Law Commission

Consultation Paper No 209

CONTEMPT OF COURT

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

THE LAW COMMISSION

APPENDIX B: CONTEMPT OF COURT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

CONTENTS

	Paragraph	*Page*
GLOSSARY		vii
Introduction	B.1	1
Contempt by publication	B.4	1
Contempt by jurors	B.7	2
Contempt in the face of the court	B.10	2
ARTICLE 10: FREEDOM OF EXPRESSION		**3**
Introduction	B.12	3
The definition of "expression"	B.14	3
Political expression	B.20	5
Expression which shocks, offends or disturbs	B.23	5
Who exercises article 10 rights?	B.25	6
Interference	B.30	7
Article 10(2) justifications	B.34	8
A restriction prescribed by law	B.38	9
Strict liability contempt under section 2(2)	B.41	10
Intentional contempt by publication	B.43	11
Reporting restrictions under section 4(2) and section 11	B.45	11
The legitimate aims	B.51	12
Relevance to contempt	B.56	14

	Paragraph	*Page*
A restriction necessary in a democratic society within the margin of appreciation	B.60	15
Margin of appreciation	B.70	18
Contempt by publication	B.74	19
Contempt by publication under section 2(2)	B.74	19
The power to order the removal of material published before proceedings became active	B.87	21
Abuse of process and section 2(2)	B.100	24
The defence under section 5	B.107	26
Contempt by publication at common law	B.111	26
Evidence and procedure	B.114	27
Sanctions for contempt by publication	B.115	27
Juror contempt	B.117	27
Jurors disclosing information	B.117	27
Jurors seeking information	B.131	31
Contempt in the face of the court	B.135	32
ARTICLE 8: THE RIGHT TO PRIVACY		**35**
Introduction	B.145	35
Positive and negative rights	B.148	35
The content of article 8	B.152	36
Article 8(2) restrictions	B.155	37
Interference	B.157	37
Juror contempt	B.161	38
“In accordance with the law"	B.163	39
The legitimate aims	B.166	39
“Necessary in a democratic society” and the margin of appreciation	B.172	41
Contempt by publication	B.175	41
Juror contempt	B.178	42

	Paragraph	*Page*
ARTICLE 5: THE RIGHT TO LIBERTY		**44**
Introduction	B.181	44
"A procedure prescribed by law"	B.186	46
Article 5(1)(a): the lawful detention of a person after conviction by a competent court	B.187	46
Article 5(1)(b): the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law	B.189	47
Article 5(1)(c): the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so	B.191	47
Article 5(3)	B.194	48
Article 5(2)	B.199	50
Article 5(4)	B.202	50
Contempt by publication	B.207	51
Juror contempt	B.212	52
Contempt in the face of the court	B.215	53
ARTICLE 6: THE RIGHT TO A FAIR TRIAL		**55**
Introduction	B.219	55
The determination of civil rights and obligations	B.222	56
Any criminal charge	B.223	56
Is contempt criminal or civil for ECHR purposes?	B.235	59
Article 6(1)	B.241	60
"A fair and public hearing"	B.241	59
"Within a reasonable time"	B.244	61
"An independent and impartial tribunal established by law"	B.246	61
An independent and impartial jury	B.252	64
Article 6(1) implied rights	B.260	66

	Paragraph	*Page*
Article 6(2)	B.268	68
Contempt by publication	B.272	69
Juror contempt	B.279	70
Jurors seeking information	B.279	70
Jurors disclosing information	B.283	72
Contempt in the face of the court	B.286	73
Article 6(3): Minimum rights in criminal proceedings	B.289	74
"Be informed promptly … of the nature and cause of the accusation"	B.290	74
Adequate time and facilities to prepare a defence	B.291	74
To defend oneself in person or through legal assistance, free of charge if necessary	B.294	75
Examination of witnesses	B.296	76
Interpretation	B.301	77
Contempt by publication	B.302	77
Juror contempt	B.306	78
Contempt in the face of the court	B.311	79
ARTICLE 7: NO PUNISHMENT WITHOUT LAW		**81**
Introduction	B.315	79
Contempt by publication	B.322	82
Juror contempt	B.324	82
Contempt in the face of the court	B.326	83

GLOSSARY

This is a glossary of terms and abbreviations used in this consultation paper.

STATUTES

"the 1981 Act"	Contempt of Court Act 1981

REPORTS

The Phillimore report	Report of the Committee on Contempt of Court (1974) Cmnd 5794

BOOKS

Archbold	P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2012)
Blackstone's	Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2012)
Borrie and Lowe: The Law of Contempt	I Cram (ed), *Borrie and Lowe: The Law of Contempt* (4th ed 2010)
Arlidge, Eady and Smith on Contempt	D Eady and A T H Smith, *Arlidge, Eady and Smith on Contempt* (4th ed 2011)
Miller	C J Miller, *Contempt of Court* (3rd ed 2000)
Clayton and Tomlinson	R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009)

APPENDIX B
CONTEMPT OF COURT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

INTRODUCTION

B.1 The purpose of this appendix is to examine the compatibility of the current English law of contempt by publication, contempt involving jurors and contempt in the face of the court with the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR). The ECHR is applicable to UK law by virtue of the Human Rights Act 1998. In consequence, the compatibility of UK law with the Convention is justiciable in domestic courts and, ultimately, at the European Court of Human Rights (ECtHR). Article 1 of the ECHR provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention". This appendix will draw on existing ECHR case law to determine the extent to which the current domestic law is compatible with the ECHR and, if necessary, highlight how our proposed reforms would bring the law into compliance.[1]

B.2 The scope of this appendix focuses on the most relevant of the ECHR articles: 10, 8, 5, 6 and 7. It considers the jurisprudence interpreting each article and the impact that this case law has in so far as it is relevant to the three different areas of contempt which are the subject of the consultation paper. Whilst we explain in brief terms the law on contempt and our proposals to reform the law here, it is necessary to read this appendix in conjunction with the consultation paper which deals with matters in more detail. We have focused this appendix on areas of the law on contempt where there may be concerns or questions about ECHR-compatibility, rather than seeking to undertake a survey of the entire law.

B.3 We begin this appendix with a brief reminder of the law of contempt which we consider in the consultation paper.

CONTEMPT BY PUBLICATION

B.4 In brief, under section 2(2) of the Contempt of Court Act 1981, a publication which occurs when proceedings are active which creates a substantial risk of seriously prejudicing or impeding the course of justice in the proceedings is in contempt. It is immaterial whether the publisher was aware of the risk, hence section 2 is also known as strict liability contempt. Section 5 of the 1981 Act provides an exception to section 2 where the publication contains "a discussion in good faith of … matters of general public interest" where "the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion". At common law, it is also a contempt to publish material intending to impede or prejudice proceedings even if they are not active.

B.5 Additionally, under section 4(2) of the 1981 Act, a court has the power to order the postponement of any report of proceedings "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice". This is

[1] It should be noted that whilst this appendix draws on existing jurisprudence, by virtue of art 46 of the ECHR, judgments in cases before the court are binding only between the parties. Nonetheless, the court's body of case law is illustrative of the approach that the domestic law should take in order to be ECHR compliant.

coupled with a power under section 11 to give "directions prohibiting the publication" of any matter which was "withheld from the public" during the proceedings.

B.6 Contempt by publication is currently usually tried before the Divisional Court using a civil procedure, and is subject to penalties of a fine or imprisonment.

CONTEMPT BY JURORS

B.7 There are two types of contempt that can be committed by jurors. First, at common law, jurors who deliberately and knowingly disobey the direction of the judge not to undertake research on the internet about the case that they are trying are in contempt of court, following the case of *Dallas*.[2] Secondly, under section 8 of the 1981 Act, "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", subject to certain statutory exceptions. At common law, evidence of a jury's deliberations is in any event inadmissible, subject to certain exceptions where either "the jury as a whole declined to deliberate at all" or where it is said that the jury has been affected by "extraneous influences".[3]

B.8 Contempt by jurors is currently tried before the Divisional Court using a civil procedure, and is subject to penalties of a fine or imprisonment.

B.9 Chapter 4 considers various measures which seek to dissuade jurors from undertaking research about the case that they are trying, in order to protect against the risk that a jury will base its verdict on inadmissible evidence and/or become biased by material discovered during the research.

CONTEMPT IN THE FACE OF THE COURT

B.10 Contempt in the face of the court involves "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".[4] Most commonly, although certainly not always, such conduct will involve abusive or disruptive behaviour in the courtroom. In the Crown Court, this is a contempt at common law. In the magistrates' court, it is a contempt under section 12 of the 1981 Act to wilfully insult "the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court" or to wilfully interrupt the proceedings or otherwise misbehave.

B.11 Contempt in the face of the court may be dealt with by the court on its own motion, although there is a lack of clarity about the rules of evidence and procedure, and the position in relation to bail, if the court does this. Contempt in the face of the court is subject to penalties of a fine or imprisonment, although the maximum penalties vary between the magistrates' and Crown Court.

[2] [2012] EWHC 156 (Admin), [2012] 1 WLR 991.

[3] *Smith* [2005] UKHL 12, [2005] 1 WLR 704 at [16].

[4] *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153 at [29], relying on *HM Advocate v Airs* (1975) JC 64, 1975 SLT 177.

ARTICLE 10: FREEDOM OF EXPRESSION

INTRODUCTION

B.12 The ECHR provision with the most obvious relevance to the law of contempt is article 10. We consider here the notion of freedom of expression, who has the right to express themselves and what amounts to an interference with the right, all within the context of the law on contempt by publication, contempt by jurors and contempt in the face of the court. This section then considers the ECHR jurisprudence in relation to the exceptions to freedom of expression, which require that any interference with the right must be prescribed by law (in relation to which we consider various aspects of contempt by publication). We also consider the relevant legitimate aims that any interference must seek to achieve. This section then examines the question of whether the interference is necessary in a democratic society and proportionate (which requires consideration of various aspects of contempt by publication, contempt by jurors and contempt in the face of the court).

B.13 Article 10 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. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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.

The definition of "expression"

B.14 The ECtHR has held in numerous cases that the concept of freedom of expression encapsulated in article 10(1) includes the right to impart information to others in almost all forms. Indeed, as Lester, Pannick and Herberg emphasises:

> In adopting a broad and purposive definition of protected speech, the Strasbourg Court has held that speech through almost every known expressive medium, and with almost any content falls within the scope of article 10 … . Article 10 protects not only the substance of ideas or information expressed, but also the tone or manner in which they are conveyed.[5]

[5] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8 (footnotes omitted). See also Clayton and Tomlinson para 15.241.

B.15 This is an expansive definition.[6] The protection of expression is generally not limited by the content of such expression,[7] meaning that article 10 covers both facts and opinions.[8] In addition, the ECtHR has held that websites and postings on internet forums amount to expression under article 10.[9] It is uncontroversial to speculate that this would also apply to the myriad of other forms of new media communication, such as Facebook or Twitter.

