

- 6.24 Do consultees agree with our conclusion that the definition of publication in section 2(1) of the 1981 Act is broad enough to cover things appearing in the new media? If not, why not?

[paragraph 3.22]

Addressed to the public at large or any section of the public

- 6.25 Do consultees consider that the lack of a statutory definition of "a section of the public" is creating problems in practice? If so, can they provide examples?

[paragraph 3.29]

The time of the publication

- 6.26 Do consultees consider that section 2 is correctly construed as applying to publications commencing before proceedings were active?

[paragraph 3.63]

- 6.27 Do consultees consider that section 2(3) should be amended to confirm that “time of the publication” is to be interpreted as meaning “time of first publication”?

[paragraph 3.67]

- 6.28 We propose that the courts be provided with a power to make an order when proceedings are active, to remove temporarily a publication that was first published before proceedings became active, which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Such an order shall be capable of being made against any person who is a publisher within the meaning of the 1981 Act and failure to comply with such an order without reasonable excuse shall be a contempt of court.

Do consultees agree?

[paragraph 3.75]

- 6.29 We also provisionally propose that a court should have the power to make an order when proceedings are active, to remove or disable access temporarily to a publication that was first published before proceedings became active, which creates a substantial risk of serious prejudice or impediment.

Such an order shall be capable of being made against any person who has sufficient control over the accessibility of the material that they are able temporarily to remove it or disable access to it and failure to comply with such an order without reasonable excuse shall be a contempt of court.

Do consultees agree?

[paragraph 3.79]

Who might apply to the court for such an order to be made?

- 6.30 We propose that the application should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General. Do consultees agree?

[paragraph 3.83]

What penalty will follow?

- 6.31 Do consultees consider that the current maximum penalty is appropriate? Do consultees consider that the court should have the power to impose community penalties?

[paragraph 3.84]

- 6.32 Do consultees think that this new contempt should be tried in the Divisional Court under Part 81 of the Civil Procedure Rules or should it be tried on indictment or “as if on indictment” as we propose to try section 2(2) contempts?

[paragraph 3.85]

Place of publication

- 6.33 Do consultees consider that the absence of a definition of the place of publication creates problems in practice? Is a statutory definition of the place of publication necessary? If so, what form should that definition take? For example,

- (1) should it be necessary that the publication was produced within England and Wales; or
- (2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or
- (3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad?

[paragraph 3.95]

JUROR CONTEMPT

Jurors seeking information

- 6.34 Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced?

[paragraph 4.40]

Jurors disclosing information

- 6.35 Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice?

[paragraph 4.60]

- 6.36 Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research?

[paragraph 4.62]

Evidence and procedure

- 6.37 Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury?

[paragraph 4.69]

6.38 Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?

[paragraph 4.72]

6.39 Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?

[paragraph 4.73]

6.40 If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in *Dallas* be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected?

[paragraph 4.74]

6.41 Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8?

[paragraph 4.75]

6.42 Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years' imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)?

[paragraph 4.76]

Preventative measures

Education and pre-trial information

6.43 Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service?

[paragraph 4.78]

In-trial procedures and judicial directions

6.44 Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do?

[paragraph 4.83]

6.45 Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud?

[paragraph 4.84]

6.46 Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so?

[paragraph 4.85]

6.47 Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court?

[paragraph 4.87]

6.48 Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices?

[paragraph 4.88]

6.49 Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room?

[paragraph 4.89]

6.50 Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge?

[paragraph 4.90]

6.51 Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns?

[paragraph 4.91]

6.52 Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be?

[paragraph 4.92]

CONTEMPT IN THE FACE OF THE COURT

In the Crown Court

6.53 A survey of 100 Crown Court judges in 2012, of whom 43 responded, revealed that they had dealt with only eight cases of contempt in the face of the Crown Court within the preceding 12 months. In consultees' experience, is this representative of the true prevalence of contempt in the face of the Crown Court?

[paragraph 5.32]

6.54 Do consultees agree that proceedings for contempt in the face of the court are criminal proceedings to which the strict rules of evidence apply?

[paragraph 5.41]

In the magistrates' courts

- 6.55 Our survey of 145 District Judges, of whom 52 replied, revealed that 31 respondents had dealt with at least one instance of contempt in the face of the court in a 12 month period in 2011/2012. In consultees' experience, is this representative of the true prevalence of contempt in the face of the magistrates' courts?

[paragraph 5.52]

The immediate enquiry procedure for dealing with contempt in the face of the court

- 6.56 Should there be specific guidance to courts on when an enquiry into an alleged contempt in the face of the court should be passed to another court, and if so, what factors would consultees identify as making that step desirable? Such factors might be:

- (1) when the alleged contempt is directed at the judge or magistrate personally; and/or
- (2) when there are issues of fact to be resolved.

[paragraph 5.82]

Provisional proposals for reform: Crown Court

- 6.57 We provisionally propose a statutory power to deal with intentional threats or insults to people in the court or its immediate precincts and misconduct in the court or its immediate precincts committed with the intention that proceedings will or might be disrupted.

[paragraph 5.88]

Detention of the alleged contemnor

- 6.58 We provisionally propose that where the Crown Court or the magistrates' court order C's immediate temporary detention, C shall be entitled, if he or she so requests, to have one friend or relative or other person told, as soon as is practicable, that he or she is being detained, and, if he or she so requests, to consult a legal representative in private at any time.

[paragraph 5.92]

- 6.59 We provisionally propose that the Crown Court should have the following specific statutory powers:

- (1) to require an officer of the court or a constable to take C into custody for the purposes of immediate temporary detention;
- (2) following a finding of contempt, to impose a fine and/or a term of imprisonment;
- (3) to suspend an order of committal; and
- (4) to revoke an order of committal and to order the discharge of C.

[paragraph 5.95]

6.60 We provisionally propose that if the Crown Court orders C's immediate temporary detention then C should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out.

[paragraph 5.96]

6.61 Are there other powers which consultees think courts need or duties the court should have in relation to sentencing for contempt in the face of the court?

[paragraph 5.97]

6.62 For example, do consultees think there is a need for a power to remand a person after a finding of contempt but before sentence, for reports to be provided to inform sentence?

[paragraph 5.98]

6.63 Should the court be required to have regard to the likely penalty which would have followed a conviction?

[paragraph 5.99]

The maximum penalty

6.64 Do consultees consider that there is any need to reduce the maximum sentence? If so, what maximum sentence would consultees suggest is appropriate?

[paragraph 5.100]

Hearsay evidence

6.65 Do consultees think that it should be put on a statutory basis that enquiries into alleged contempts in the face of the court are criminal proceedings to which the strict rules of hearsay evidence apply?

[paragraph 5.105]

Other aspects of criminal procedure

6.66 Do consultees think that other aspects of the rules and procedures which apply to criminal proceedings ought to apply to an enquiry into a contempt in the face of the court, and if so, why?

[paragraph 5.108]

Provisional proposals for reform: magistrates' courts

Power to suspend an order of committal

6.67 We provisionally propose that magistrates should have power to suspend an order of committal made under section 12 of the 1981 Act. Do consultees agree?

[paragraph 5.109]

Power to adjourn the enquiry into the contempt and power to remand into custody pending the contempt hearing

- 6.68 Do consultees think magistrates should have the power to adjourn the hearing for contempt beyond the rising of the court to the next business day? If so, should they have power to order that C be detained until that time but be required to review the alleged contemnor's bail position no later than the end of the court day; or should they have power to grant bail (conditional or unconditional) to C to attend the adjourned hearing but no power to remand C in custody?

[paragraph 5.112]