B.16 Additionally, article 10 is not limited to imparting information. It has been held to cover the right to receive information,[10] for example, the right of the public to be informed by the press of matters of important public interest. However, this right to receive information does not extend as far as a positive obligation on the state to provide information or access to it.[11]

B.17 As we explain in Chapter 3, the definition of "publication" for the purposes of strict liability contempt under the 1981 Act is "any speech, writing, programme included in a cable programme service or other communication in whatever form".[12] In light of the expansive definition of expression above, and its application to the new media, it seems clear that anything which constitutes a "publication" for the purposes of strict liability contempt will fall within the ambit of article 10. Likewise, it seems clear that a contempt by publication at common law which could arise in respect of either public or private communications will also fall within the ambit of article 10.[13]

B.18 As we have explained above, the 1981 Act also includes a power under section 4(2) to postpone "the publication of any report of the proceedings, or any part of the proceedings"[14] and under section 11 to give "directions prohibiting the publication" of certain matters.[15] Again, such publications would evidently fall within article 10.

6 See also *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94) at [92] and *H and K v UK* App No 10317/83 (Commission decision).

7 With perhaps the exception of hate speech, to which art 17 would apply: Clayton and Tomlinson para 15.244. See para B.37 below.

8 Clayton and Tomlinson paras 15.247 to 15.248.

9 *Fatullayev v Azerbaijan* (2011) 52 EHRR 2 (App No 40984/07); *Mosley v UK* (2011) 53 EHRR 30 (App No 48009/08); *Times Newspapers Ltd v UK* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03). See also A Merris, "Can We Speak Freely Now? Freedom of Expression under the Human Rights Act" [2002] *European Human Rights Law Review* 750, 751.

10 See, eg, *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74); *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [50]; *Worm v Austria* (1998) 25 EHRR 454 (App No 22714/93) ("*Worm*") at [50].

11 See, eg, *Leander v Sweden* (1987) 9 EHRR 433 (App No 9248/81) at [74]; *Guerra v Italy* (1998) 26 EHRR 357 (App No 14967/89) at [53]. Some rights of access to information have been held to exist under art 8, but not art 10: see Clayton and Tomlinson para 15.249.

12 1981 Act, s 2(1). See Ch 3 at para 3.5.

13 See Ch 2 at para 2.61.

14 See Ch 2 at para 2.82 and following.

15 See Ch 2 at para 2.92 and following.

B.19 The disclosure of jury deliberations in breach of section 8 of the 1981 Act has been held to engage article 10.[16] The prohibition on jurors undertaking research about the case that they are trying may also engage article 10 as it restricts the juror's right to receive information.

Political expression

B.20 The ECtHR has also developed different categories of expression, although the only category which is relevant for present purposes is that of political expression.[17] This type of expression has not been limited to overtly political issues (the behaviour of politicians, for example) but also held to cover communication on other serious matters of public concern, such as the conduct of police officers[18] or allegations of bias against a court.[19]

B.21 Political expression is especially prized in the jurisprudence of the court[20] and in consequence, interferences with this type of expression will be subject to more serious scrutiny and will require stronger justification to be ECHR compliant. In cases of political expression, a narrow margin of appreciation may be applied by the court in assessing the proportionality of any interference.[21]

B.22 Political expression is obviously of particular significance for contempt by publication because it is highly likely that reporting on matters which are relevant to or occur during court proceedings could amount to political expression. Indeed, imparting information to the public, and the public's right to receive information, about the operation of the courts, civil and criminal justice policy, and the like, are clearly serious matters of public concern.[22] Likewise, depending on the circumstances and the content of the disclosure, a breach of section 8 by a juror could amount to political expression.

Expression which shocks, offends or disturbs

B.23 Article 10 has also been held to cover expression which shocks, offends or disturbs others.[23] As Lester, Pannick and Herberg explains, the importance of freedom of expression in a liberal democracy "demands that speech which would

[16] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [35].

[17] The court has also recognised artistic expression and commercial expression as particular categories of expression: see Clayton and Tomlinson para 15.287 and following.

[18] *Thorgeirson v Iceland* (1992) 14 EHRR 843 (App No 13778/88).

[19] *Barfod v Denmark* (1991) 13 EHRR 493 (App No 11508/85). See also I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 269.

[20] *Thorgeirson v Iceland* (1992) 14 EHRR 843 (App No 13778/88). See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.10.

[21] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 51; although Fenwick and Phillipson also argue that when it risks the right to a fair trial, the importance of that right outweighs the value afforded to political expression: p 192. See para B.72 below.

[22] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 167 to 175.

[23] *Žugić v Croatia* App No 3699/08 at [40]; *Prager v Austria* (1995) 21 EHRR 1 (App No 15974/90) at [38]; *Thorgeirson v Iceland* (1992) 14 EHRR 843 (App No 13778/88) at [63].

be regarded as unpopular or offensive fall within article 10".[24] The ECtHR jurisprudence has also drawn a clear distinction between criticism and insult.[25] Insult evidently goes beyond expression which *merely* shocks, offends or disturbs and therefore may, in principle, be punished without an unjustified interference with article 10, although the punishment must still be proportionate to the circumstances of the case.[26]

B.24 Some aspects of contempt in the face of the court may amount to instances of expression, where, for example, the alleged contemnor shouts at the judge or distributes leaflets.[27] Punishing contempt in the face of the court may in principle be justified where such conduct is insulting, but this may not necessarily be the case where the expression merely shocks, offends or disturbs.

Who exercises article 10 rights?

B.25 The rights contained within article 10 are capable of being exercised by "everyone" and this means natural and legal persons.[28] This has been held to include newspapers, television broadcasters and internet service providers.[29] It is therefore obvious that, for the purposes of contempt, individual people can exercise article 10 rights, whether they are jurors, tweeters, writers, or contemnors in the face of the court. Likewise, corporate entities which may be affected by contempt laws, such as the conventional and new media and the entities which facilitate the use of the internet such as internet service providers[30] may all exercise article 10 rights.

B.26 There is much discussion in the ECHR jurisprudence on the role and function of the free conventional press[31] in a democratic society.[32] The court has emphasised the media's "vital role of public watchdog",[33] highlighting that it has an important function in holding to account public bodies, including politicians and the judiciary.

[24] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8.

[25] *Skałka v Poland* (2004) 38 EHRR 1 (App No 43425/98).

[26] *Skałka v Poland* (2004) 38 EHRR 1 (App No 43425/98) at [34] and [39] to [42].

[27] See Ch 5 at para 5.5.

[28] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.8.

[29] *Autronic AG v Switzerland* (1990) 12 EHRR 485 (App No 12726/87) at [47] and *Casado Coca v Spain* (1994) 18 EHRR 1 (App No 15450/89) at [35]; *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74); and *Radio France v France* (2005) 40 EHRR 29 (App No 53984/00).

[30] We refer to them as "intermediaries". See Ch 3 at para 3.35.

[31] Although, of course, the application of the law of contempt by publication is not limited to the conventional press.

[32] Clayton and Tomlinson para 15.253; A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) paras 4.10.4 and 4.10.10.

[33] *Observer v UK* (1992) 14 EHRR 153 (App No 13585/88) at [59]. See also *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) at [31] and Clayton and Tomlinson para 15.311 and following.

B.27 As Fenwick and Phillipson have explained:

> The underlying aims of the exercise of media freedom and of the administration of justice are in many respects in harmony … . Free speech serves the ends of justice since it plays an informing and scrutinizing role. The exercise of both roles by the media is generally viewed as enhancing the moral authority of the justice system. Restrictions on reporting aimed at ensuring the fairness of court hearings are intended to secure the integrity of the criminal or civil justice system, but the legal significance attached to the principle of open justice is also aimed at ensuring such integrity, and a key reason for insisting upon open justice is to allow for media scrutiny of the workings of the justice system.[34]

B.28 The corollary of the important role of the press in a democratic society is that the exercise of article 10 rights carries with it "duties and responsibilities", as the wording of the article explains. In the case law of the ECtHR, the idea of "duties and responsibilities" has been employed with particular reference to corporate media organisations,[35] rather than individuals.

B.29 These concepts of both media freedom and the media's "duties and responsibilities" have obvious relevance for contempt by publication.[36]

Interference

B.30 Does the law on contempt of court interfere with the right to freedom of expression? Clayton and Tomlinson explain that anything that "impedes, sanctions, restricts or deters expression constitutes an interference".[37] This obviously also includes various forms of restraint prior to publication.[38] The ECtHR has found that such prior restraints require particularly close scrutiny because "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[39] If reporting of news is delayed it may well mean that the right protected under article 10(1) has been rendered worthless because there is no longer a purpose in exercising such a right.

[34] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 167 to 168. This idea was captured by the ECtHR in *Axen v Germany* (1984) 6 EHRR 195 (App No 8273/78) at [25]. Consider also the discussion in I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 252 and following.

[35] *Lindon v France* (2008) 46 EHRR 35 (App Nos 21279/02 and 36448/02) (Grand Chamber decision) at [67]; *Jersild v Denmark* (1995) 19 EHRR 1 (App No 15890/89) at [31].

[36] Although explanations of what these "duties and responsibilities" consist of in practice are illusive in the case law: see Clayton and Tomlinson paras 15.279 to 15.280.

[37] Clayton and Tomlinson para 15.267; see also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.17.

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

[39] *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [70]. See also I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 257 to 258 and H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 200 to 201.

B.31 Sanctions imposed after a publication has occurred also amount to interferences with article 10, even where they do not involve a criminal conviction or a financial penalty.[40]

B.32 It is obvious from Clayton and Tomlinson's quoted explanation that the restrictions in the 1981 Act in respect of section 2(2) (prejudicial/impeding publications), section 4(2) (postponing reports of court proceedings), section 11 (prohibiting reports of matters withheld from the court) and section 8 (prohibiting the disclosure of jury deliberations) will amount to interferences with article 10 rights. The prohibition on jurors undertaking research about the case that they are trying could also amount to an interference with article 10 as it limits the juror's right to receive information.

B.33 In Chapter 3 of the consultation paper, we propose to empower judges to order the temporary removal of material on the internet which was first published before proceedings became active. Such publications, under our proposal, would not automatically be caught by section 2(2) of the 1981 Act, and such order could only be made if necessary to avoid prejudicing or impeding the now active proceedings. The making of such an order will clearly amount to an interference with article 10.[41] Likewise, a finding that a person is in contempt in the face of the court will amount to an interference where the conduct in question was a form of expression.[42]

ARTICLE 10(2) JUSTIFICATIONS

B.34 Whether a restriction on the right contained within article 10 can be justified depends on whether it comes within the terms of article 10(2). The *Sunday Times* case[43] explained that the test is as follows:

a) Is the restriction prescribed by law?

b) Does it have a legitimate aim?

c) Is it necessary in a democratic society?

d) Is it within the margin of appreciation?[44]

B.35 An interference which cannot be justified under this test will not be ECHR compliant. We consider each stage of the test below, whilst also considering the relevance of each stage to various aspects of the law on contempt.

B.36 In addition, it is necessary to consider the role of article 17 in relation to freedom of expression. Article 17 provides that:

> Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

[40] Clayton and Tomlinson paras 15.270 and 15.271.

[41] See Ch 3 at para 3.75.

[42] See para B.24 above.

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

[44] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74). See also A Nicol, G Millar and A Sharland, *Media Law and Human Rights* (2nd ed 2009) para 2.35 and following.

B.37 Article 17 justifies the state imposing restrictions on freedom of expression where such expression aims to destroy the rights of others. It has been used, in particular, in relation to hate speech involving racism and holocaust denial.[45] We consider, below, its relevance to certain types of contempt by publication. However, it should be noted at this stage that invoking article 17 requires "strict scrutiny"[46] and should be a "last resort".[47]

A restriction prescribed by law

B.38 We consider now whether the law on contempt of court is a restriction on article 10 that is "prescribed by law". This requirement under article 10 is very similar to the requirement that a restriction be "in accordance with the law" under article 8.[48] The ECtHR has held that, once it is established that a particular restriction has a basis in domestic law:

> In the court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[49]

B.39 Thus, the law must be adequately accessible and formulated in a manner which is foreseeable, although absolute precision is not necessary.[50] In the recent case of *Sanoma Uitgevers BV v The Netherlands*,[51] the ECtHR stated:

> For domestic law to meet these requirements [of adequate accessibility and foreseeability] it must afford a measure of legal

[45] See Clayton and Tomlinson para 6.197 and following.

[46] *Lehideux v France* (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision) at [4] of the concurring opinion of Judge Jambrek.

[47] J Cooper and A Marshall Williams, "Hate Speech, Holocaust Denial and International Human Rights Law" [1999] *European Human Rights Law Review* 593, 605. See also Clayton and Tomlinson para 6.200.

[48] See para B.163 and following below.

[49] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [49]. See also *Gaweda v Poland* (2004) 39 EHRR 4 (App No 26229/95) at [39].

[50] See *Grigoriades v Greece* (1999) 27 EHRR 464 (App No 24348/94) at [37]; *Raichinov v Bulgaria* (2008) 46 EHRR 28 (App No 47579/99) at [44]; *Amihalachioaie v Moldova* (2005) 40 EHRR 35 (App No 60115/00) at [33]; *Worm* at [38]; and *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94) at [94].

[51] [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision).

> protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise … .
>
> Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in articles 8 to 11 of the Convention, the court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made 'law'. In sum, the "law" is the provision in force as the competent courts have interpreted it.[52]

B.40 Additionally, the court found that there must be "legal procedural safeguards commensurate with the importance of the principle at stake".[53] In other cases, the court has held that this includes a duty to give reasons for decisions made in respect of interpreting the law.[54]

Strict liability contempt under section 2(2)

B.41 There are various aspects of the law on contempt which require consideration of whether they are prescribed by law. First, in relation to strict liability contempt, questions have been raised about whether the current law can be said to be foreseeable. Section 2(2) provides 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.

B.42 Whilst the wording of this provision and the case law interpreting it are reasonably clear, it is notable that there is no published policy by which the Attorney General – who is responsible for bringing contempt proceedings under section 2(2) – decides whether or not to pursue such proceedings.[55] It may also be of relevance that the decision of the Attorney General not to bring proceedings for contempt by publication is not judicially reviewable and there is no duty on the

[52] *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [82] to [83].

[53] *Sanoma Uitgevers BV v The Netherlands* [2011] Entertainment and Media Law Reports 4 (App No 38224/03) (Grand Chamber decision) at [88].

[54] *Glas Nadezhda EOOD v Bulgaria* (2009) 48 EHRR 35 (App No 14134/02) at [50] to [53]. Although Clayton and Tomlinson have argued that the requirement to give reasons is more properly an aspect of "necessary in a democratic society" than foreseeability: Clayton and Tomlinson para 15.304.

[55] Consider, by comparison, the prosecution guidance issued by the CPS in relation to assisted suicide following the case of *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345.

Attorney to give reasons for the decision not to bring proceedings.[56] This may call into question the ability of publishers to foresee the likely result of any particular course of conduct.[57] In the consultation paper, we seek to address this issue by asking consultees whether the Attorney General should publish a list of factors relevant to the decision to bring proceedings for contempt.[58]

Intentional contempt by publication

B.43 With regard to common law contempt by publication, there may also be concerns about the extent to which the current law is accessible and reasonably foreseeable, given the lack of clarity about the elements of the offence, which we explain in Chapter 2. In particular, there are ambiguities in the law about the necessary mental element of the contempt. Arlidge, Eady and Smith also explains that intentional contempt by publication can apply to proceedings which are "imminent" in that they are "virtually certain to take place" but have not yet begun.[59] However, it is unclear how a publisher is supposed to know whether proceedings are "imminent" and, indeed, how "imminent" they have to be if they have in fact not yet been commenced. Likewise, it is unclear whether intentional contempt can apply to proceedings which are said to be "on the cards" but not (yet) "virtually certain" to happen.[60] Again, how the publisher is supposed to know that proceedings are "on the cards", and what preliminary steps prior to the commencement of proceedings would be sufficient for them to be deemed "on the cards", may be uncertain.

B.44 This issue may not be hugely significant in respect of the day-to-day practice of the media because prosecutions for intentional contempt by publication are exceptionally rare. However, there may be concerns nonetheless that the lack of clarity in the law means it may not be an interference with freedom of expression "prescribed by law" for the purposes of article 10. It is for this reason that we ask consultees whether the common law of contempt by publication should be clarified in statute.

Reporting restrictions under section 4(2) and section 11

B.45 Reporting restrictions under section 4(2) and section 11 are also interferences with article 10 which need to be "prescribed by law" to be ECHR compliant. The position with regards to section 4(2) orders may also be problematic. As we explain in Chapter 2, section 4(2) empowers a court to order the postponement of reporting of court proceedings "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".

B.46 Concerns have been raised about the difficulties encountered by publishers in obtaining information about whether such a court order has been made and if so, in what terms (unless the publisher is present in court when the order is made). It seems possible that the current lack of procedures for notifying publishers of the

[56] *R v Solicitor-General ex p Taylor* [1996] Crown Office Digest 61.

[57] See Ch 2 at para 2.61.

[58] See Ch 2 at para 2.63.

[59] Arlidge, Eady and Smith on Contempt para 5-12; *A-G v News Group Newspapers Ltd* [1989] QB 110, 135; and *A-G v Sport Newspapers Ltd* [1991] 1 WLR 1194. See also J N Spencer, "Caught in Contempt of Court" (1992) 56 *Journal of Criminal Law* 73.

[60] Arlidge, Eady and Smith on Contempt para 5-12.

existence of section 4(2) orders may be in breach of the requirement that the law be adequately accessible and foreseeable in some cases. Imposing liability on publishers in circumstances where it is difficult for them to ascertain whether publication has been prohibited risks breaching article 10. This is a very real risk given that the relevant Practice Direction states that there is a duty on editors to check whether an order has been made and in what terms.[61] In the consultation paper, we propose introducing an online scheme listing all section 4(2) orders and notifying interested parties about such orders in order to remedy this potential lack of foreseeability.

B.47 In our informal preliminary consultations, stakeholders also raised concerns that section 11 may pose problems for the compatibility of the law with article 10 because, as with section 4(2) orders, publishers may have difficulty in determining whether a section 11 order has been made, and if so, in what terms (unless they were in court to witness its making).

B.48 Section 11 provides that:

> 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.

B.49 Section 11 orders are quite different from section 4(2) orders. With a section 11 order, the mere dissemination of the terms of the order is likely to publicise the very matter that the order was intended to protect. For example, if the name of a blackmail victim is withheld from the court, the wide publicity of a section 11 order which provides that "blackmail complainant John Smith shall not be named" undermines the very reason for making the order in the first place. A section 4(2) order is generally designed to prevent a current or future jury from discovering certain information before the current or future proceedings have been completed (for example, to prevent the jury from knowing that the defendant faces other charges in other proceedings). By contrast, section 11 orders are, by their very nature, designed to prevent the public at large from knowing certain information, not merely the jury. For that reason section 11 orders have been excluded from our proposal for an online list of orders.

B.50 There is a potential difficulty with the threat of imposing liability for the breach of a section 11 order if a publisher cannot discover the existence or terms of the order. However, the mental element for breach of a section 11 order is that the conduct was "specifically intended to impede or prejudice the administration of justice".[62] In light of this, it is difficult to imagine how a publisher could be held liable without knowing of the existence and content of the order, since they would be unlikely to be able to form such intention. In consequence, we consider this aspect of the law to be sufficiently "prescribed by law" to be article 10 compliant.

The legitimate aims

B.51 In addition to being "prescribed by law", the restrictions on article 10 imposed by the law on contempt must be for "legitimate aims". Of the various legitimate aims

[61] *Practice Direction (Contempt: Reporting Restrictions)* [1982] 1 WLR 1475.

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

listed under article 10(2), the most relevant for contempt are that of maintaining the authority and impartiality of the judiciary, and the aim of protecting the reputation or rights of others.[63]

B.52 The concept of maintaining the authority and impartiality of the judiciary has been interpreted fairly broadly by the ECtHR. "Judiciary" has been held to include "the machinery of justice or the judicial branch of government as well as judges in their official capacity".[64] It seems this would also include lay jurors.[65] The issue is not the protection of individual judges from criticism, but the protection of the justice system.[66] The ECtHR has found that, in criminal cases, there is a threat to impartiality where the judicial body could be influenced by external factors when determining the guilt or innocence of the accused.

B.53 Thus, in *Worm v Austria*[67] it was held that:

> The court has consistently held that the expression "authority and impartiality of the judiciary" has to be understood "within the meaning of the Convention". For this purpose, account must be taken of the central position occupied in this context by article 6 which reflects the fundamental principle of the rule of law.
>
> The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.
>
> "Impartiality" normally denotes lack of prejudice or bias. However, the court has repeatedly held that what is at stake in maintaining the impartiality of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large.
>
> It follows that, in seeking to maintain the "authority and impartiality of the judiciary", the Contracting States are entitled to take account of considerations going — beyond the concrete case — to the protection of the fundamental role of courts in a democratic society.[68]

B.54 The court has also found that the protection of fair trial rights comes within the concept of the "protection of the reputation or rights of others". In *News Verlags v*

[63] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 182 to 194. On the relationship between arts 6 and 10 consider J J Spigelman AC, "The Principle of Open Justice: A Comparative Perspective" (2006) 29(2) *University of New South Wales Law Journal* 147, 158 and following.

[64] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [55].

[65] See, by way of comparison, *X v Norway* App No 3444/67 (Commission decision) which considered that the impartiality of a jury was relevant to art 6.

[66] *Sunday Times v UK (No 1)* (1979) 2 EHRR 245 (App No 6538/74) at [55].

[67] *Worm*.

[68] *Worm* at [40] (footnotes omitted).

Austria,[69] a magazine was fined for publishing a photograph of a suspected letter bomber, in breach of a court order prohibiting publication. The ECtHR accepted that the purpose of the injunction was to protect the suspect's entitlement to the presumption of innocence, and, therefore, it was within the scope of the legitimate aims of maintaining the authority and impartiality of the judiciary and protecting the reputation or rights of others.[70]

B.55 In *Channel Four v United Kingdom*[71] the broadcaster was prohibited from showing a staged reconstruction of a criminal appeal in anticipation of the judgment being delivered. The European Commission found that this prohibition was justifiable on the grounds of protecting article 6 rights, and the public interest in protecting the reputation of the appeal court from any perception that the judges might have been unduly influenced by the televised reconstruction. Indeed, the state may have an obligation to impose restrictions on freedom of expression in order to protect article 6 rights.[72]

Relevance to contempt

B.56 The law on contempt by publication under section 2 and section 4(2) of the 1981 Act, and at common law, is clearly intended to protect the authority and impartiality of the judiciary and the fair trial rights of others.[73] Such legitimate aims may also be relevant to section 11 orders.[74] Upholding the authority and impartiality of the judiciary and the fair trial rights of others is also applicable to juror contempts. The justifications for section 8 include the importance of the finality of the jury's verdict and ensuring that jurors can reach a decision without fear of ridicule or recrimination, which fall under these legitimate aims.[75] Likewise, the contempt involving jurors undertaking research about the case that they are trying is clearly designed to protect the authority and impartiality of the judiciary and the fair trial rights of others.

B.57 Additionally, upholding the authority and impartiality of the judiciary is of obvious relevance to the law on contempt in the face of the court because, as Lord Justice Salmon has 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".[76] Protecting the right to a fair trial of the parties in court proceedings could also be said to be relevant to contempt in the face of the court given that the law seeks to prevent such proceedings from being disturbed, and to protect the parties' access to justice.

[69] *News Verlags v Austria* (2001) 31 EHRR 8 (App No 31457/96).

[70] *News Verlags v Austria* (2001) 31 EHRR 8 (App No 31457/96) at [45]. But the Court also found that the prohibition was disproportionate. See para B.66 below.

[71] *Channel Four v UK* (1988) 10 EHRR CD503 (App No 11658/85) (Commission decision).

[72] *Observer v UK* (1992) 14 EHRR 153 (App No 13585/88) at [61]. See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.40.

[73] Although see the discussion of these issues in H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 246 and following.

[74] See also, in relation to art 8, para B.175 below.

[75] See Ch 4 at para 4.55.

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

B.58 The legitimate aim of preventing disorder or crime may also be relevant to contempt. The prevention of crime appears to have been quite strictly construed in the ECtHR case law in relation to article 10 so that it relates to specific criminal offences,[77] unlike in relation to article 8 where the court has held that the prevention of crime extends to the wider operation of the criminal justice system.[78] This legitimate aim of preventing disorder or crime has obvious relevance to contempt in the face of the court, where certain forms of expression may need to be punished (such as abusing a defendant or a judge) in order to prevent disruption to the proceedings, to prevent the disorder from spreading or where such conduct is in and of itself criminal (such as threatening to kill one of the parties to the proceedings).

B.59 Finally, the legitimate aim of preventing the disclosure of information received in confidence may also have relevance to contempt, given the prohibition on the disclosure of jury deliberations. Section 8 of the 1981 Act imposes on jurors a duty of confidence which falls within the ambit of this legitimate aim.[79]

A restriction necessary in a democratic society within the margin of appreciation

B.60 The interference with article 10 by the law on contempt of court must be "necessary" within the meaning of that term under the ECHR. This requirement has relevance for both articles 8 and 10. What is written here should, therefore, also be taken into consideration in respect of article 8.[80] Clayton and Tomlinson explains that the court is required to consider three things in addressing whether an interference is necessary in a democratic society:

> Whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under Article 10(2).[81]

This assessment goes to the heart of the protection of article 10 as a qualified right.[82]

B.61 In *Worm v Austria*, W, a journalist, wrote an article during the trial of a high profile defendant (D) which was highly critical of D and stated, in essence, that he was guilty as charged. W was subsequently prosecuted by the Austrian authorities for the offence of "having exercised prohibited influence on criminal proceedings",[83] an offence akin to contempt by publication in England. W was convicted and fined, along with the publisher.

[77] See the summary in Clayton and Tomlinson para 15.368.

[78] For example, in *Z v Finland* (1998) 25 EHRR 371 (App No 2209/93). See below at para B.167.

[79] See para B.117 and following below.

[80] See paras B.172 to B.174 below.

[81] Clayton and Tomlinson para 15.306. See also I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 258 and *Sunday Times UK* (1979) 2 EHRR 245 (App No 6538/74) at [59].

[82] Rather than an absolute right. A qualified right is one that can be subject to limitations, such as under art 10(2).

[83] *Worm* at [11].

B.62 Before the ECtHR, the issue in dispute was the extent to which W's conviction was necessary in a democratic society. The court recalled that:

> Freedom of expression constitutes one of the essential foundations of a democratic society and … the safeguards to be afforded to the press are of particular importance.
>
> As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under article 10(2), whether the restriction was proportionate to the legitimate aim pursued.[84]

B.63 Furthermore, protecting the legitimate aim of maintaining the authority and impartiality of the judiciary does

> not entitle states to restrict all forms of public discussion on matters pending before the courts … . Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment on court proceedings, contributes to their publicity and is thus perfectly consonant with the requirement under article 6(1) of the Convention that hearings be public.[85]

B.64 The court drew attention to the fact that everyone is entitled to a fair trial:

> This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.[86]

[84] *Worm* at [47] (footnotes omitted). The *Sunday Times* case also held that the art 10(2) exceptions should be narrow in interpretation and strictly construed, because of the particular importance of the rights of the press in a democratic society: *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [65].

[85] *Worm* at [50].

[86] *Worm* at [50].

B.65 Similarly, in *Pedersen v Denmark*,[87] the court observed that:

> Protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism. Under the terms of para 2 of article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". ... Also of relevance for the balancing of competing interests which the court must carry out is the fact that under article 6(2) of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty.[88]

B.66 Likewise, in *News Verlags v Austria*,[89] the court held that the press has a duty to impart information to the public (within reasonable bounds), including in respect of court reporting, but that this had to be balanced against the competing interest of the presumption of innocence.[90] In that case, the absolute prohibition on publishing photographs identifying a particular suspect was in excess of what was necessary to protect the defendant's rights, and, therefore, disproportionate.

B.67 Other cases have established that the fact that the interference with article 10(1) results in a criminal conviction rather than a civil or disciplinary penalty is relevant to assessing the proportionality of the measure,[91] and that the stigma of criminal conviction weighs heavily in the proportionality assessment.[92]

B.68 It has also been held in *Brown v United Kingdom*[93] that holding a publisher liable for the content of a publication, even where the publisher does not exercise editorial control, is a legitimate means of protecting the rights of others. On the facts of *Brown*, the conviction and fine of the publisher for unlawfully publishing the name of a rape complainant was proportionate.

B.69 Thus, it appears that in assessing the proportionality of an interference with article 10(1), the court will consider all the aspects of the case before it, including the applicant's role, status and interest, the general public interest, and the interests of any other parties affected by the interference, such as defendants who face prejudicial publicity.

87 *Pedersen v Denmark* (2006) 42 EHRR 24 (App No 49017/99) (Grand Chamber decision).

88 *Pedersen v Denmark* (2006) 42 EHRR 24 (App No 49017/99) (Grand Chamber decision) at [78] (footnotes omitted).

89 *News Verlags v Austria* (2001) 31 EHRR 8 (App No 31457/96).

90 Under art 6(2). See paras B.268 to B.271 below.

91 *Raichinov v Bulgaria* (2008) 46 EHRR 28 (App No 47579/99) and *Amihalachioaie v Moldova* (2005) 40 EHRR 35 (App No 60115/00).

92 *Lehideux v France* (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision) at [57].

93 (2002) 35 EHRR CD 197 (App No 52770/99) (admissibility).

Margin of appreciation

B.70 The margin of appreciation is the doctrine which allows "latitude" to states in performing their obligations under the Convention.[94] It encompasses both "an interpretative *obligation* to respect domestic cultural traditions and values when considering the meaning and scope of human rights"[95] and

> a *standard of judicial review* to be used when enforcing human rights protection; with the margin of appreciation entailing the idea that national authorities are generally in a better position than a supervisory court to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual.[96]

B.71 The "width" of the margin of appreciation varies depending on the issues at stake in any particular proceedings. The factors which determine the width of the margin may include the nature and significance of the right in question; the nature of the exercise of the right and the degree of interference by the state; whether matters of general social or economic policy are in play; the degree of consensus within the state signatories to the Convention; and the manner in which the state justifies its interference.[97] The margin of appreciation is, therefore, closely related to the proportionality assessment. It has been argued that, where a wide margin of appreciation is upheld, the court will approach proportionality in less rigorous terms.[98]

B.72 Under article 10, the width of the margin of appreciation depends on "the 'type' of expression involved and on the extent to which there is common ground between different Member States".[99] Political expression is likely to be given a narrow margin of appreciation[100] and therefore a state's interference will be more closely circumscribed. However, it has been argued that where article 6 is imperilled by the expression, the margin of appreciation will be curtailed because article 6 takes precedence.[101] The margin of appreciation enjoyed by the state also varies depending on the legitimate aim the interference seeks to protect.[102] Where the justification for the interference with freedom of expression is to pursue the legitimate aim of maintaining the authority and impartiality of the judiciary, there

[94] Clayton and Tomlinson para 6.42. On account of its role in delineating the relationship between the ECtHR and the national authorities, the margin has no direct application in domestic case law: *R v DPP ex p Kebilene* [2000] 2 AC 326, 380 to 381.

[95] Clayton and Tomlinson para 6.45 (emphasis in original).

[96] Clayton and Tomlinson para 6.45 (emphasis in original).

[97] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 72 to 81.

[98] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 49 and following.

[99] Clayton and Tomlinson para 15.308.

[100] *Wingrove v UK* (1997) 24 EHRR 1 (App No 17419/90) at [58] and *Bowman v UK* (1998) 26 EHRR 1 (App No 24839/94) (Grand Chamber decision). See also H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 50 to 51.

[101] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 192 to 194.

[102] *Worm* at [49].

will be a narrow margin of appreciation because there is a "substantial measure of common ground"[103] on the issue between the member states.

B.73 We now turn to consider the application of this Strasbourg case law to the areas of the English law on contempt which we consider in our consultation paper.

CONTEMPT BY PUBLICATION

Contempt by publication under section 2(2)

B.74 In *Worm v Austria,* where the interference was a conviction under an Austrian law similar to section 2(2), the ECtHR explained that the domestic court had had to consider whether W's article was "objectively capable of influencing the outcome of the proceedings pending at the material time".[104] The domestic court had found that the risk that members of the defendant's (D) tribunal, including lay members, would have read the article could not be excluded. W had also pointed to the guilt of the defendant.

B.75 The ECtHR went on to conclude that,

> the fact that domestic law as interpreted by the … [domestic court] did not require an actual result of influence on the particular proceedings to be proved does not detract from the justification for the interference on the ground of protecting the authority of the judiciary.[105]

B.76 The ECtHR found that the conviction was proportionate, as was the sanction, because of the amount of the fine and the fact that the publisher was jointly and severally liable for it.[106] Therefore, article 10 had not been violated because the right to freedom of expression did not outweigh the adverse consequences of the publication to the authority and impartiality of the judiciary.

B.77 It is also notable that *Worm v Austria* held the conviction to have been ECHR compatible even though the law did not require *intention* to prejudice the proceedings to be demonstrated.[107]

B.78 It is difficult to assess in the abstract the proportionality of the law on strict liability contempt by publication generally. It is noteworthy that, in order for a publisher to be liable for strict liability contempt under section 2(2), a combination of factors – including that there be a publication to a section of the public (not a private communication),[108] that proceedings be active (and there is a clear and limited window for this active period)[109] and that there be a substantial risk of serious

[103] *Worm* at [49]; *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [59]. See also I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 257.

[104] *Worm* at [51].

[105] *Worm* at [54] (footnotes omitted).

[106] *Worm* at [56] to [57]. Although this decision has been criticised: See I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 269 and following; L Charalambous, "Comment: Avoiding the Courtroom Cooler" *Law Society Gazette*, 2 Feb 2006, p 12.

[107] *Worm* at [50].

[108] See Ch 3 at para 3.24.

[109] See Ch 2 at para 2.9 and following.

prejudice[110] – must be proved beyond reasonable doubt. Furthermore, it is extremely rare for publishers to be punished by anything more than a fine, although orders for costs are also common.[111] All of these factors point to the proportionality of strict liability contempt in general, albeit that a court would obviously be required to make an assessment of article 10 on a case-by-case basis, taking into account the importance of the expression in question.

B.79 The fact that the rule under section 2 is a strict liability one in respect of the risk of prejudice to the proceedings – rather than requiring intention – also appears to be generally compliant with the ECHR.

B.80 We deal in Chapter 2 with the definition of active proceedings for the purposes of section 2(2), since proceedings being active is a key element of that contempt. Without active proceedings, there is no liability. In that chapter, we propose to amend the definition of active proceedings to end at the final verdict in the case, rather than at sentence. This brings the law into line with current practice, and is therefore likely to strengthen its article 10 compliance.[112]

B.81 We also note in that chapter that the issue of an extradition warrant, for extradition to England and Wales from a foreign jurisdiction triggers the active period for the purposes of section 2(2). There may be concerns about the impact of this on the publisher's article 10 rights because there can often be delays in extradition cases which mean that publication is prohibited for a longer period than might normally be the case where there is an non-extradition arrest warrant (ie where the suspect is already within the jurisdiction).

B.82 However, we consider that the impact of 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. Although the warrant will not expire, the active period will. Furthermore, the active period cannot be reviewed in isolation, because it is not publications about active proceedings in themselves which are prohibited, but publications which create a substantial risk of serious prejudice. There is also the 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 – to consider. This would need to be taken into account by a court in determining whether there was a substantial risk of serious prejudice. The fade factor therefore 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.

B.83 We also deal in Chapter 2 with the issue of whether the elements of the test under section 2(2), namely *substantial* risk of *serious* prejudice, are appropriate. Some have argued that the threshold of prejudice that is *serious* is too high to adequately protect article 6, whilst the requirement of risk that is *substantial* is too low to adequately protect article 10.[113]

B.84 In particular, commentators suggest that, following *Worm v Austria*, the test of serious prejudice should instead be replaced by a test of *any* prejudice. This is

[110] See Ch 2 at para 2.25 and following.

[111] See Ch 2 at para 2.106 and following.

[112] See Ch 2 at para 2.24.

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

because a jury which has been prejudiced *in any way* is likely to be partial for the purposes of article 6. Removing the need for the prejudice to be serious would ensure maximum protection for the defendant's article 6 rights which, of course, require an impartial tribunal both subjectively (it must in fact not be biased) and objectively (it must not appear to be biased).[114] It is argued that the present test sets the prejudice threshold too high to achieve this protection.

B.85 The corollary of this is that the standard of risk could be increased from substantial to *likely* risk, in order to better protect article 10 rights.[115] After all, it is arguable that there must be a greater degree of certainty about the actual prejudice occurring in order to justify the imposition of limits on freedom of expression. Given that *substantial*, for the purposes of section 2(2) has been interpreted by the courts to mean "not insubstantial", this is currently a reasonably low threshold. If the degree of prejudice were downgraded from *serious* prejudice to *any* prejudice, it is arguable that the degree of risk necessary would need to increase in order to ensure that the test is proportionate in article 10 terms.

B.86 The key issue here is the relationship between the two benchmarks of substantial risk and serious prejudice. Together they make up one test which must do two things: it must help ensure adequate protection for defendants' fair trial rights, whilst also being the minimum interference necessary with the right to freedom of expression. The greater the likelihood (the risk) of the consequence (the prejudice) occurring, the less need there is for that consequence to be at a serious level in order to protect article 6. Yet, the less serious the consequence (the prejudice) needs to be, the greater the need for a high likelihood that that consequence will occur (the risk) in order to protect article 10. This is why we ask consultees whether the relationship in the current test between "substantial risk" and "serious prejudice" is appropriately struck.

The power to order the removal of material published before proceedings became active

B.87 In Chapter 3, we propose that the time of publication for the purposes of section 2 of the 1981 Act be treated as time of first publication. In that chapter we explain that the interpretation of the time of publication under section 2 matters a great deal for a commonly occurring problem. Consider the case where the publisher 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. New proceedings subsequently become active against that same offender, and the nature of the material is such that it poses a substantial risk of serious prejudice or impediment. There is a question about whether the publisher is liable under section 2(2).

B.88 This issue has arisen because of the astonishing capacity for storing information digitally and the ease of access to such information via any internet-enabled device anywhere in the world. As the ECtHR has explained:

[114] See para B.247 below.

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

> In light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of internet archives is a critical aspect of this role and the court therefore considers that such archives fall within the ambit of the protection afforded by article 10.[116]

B.89 In *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom*,[117] the issue of internet archives in relation to libel was considered. In particular, *The Times* argued that the law "whereby each time material is downloaded from the internet a new cause of action in libel proceedings accrued" was a breach of article 10 because it was disproportionate.[118] The court made two observations which are of particular relevance to contempt. First, it was held that internet

> archives constitute an important source for education and historical research ... . However, the margin of appreciation afforded to states in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.[119]

B.90 Secondly, considering the facts of the case, the court found that attaching a notice to the internet article explaining that it was the subject of libel proceedings was not an excessive interference with article 10. In reaching this conclusion, the court found that it was key that it was the newspaper's own archive, under their control; that there was no requirement that "potentially defamatory articles should be removed from archives altogether";[120] and that it had been "brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press".[121]

B.91 The law in this area has been informed by the Scottish case of *HM Advocate v Beggs (No 2)*,[122] where it was held that publication was a continuing act, applying "to a period of time during which the material was accessible on the web site,

[116] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03) at [27].

[117] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03).

[118] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03) at [3].

[119] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03) at [45].

[120] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03) at [47].

[121] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03) at [47].

[122] 2002 SLT 139.

commencing with the moment when it first appeared and ending when it was withdrawn".[123] This approach was taken because a juror looking for contemporary reports of active proceedings will use search terms that are likely to reveal a mix of publications first published post-active proceedings and those first published before proceedings became active.[124]

B.92 However, there are concerns that adopting the continuing act concept from *Beggs* could require publishers to continuously monitor their internet archive in order to ensure that proceedings have not become active since first publication of the material. For some publishers, this could be an expensive and time-consuming endeavour. In consequence, this may not be a proportionate restriction on their article 10 rights. In light of this, we ask consultees whether they consider that this burden on publishers is disproportionate.

B.93 If consultees consider that this is disproportionate, we suggest that time of publication under section 2 of the 1981 Act should be treated as time of *first* publication. However, this leaves a gap in respect of the protection afforded to the defendant's article 6 rights by the law on contempt by publication. This is because the information published before proceedings become active can still cause prejudice to the defendant if a juror or witness sees it, but there will be no restriction on such information because it will no longer fall within section 2(2).

B.94 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 internet. Some of that will have been first published 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.[125] Despite these measures there will remain some risk of this occurring. There are additional risks, including that potential jurors about to serve but unaware of the case they will be trying might look on the internet (perhaps by looking for information in relation to the Crown Court centre). Such individuals could quite legitimately come across extremely prejudicial material.

B.95 In consequence, we propose that, in order to protect the right to a fair trial, it should be a contempt of court under the 1981 Act where the following criteria are all established:

(a) A publication was made to the public at large or any section of the public before proceedings became active.

(b) Subsequently, proceedings become active.

(c) 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.

[123] 2002 SLT 139 at [22]. See also Arlidge, Eady and Smith on Contempt para 4-28.

[124] See *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).

[125] See Ch 4 at para 4.78 and following.

(d) 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.

(e) Such order is made for a specific duration.

(f) The person subject to the order fails without lawful excuse to comply with the terms of that order.

B.96 In contrast with the law as it currently stands, under the potential new contempt, publishers 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. Instead, the publisher is required to be put on notice of the specific material which is to be removed – a factor the court in *Times Newspaper Ltd (Nos 1 and 2) v United Kingdom*[126] held was significant. Furthermore, if a party were unable for some reason to remove the material from the internet, this would clearly amount to a lawful excuse 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. This addresses the problem of the potentially disproportionate burden currently on publishers under section 2(2).

B.97 Additionally, the courts would have to be sure that it was necessary to remove the publication in order to prevent a substantial risk of serious prejudice. The removal would also be temporary until the risk had passed, for example because the trial was over. These factors also reinforce our view that such a proposal would be proportionate within the terms of article 10.

B.98 Furthermore, this new form of contempt would apply to anyone who has control over the publication at the time of the order. The question will be whether, in respect of material that is available to the public or section of the public, the person has capability to prevent that material from being available. This means that the material can be removed, and the defendant's article 6 rights protected, even if, for example, the original publisher of the material cannot be found (for example, a web host could be ordered to disable a particular website with comments on it if the author of the comments cannot be identified).

B.99 Article 6 rights are further strengthened by the fact that we propose that the application for such an order should be capable of being made by the prosecution or defendant without first seeking permission of the Attorney General.

Abuse of process and section 2(2)

B.100 In Chapter 2 of the consultation paper, we consider the issue of the relationship between the test under section 2(2) and the test for an application that the proceedings are an abuse of the court's process based on prejudicial publicity. In respect of that latter test, the issue for the court is whether the publicity has

[126] *Times Newspapers Ltd v United Kingdom (Nos 1 and 2)* [2009] Entertainment and Media Law Reports 14 (App Nos 3002/03 and 23676/03).

rendered a fair trial impossible, because the jury will no longer be an independent or impartial tribunal for the purposes of article 6.[127]

B.101 In considering this issue, Lord Hope in *Montgomery v HM Advocate*[128] held that the right to a fair trial under the ECHR did not set out "to make it impracticable to bring those who are accused of crime to justice".[129] His Lordship noted that, generally, trust could be placed in the jury's ability to perform their duty to reach a decision in accordance with the evidence and directions of the judge.[130] Lord Hope concluded that "the careful directions which the judge may be expected to give the jury in the course of the trial will be sufficient to remove any legitimate doubt that may exist at this stage about the objective impartiality of the tribunal".[131]

B.102 More recently in *Abu Hamza*,[132] Lord Phillips CJ held that the fact that "adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial".[133] In so holding, Lord Phillips CJ noted that "the risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated".[134]

B.103 Subsequently, Abu Hamza applied to the ECtHR, challenging the decision from the Court of Appeal. There, the ECtHR held that in most cases, "the nature of the trial process and, in particular, the role of the trial judge in directing the jury will ensure that the proceedings are fair".[135] In consequence, it could not be said that the trial would be unfair.

B.104 It therefore appears that the courts have imposed a high threshold for establishing whether there is an abuse of process. Nonetheless, it is clear that where a fair trial is deemed impossible, the application will be successful because the trial cannot proceed unless it can meet the requirements of article 6.

B.105 By contrast, the test for contempt by publication under section 2(2) is, of course, that the publication created a substantial risk of serious prejudice. This is evidently a lower threshold than rendering a fair trial impossible.

B.106 One of the reasons for this is that the test for an abuse of process is required to account for the cumulative impact of publicity. That test must be able to take into account the *totality* of the prejudice and the likely impact that the publicity as a whole would have on the independence and impartiality of the tribunal. On the other hand, in relation to contempt, it would obviously be disproportionate to hold publishers liable for prejudice caused by that cumulative effect, where the publications of each individual publisher had not, on their own, caused a

[127] See para B.252 and following.

[128] [2003] 1 AC 641.

[129] [2003] 1 AC 641, 673.

[130] [2003] 1 AC 641, 673 to 674.

[131] [2003] 1 AC 641, 674.

[132] [2006] EWCA Crim 2918, [2007] QB 659.

[133] [2006] EWCA Crim 2918, [2007] QB 659 at [92].

[134] [2006] EWCA Crim 2918, [2007] QB 659 at [92].

[135] *Mustafa (aka Abu Hamza) v UK* (2011) 52 EHRR SE11 (App No 31411/07) (admissibility) at [39], citing *Noye v UK* (2003) 36 EHRR CD231 (App No 4491/02) (admissibility).

substantial risk of serious prejudice. It would be contrary to the ordinary principles of criminal liability and article 10 to hold a publisher liable for conduct that was not their own. In consequence, we consider that the two tests must remain distinct in order to be ECHR compliant.

The defence under section 5

B.107 Section 5 of the 1981 Act provides an exception for publications which may fall foul of section 2(2) as follows:

> 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.

B.108 Fenwick and Phillipson have argued that section 5,

> does not provide a means of weighing up the seriousness of the prejudice against the significance of the speech in question … it is not the equivalent of a proportionality test since it depends upon problematic determinations as to the central focus of a publication, as opposed to its peripheral aspects. The courts are being asked to engage in literary as opposed to legal analysis.[136]

B.109 However, we consider that the aim of section 5 is to strike the appropriate balance between ensuring the right to a fair trial and permitting publishers freedom of expression to report on important matters of public concern. Furthermore, it is unusual to have a case where the publication could be said to create a substantial risk of serious prejudice, yet where the risk is incidental to the important matter of public concern under discussion. This is probably why section 5 is rarely invoked.

B.110 The courts, as public bodies bound by the Human Rights Act 1998, are required in applying section 5 to assess the proportionality of the contempt proceedings to freedom of expression. In those rare cases where the publication creates such a risk that a fair trial is impossible (albeit that the publication came within section 5 and was not prohibited because the risk was "incidental"), the defendant will be able to succeed in establishing that the criminal proceedings against them are an abuse of process, and therefore can protect their article 6 rights in that way.[137] In consequence, we do not consider that section 5 necessarily requires modification in order to ensure ECHR compliance, but we ask consultees for their views on this matter.

Contempt by publication at common law

B.111 Is contempt by publication at common law proportionate in article 10 terms? We consider that a finding of contempt at common law would be likely, in most cases, to meet the requirement of proportionality under article 10, given that the prosecution is required to prove that the publisher has the intention to interfere with the administration of justice and therefore the threshold for liability is a high one.

[136] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 282.

[137] See para B.278 below.

B.112 In most circumstances, conviction would be proportionate to protecting the legitimate aims of the independence and impartiality of the judiciary and the rights and freedoms of others. This is particularly so given that prosecutions under the common law are exceptionally rare (given that almost all publication contempts of this type will fall under section 2(2)),[138] and are likely only to be instituted in extreme cases.

B.113 Furthermore, in such extreme cases, it is possible that article 17 would apply, preventing the alleged contemnor from invoking their right to freedom of expression where the exercise of that right aimed to destroy a defendant's right to a fair trial.

Evidence and procedure

B.114 We also make proposals in relation to the procedure for dealing with section 2(2) contempts and contempt by publication at common law in the consultation paper. The procedure could obviously be relevant to an assessment of whether the law meets the implied procedural safeguards of article 10. However, we consider these potential procedural amendments in the sections of this appendix on articles 5 and 6.[139]

Sanctions for contempt by publication

B.115 In respect of the penalties imposed for contempt by publication – both strict liability and at common law – we consider providing a sentencing power allowing the courts to impose a fine set at a percentage of the turnover of the publisher. At present, fines obviously reflect the means of the publisher, but are not specifically linked to turnover. Additionally, we propose to extend the power to impose an order on a publisher for the payment of wasted costs from the criminal proceedings prejudiced, impeded or intentionally affected by a contempt by publication. At present, this power may not apply to the Divisional Court, even though it is in that court that proceedings for contempt by publication are generally brought.

B.116 We consider that neither of these powers in principle is incompatible with article 10. The use of either power would obviously require the courts to take into consideration the proportionality of using it in a particular case.[140]

JUROR CONTEMPT

Jurors disclosing information

B.117 As we have explained above, by virtue of section 8 of the 1981 Act, jurors are prohibited from disclosing their deliberations. Other parties are also prohibited from soliciting such information from jurors and, if they happen to receive such information, from disclosing it themselves.[141] There may be concerns that this potentially conflicts with articles 10 and 6, as jurors could be inhibited from disclosing miscarriages of justice. The ECtHR was recently called upon to consider section 8 of the 1981 Act in the context of article 10. Seckerson, a juror

[138] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 284.

[139] See paras B.207 to B.211 and paras B.272 and B.278 below.

[140] See the discussion in G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) para 7.040. See also Ch 2 at paras 2.110 to 2.118.

[141] See Ch 4 at para 4.41 and following.

in a trial, and *The Times* newspaper were convicted of breaching section 8 following the publication of articles which disclosed Seckerson's views about the trial on which he had sat as a juror. Both the juror and the newspaper were fined. They complained to the ECtHR that their convictions were not necessary in a democratic society and were disproportionate because the publications had contributed to an important public debate about the role of expert evidence in criminal trials.[142] They also argued that the publications could not be said to undermine the administration of justice.[143]

B.118 It was accepted by the court that the interference with article 10 was prescribed by law and pursued the legitimate aim of protecting the authority and impartiality of the judiciary.[144] In considering whether the interference was necessary in democratic society, the court explained that:

> Rules imposing requirements of confidentiality as regards judicial deliberations play an important role in maintaining the authority and impartiality of the judiciary, by promoting free and frank discussion by those who are required to decide the issues which arise … . As to lay jurors, who are often obliged by law to undertake jury service as part of their civic duties, it is essential that they be free to air their views and opinions on all aspects of the case and the evidence before them, without censoring themselves for fear of their general views or specific comments being disclosed to, and criticised in, the press.[145]

B.119 The court explained that section 8 as an absolute rule could not be said to be disproportionate but, notably, highlighted that:

> It is 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: the applicants themselves argued that the disclosures did not seek to challenge or undermine the verdict in the particular case in question but to contribute to the serious debate concerning the use of expert medical evidence in criminal trials.[146]

B.120 The court observed that because limited aspects of the articles were held to be in breach of section 8, the applicants were not prevented from contributing to the public debate on the issue of expert evidence. Although the fines imposed were

[142] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [35].

[143] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [37].

[144] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [41].

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

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

not insignificant and the applicants had not intended to breach section 8, the interference was deemed proportionate.[147]

B.121 As we have explained in Chapter 4, many commentators have criticised the prohibition within section 8 of the 1981 Act for its potential lack of compliance with article 10. There has also been criticism of the related issue of the compliance with article 6 of the common law prohibition on the admissibility of evidence of jury deliberations.[148] This prohibition essentially establishes that, save in certain limited circumstances, evidence of a jury's deliberations is inadmissible. So, for example, such evidence cannot generally be used to argue that a conviction was unsafe because, say, the jurors misunderstood the judge's directions on the law.

B.122 Although the domestic cases have confirmed the compliance of the law with the ECHR in the situations that they have considered,[149] there has yet to be a case before the ECtHR dealing directly with the issue of miscarriages of justice or research into jury deliberations which we consider in the consultation paper. The reasoning in *Seckerson* implies that the absolute nature of section 8 may, in some circumstances, be incompatible with article 10, depending of course on the facts of the particular case.[150]

B.123 At first sight, it is questionable whether anything that amounts to a blanket ban on an aspect of freedom of expression can *always* be said to be ECHR compliant, regardless of the circumstances. After all, the essence of the requirement that any interference with article 10 be "necessary in a democratic society" is that the interference must be proportionate to the legitimate aim. This means the interference must be no wider than strictly necessary to meet that aim. An absolute prohibition may therefore, *in principle*, be of questionable proportionality. This is particularly so given, as we explained in Chapter 4, that the *New Statesman* case[151] identified that the common law did not prohibit disclosure of jury deliberations. In that case, Lord Chief Justice Widgery 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.[152] In consequence, some may argue that the prohibition in section 8 has gone beyond what was necessary to fill the lacuna in the common law uncovered in the *New Statesman*.

[147] *Seckerson v UK* and *Times Newspapers Ltd v UK* (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45] to [48].

[148] See Ch 4 at paras 4.30 to 4.32.

[149] *A-G v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867. See Ch 4 at paras 4.44 to 4.48.

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

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

[152] *A-G v New Statesman and Nation Publishing Co* [1981] QB 1, 11.

B.124 We also explain in Chapter 4 that it has been argued that jurors must feel that they can express their views, without fear of ridicule or recriminations.[153] Indeed, the prohibition in section 8 has the support of jurors: one study found that 82% "felt it was correct that jurors should not be allowed to speak about what happens in the deliberating room".[154] Whilst there is evidently a public interest in ensuring that jurors feel free to air their views during their deliberations, without ridicule or recriminations, this freedom has obvious limits (such as when jurors undertake research on the internet and report it back to their fellow jurors). This freedom must also be balanced against other public interest factors, such as anonymised research into jury trials which could lead to greater understanding of the system and improvements in its operation.[155]

B.125 Likewise, there is an obvious public interest in cases of wrongful convictions being uncovered,[156] both in the particular case concerned and also in general in relation to the lessons that can be learned for the future about what has gone wrong in that case and what can be done to fix it. Some argue that a certain degree of transparency in the jury system is likely to improve public confidence in its operation, which is self-evidently in the public interest. It is, on this view, arguable that the absolute nature of section 8 in its present form struggles to achieve the appropriate balance between these public interests.

B.126 In Chapter 4, we ask consultees whether 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. If such a specific defence were adopted, we consider that this should remedy concerns about article 10 compliance, whilst also ensuring that the sanctity of jury deliberations are left largely intact, except where the public interest demands otherwise.[157]

B.127 A separate concern about the article 10 compliance of section 8 arises because it inhibits academic research. The views of researchers about the impact of section 8 differ.[158] Some argue that the section makes research into juries in the UK effectively "impossible".[159] Others, however, consider that there are still some types of research which can be undertaken using juries, but that the scope of such research may be limited. Nonetheless, there is obviously a degree of

[153] *A-G v Fraill* [2011] EWHC 1629, [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.

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

[155] "Jury Room Deliberations" 131 *New Law Journal* 101. See also G Daly and I Edwards, "Jurors Online" [2009] 173 *Criminal Law and Justice Weekly* 261.

[156] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 240 to 241.

[157] See Ch 4 at paras 4.39 and 4.40.

[158] See Ch 4 at paras 4.53 and 4.61.

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

"confusion about what jury research can and cannot be conducted".[160] This too may be a problem for article 10 given that it may call into question the extent to which the law is adequately accessible and foreseeable, and may have a "chilling effect" on the exercise of article 10 rights.

B.128 In Chapter 4, we also ask whether consultees consider that there are currently research projects which cannot be addressed without amending section 8. If so, we ask whether it is necessary to amend section 8 to allow this research into juries and what measures should be put in place to regulate such research. We seek to discover the extent to which there is this "chilling effect". We consider that amending the law to allow research to be undertaken could bring the law into greater article 10 compliance.

B.129 Breach of section 8 is a contempt punishable with a fine or imprisonment. During our informal discussions at the start of this project, some stakeholders raised concerns about whether the current contempt procedure for dealing with a breach of section 8 can be said to be "prescribed by law" within the meaning of article 10.[161] We consider these issues in relation to the substantive articles 5 and 6 elsewhere in this appendix, but it should be noted that the same concerns raise problems for the procedural guarantees of article 10, and could be remedied by amendments to the procedure.[162]

B.130 Finally, we ask consultees about the appropriateness of the current penalty for breach of section 8, as any penalty imposed will need to be proportionate given that article 10 will be engaged.[163] The requirement of proportionality may suggest that a prison sentence is less likely to be appropriate in these cases.

Jurors seeking information

B.131 One of the most topical concerns for the law on contempt of court has been that, despite being warned not to, jurors are using the internet to search for material related to the trial on which they are sitting.[164] As we have explained in Chapter 4, jurors' rights to receive information may be covered by article 10.[165] However, such rights can of course be restricted by reference to the aim 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, provided such restriction is proportionate.

B.132 We ask consultees whether a specific statutory offence of intentionally seeking information related to the case that the juror is trying should be introduced. This possible offence is drawn in deliberately circumspect terms. It would clearly not amount to a prohibition on using the internet *in itself* since such a prohibition would be wholly disproportionate (let alone impossible to enforce). The offence would be a prohibition limited to the period of jury service and to information related to the case the juror is trying. In such circumstances, if article 10 were engaged by the offence, we consider that such a limited prohibition would be a

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

[161] See Ch 4 at para 4.67.

[162] See below at para B.212 and para B.306 and following.

[163] See Ch 4 at paras 4.75 and 4.76.

[164] See Ch 4 at para 4.17 and following.

[165] See Ch 4 at para 4.32.

proportionate measure, necessary to protect the rights of others to a fair trial and to ensure the impartiality of the jury. Furthermore, by providing clarity about what is and is not prohibited, a specific offence would help ensure that the law is accessible and reasonably foreseeable.

B.133 However, some people may have concerns about whether the current contempt procedure for dealing with errant jurors – given that such proceedings are so unusual – can be said to be "prescribed by law" within the meaning of article 10. We consider these issues in relation to the substantive articles 5 and 6 elsewhere in this appendix.[166]

B.134 Finally, we ask consultees about the appropriateness of the current penalty for any new offence of intentionally seeking information related to the case that the juror is trying, as any sentence will need to be proportionate if article 10 is engaged.[167]

CONTEMPT IN THE FACE OF THE COURT

B.135 Contempt in the face of the court deals with court powers to enquire into and punish disruption and disorder in the court. Some instances of contempt in the face of the court may fall within the ambit of article 10, depending on the conduct in question.[168] In most cases, it seems clear that imposing criminal penalties on such conduct will be proportionate because of the need to prevent disorder to the court process, to protect the rights of others (for example to prevent witnesses being subject to abusive behaviour) and to maintain the authority of the judiciary.

B.136 Our empirical research about the ways in which judges deal with contempt in the face of the court shows that many judges are only likely to treat more serious disruption as contempt, ensuring proportionality in relation to more minor cases (where, for example, the person may merely be asked to leave the public gallery).

B.137 As we have explained above, contempt in the face of the magistrates' court is dealt with by section 12 of the 1981 Act. This provides that

> 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;[169] or
>
> (b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

B.138 Since this section applies only to "wilful" insults, interruptions or misbehaviour in the magistrates' court,[170] it is also likely in general to be article 10 compliant given

[166] See paras B.212 to B.214 and para B.306 and following below.

[167] See Ch 4 at para 4.76.

[168] See Ch 5 at para 5.5 and 5.21.

[169] "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.

[170] See Ch 5 at paras 5.48 to 5.50.

the limited penalty to be applied (a maximum of one month imprisonment). There is also a requirement for intention or recklessness. In cases which involve freedom of expression, the court must of course take into account the alleged contemnor's article 10 rights when reaching a decision about whether the conduct breaches section 12. A finding of contempt on the basis of mere criticism of the court or proceedings or judiciary would not be compatible with article 10.

B.139 We consider that our proposal to provide a power in the Crown Court to deal with intentional threats or insults and misconduct committed with the intention that proceedings will or might be disrupted includes a sufficiently high threshold of both the mental element and the conduct element to ensure general article 10 compliance.[171] The proportionality of the interference may need to be assessed on a case-by-case basis, particularly when considering the appropriate penalty, if article 10 is engaged. Again, a finding of contempt on the basis of mere criticism of the court or proceedings or judiciary would not be compatible with article 10.[172]

B.140 The ECtHR has been particularly concerned about cases involving defence advocates[173] given the obvious implication for both the advocate's article 10 rights and their client's article 6 rights.[174] As Lester, Pannick and Herberg explains:

> The ECtHR has held that lawyers are entitled to freedom of expression and to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds; important factors in assessing the scope of a lawyer's free speech rights in this regard are the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession.[175]

B.141 In *Nikula v Finland*,[176] a defence lawyer criticised the public prosecutor in particular proceedings and was subsequently convicted of negligent defamation and fined. On appeal, the conviction was upheld but the sentence was waived. The ECtHR held that lawyers occupy a special position so it was legitimate to expect them to contribute to public confidence in the administration of justice.[177]

B.142 However, addressing what had been said by N, the court held that the conviction,

[171] See Ch 5 at para 5.88.

[172] We have considered criticism or insults which take place outside the court room in our consultation paper on scandalising the court: Contempt of Court: Scandalising the Court (2012) Law Commission Consultation Paper No 207.

[173] *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [55].

[174] *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [49].

[175] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.40.

[176] (2004) 38 EHRR 45 (App No 31611/96).

[177] (2004) 38 EHRR 45 (App No 31611/96) at [45].

> is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred.[178]

B.143 The court found that interference with defence counsel's freedom of expression would only be justified in exceptional cases and that article 10 had been violated in this case.[179]

B.144 Proceedings against an advocate for contempt in the face of the court are exceptionally rare in England and Wales. We consider that in practice defence counsel would be afforded a very wide degree of latitude in making what they consider to be reasonably arguable submissions. Indeed, advocates could not be held in contempt when making reasonably arguable submissions because they would be professionally bound to make such submissions on behalf of their client.[180] The Lord Chief Justice in *Dallas*[181] explained that "it is never a contempt of counsel to advance submissions that he thinks are appropriate".[182]

[178] (2004) 38 EHRR 45 (App No 31611/96) at [54].

[179] See also *Amihalachioaie v Moldova* (2005) 40 EHRR 35 (App No 60115/00).

[180] Section 303(a) of the Bar Code of Conduct requires a barrister to "promote and protect fearlessly and by all proper and lawful means the lay client's best interests and [to] do so without regard to his own interests or to any consequences to himself or to any other person". See also principles 1 to 5 of the Solicitors Regulation Authority Code of Conduct 2011.

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

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

ARTICLE 8: THE RIGHT TO PRIVACY

INTRODUCTION

B.145 We consider here the implications that the law of contempt has for article 8 rights. There is clearly a vast amount of case law in this area and so we confine ourselves at the outset to an explanation of the jurisprudence most relevant to the law on contempt. This section then considers the protection of article 8 rights in relation to contempt by publication and contempts involving jurors.

B.146 Article 8 establishes that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

B.147 The rights contained within article 8 are capable of being exercised by "everyone" which means natural persons,[183] although companies have been held to enjoy a right to "privacy, premises and correspondence".[184]

Positive and negative rights

B.148 Article 8 has both negative and positive aspects. It is a negative right in that it prevents state interference in private life, home and correspondence. Conversely, article 8 is a positive right in that it can require the state to take measures in order to fulfil its obligation to protect article 8 rights.[185] This is because article 1 of the ECHR requires states to give effect to the rights within the Convention, not merely to refrain from infringing them.

B.149 In assessing whether there is a positive obligation on the state to take action, the court will consider the needs of the individual as against those of society as a whole. A state obviously cannot be compelled to remedy every private act which impacts on another citizen's private and family life, home and correspondence.[186] Whilst the assessment of whether a positive duty on behalf of the state exists will vary depending on the facts of the case, in general such duty will only be upheld where there exists "a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life".[187] Where it is argued that a positive obligation is engaged, the court will consider the applicant's claim in

[183] Clayton and Tomlinson para 12.235.

[184] Clayton and Tomlinson para12.235, citing *Wieser v Austria* (2008) 46 EHRR 54 (App No 74336/01) at [67]. See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.8.8.

[185] *Marckx v Belgium* (1979) 2 EHRR 330 (App No 6833/74) at [31]; *Airey v Ireland* (1979) 2 EHRR 305 (App No 6289/73) at [32]; *X and Y v The Netherlands* (1986) 8 EHRR 235 (App No 8978/80) at [23]. See also the discussion in A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.8.3.

[186] *Sentges v The Netherlands* [2004] Community Care Law Reports 400 (App No 27677/02).

[187] *Botta v Italy* (1998) 26 EHRR 241 (App No 21439/93) at [34].

relation to the nature of the aspect of article 8 said to be engaged; the prejudice caused; the "breadth and clarity" of the claimed obligation; and whether there exists a consensus amongst states on the issue.[188]

B.150 In some specific cases, the ECtHR has held that the state has a positive obligation to provide information. However, the ECHR jurisprudence establishes that there is no general right of access to public information under article 8, or any other article for that matter.[189]

B.151 The state has also been found to have a positive obligation to prevent interference with article 8 rights by private actors in relation to the media. This has included cases where photographs have been taken of famous people undertaking their (private) daily business in public locations[190] or the publication of private information.[191] The court has held that the state may have an obligation to prevent the abuse of one person's private life by another, but that this must be balanced with the right to freedom of expression.[192] There is also an obligation to protect a person's reputation by providing remedies for dealing with defamatory statements.[193]

The content of article 8

B.152 For the purposes of this appendix, the focus is on those aspects of article 8 which are relevant to contempt of court. The concept of a "private life" is not limited to the right to privacy, but extends to the establishment and development of human relationships, whether that be within the family, socially, or through professional or business activities.[194] "Private life" is widely interpreted. Thus, "the general test as to whether the right to private life in article 8 is engaged is whether there is a 'reasonable' or 'legitimate' expectation of privacy".[195] The ECtHR has also held that "personal autonomy" is a key aspect of private life, including "the right to conduct one's life in a manner of one's own choosing".[196]

B.153 Disclosure of personal information by the state could amount to an interference with article 8. Additionally, "the court has recognized the state's positive obligation to protect individuals from media intrusion into their private lives".[197] This has included the publication of photographs taken during the course of criminal proceedings such as those taken by the police for identification

[188] Clayton and Tomlinson para 12.248.

[189] Clayton and Tomlinson para 12.254.

[190] Such as *Von Hannover v Germany* (2005) 40 EHRR 1 (App No 59320/00).

[191] *Armonienė v Lithuania* (2009) 48 EHRR 53 (App No 36919/02).

[192] *Von Hannover v Germany* (2005) 40 EHRR 1 (App No 59320/00) at [57] to [58] and *Lindon v France* (2008) 46 EHRR 35 (App Nos 21279/02 and 36448/02) (Grand Chamber decision) at [O-I8] by Judge Loucaides (concurring opinion).

[193] *Pfeifer v Austria* (2009) 48 EHRR 8 (App No 12556/03).

[194] *Amann v Switzerland* (2000) 30 EHRR 843 (App No 27798/95) at [65]; *Rotaru v Romania* (2000) 8 Butterworths Human Rights Cases 449 (App No 28341/95) (Grand Chamber decision) at [43].

[195] Clayton and Tomlinson para 12.264.

[196] Clayton and Tomlinson para 12.266, citing *Pretty v UK* (2002) 35 EHRR 1 (App No 2346/02) at [62].

[197] Clayton and Tomlinson para 12.285 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.8.40.

purposes[198] and photographs of an individual leaving a police station where they were being questioned.[199] The ECtHR has held that there must be a public interest in the publication in order to justify the interference with article 8.[200]

B.154 The right to respect for correspondence obviously includes letters,[201] phone calls[202] and electronic correspondence.[203] Additionally, "information derived from the monitoring of personal internet usage" at work has also been held to be covered by article 8.[204] The cases from the ECtHR dealing with correspondence tend to deal with surveillance of postal correspondence – for example, reading the letters of prisoners – and intercepting telephone calls.[205]

ARTICLE 8(2) RESTRICTIONS

B.155 A restriction on an aspect of article 8 rights may be justified if it comes within the terms of article 8(2). As with Article 10, the exercise of the right takes primacy over the restriction and any restriction is subject to a four-stage test under article 8(2), namely:

(a) Is the restriction prescribed by law?

(b) Does it have a legitimate aim?

(c) Is it necessary in a democratic society?

(d) Is it within the margin of appreciation?

B.156 An interference which cannot be so justified will not be ECHR compliant. The ECtHR has held that assessing the justification under article 8(2) may require balancing "the competing interests of the individual and of the community as a whole".[206]

Interference

B.157 In respect of what amounts to an "interference" for the purposes of article 8(2), the ECtHR has held that intercepting telephone calls and postal mail,[207] preventing an individual from initiating correspondence,[208] and storing or releasing personal information[209] will all amount to interferences. Where it is an

[198] *Sciacca v Italy* (2006) 43 EHRR 20 (App No 50774/99).

[199] *Gurguenidze v Georgia* App No 71678/01 (available only in French); for a summary, see https://wcd.coe.int/ViewDoc.jsp?id=1049643&Site=COE (last visited 1 Nov 2012).

[200] *Von Hannover v Germany* (2005) 40 EHRR 1 (App No 59320/00) at [76].

[201] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.8.82.

[202] Clayton and Tomlinson para 12.313.

[203] *Wieser v Austria* (2008) 46 EHRR 54 (App No 74336/01) at [45].

[204] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.8.83, citing *Copland v UK* (2007) 45 EHRR 37 (App No 62617/00) at [41] to [42].

[205] See Clayton and Tomlinson para 12.314 and following and para 12.321 and following.

[206] Clayton and Tomlinson para.12.244.

[207] *De Wilde v Belgium (No 1)* (1979-80) EHRR 373 (App Nos 2832/66, 2835/66 and 2899/66); *Silver v UK* (1983) 5 EHRR 347 (App No 5947/72 and others); and *Malone v UK* (1985) 7 EHRR 14 (App No 8691/79), amongst other cases.

[208] *Golder v UK* (1979) 1 EHRR 524 (App No 4451/70).

[209] *Leander v Sweden* (1987) 9 EHRR 433 (App No 9248/81).

act by a public body about which the applicant complains, there does not appear to be a generally applicable threshold for whether that act will amount to an interference, although Clayton and Tomlinson argue that any "adverse effect" will normally be enough to justify the finding of an interference.[210]

B.158 The ECtHR has found that it may not always be necessary to establish that the applicant has been *directly* affected by the interference of which they complain. In such contexts,

> the court might nevertheless make a finding of interference on grounds that the existence of a legislative or administrative system may be sufficient in itself to constitute an interference with the article 8 rights of the applicant.[211]

B.159 Thus, the fact that there could *potentially* be an interference may be enough. The risk of prosecution, for example, for homosexual activity was found to be an interference with article 8, even though the applicant had not actually been prosecuted.[212] Likewise, a system which can undertake surveillance of telephone calls was held to be an interference, regardless of whether the applicant's calls had actually been intercepted. The fact that the applicant was likely to have their calls intercepted was sufficient.[213]

B.160 Clayton and Tomlinson also explains that where the complaint relates to the state's inaction (in other words, breach of the positive obligation imposed on the state to protect article 8 rights), "additional factors must be identified to justify the imposition of such an obligation".[214]

Juror contempt

B.161 We doubt that section 8 of the 1981 Act, which prohibits the disclosure of jury deliberations, amounts to an interference with article 8.[215] Whilst the section obviously limits the content of jurors' correspondence, given that they cannot disclose their jury deliberations by letter or telephone, we consider that this is more appropriately considered an aspect of their freedom of expression under article 10, rather than their rights under article 8.[216] The majority of the case law in relation to correspondence deals with interference with the *vehicles* for imparting information through correspondence – telephone or mail interception for example – and this seems to lend further support to the view that the prohibition on disclosure is best viewed through the lens of article 10. The means of correspondence is protected by article 8, whilst its content is protected by article 10.

[210] Clayton and Tomlinson para 12.328, citing *Bensaid v UK* (2001) 33 EHRR 205 (App No 44599/98).

[211] Clayton and Tomlinson para 12.330.

[212] See *Dudgeon v UK* (1982) 4 EHRR 149 (App No 7525/76) at [41]; *Norris v Ireland* (1991) 13 EHRR 186 (App No 10581/83) at [38]; and *Modinos v Cyprus* (1993) 16 EHRR 485 (App No 15070/89) at [20] to [24].

[213] *Malone v UK* (1985) 7 EHRR 14 (App No 8691/79).

[214] Clayton and Tomlinson para 12.328.

[215] See Ch 4 at para 4.39.

[216] See para B.117 and following above.

B.162 In relation to a potential offence of intentionally seeking information about the case which the juror is trying, about which we ask consultees, we again consider that it is unlikely that this would reach the threshold to amount to an interference with article 8, and is, therefore, more properly considered in relation to the right to receive information under article 10. In any event, we consider that, even if article 8 were engaged by the prohibition on jurors undertaking such research, the measure would be deemed proportionate given its limited scope in both time and subject matter, and that it is necessary to protect the fair trial rights of others and to prevent crime by ensuring public confidence in an impartial jury system.[217]

"In accordance with the law"

B.163 As with article 10, the interference "must have a basis in domestic law",[218] which includes both statute and case law.[219] The law is also required to be of a particular "quality", namely "compatible with the rule of law".[220] This means that the law must have built-in safeguards in order to protect against arbitrary interferences with article 8 rights by the state.[221]

B.164 The law is also required to be accessible and reasonably foreseeable, so that citizens can predict the likely legal consequences of their actions.[222] Additionally, where the law allows the exercise of discretion, the law can still be deemed foreseeable, "provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question".[223] These requirements, and the extent to which contempt of court satisfies them, are considered in more detail in relation to article 10.[224]

B.165 Article 8 is also similar to article 10 in that there are implied procedural guarantees.[225] This means that the domestic law and procedure must ensure that individuals are protected by "adequate and effective safeguards against abuse".[226]

The legitimate aims

B.166 In order to justify an interference with article 8, the state must identify the relevant legitimate aim, and establish that the interference is "necessary in a democratic society" to meet that aim. The most relevant legitimate aims for the law of

[217] See para B.117 and following above.

[218] Clayton and Tomlinson para 12.335, citing *Leander v Sweden* (1987) 9 EHRR 433 (App No 9248/81) at [50].

[219] *Norris v Ireland* (1991) 13 EHRR 186 (App No 10581/83) at [40]; *Dudgeon v UK* (1982) 4 EHRR 149 (App No 7525/76) at [44].

[220] Clayton and Tomlinson para 12.335.

[221] *Malone v UK* (1985) 7 EHRR 14 (App No 8691/79) at [67]; *Herczegfalvy v Austria* (1993) 15 EHRR 437 (App No 10533/83) at [91]; *Rieme v Sweden* (1993) 16 EHRR 155 (App No 12366/86) at [60]; *Chappell v UK* (1990) 12 EHRR 1 (App No 10461/83) at [56].

[222] *Olsson v Sweden (No 1)* (1989) 11 EHRR 259 (App No 10465/83) at [61].

[223] Clayton and Tomlinson para 12.339.

[224] See para B.38 and following above .

[225] *Tysiac v Poland* (2007) 45 EHRR 42 (App No 5410/03) at [112] and [114].

[226] *Funke v France* (1993) 16 EHRR 297 (App No 10828/84) at [56].

contempt are those of preventing crime and protecting "the rights and freedoms of others".

B.167 The concept of preventing crime appears to have been interpreted widely by the ECtHR. In *Z v Finland*,[227] the case concerned the disclosure of the applicant's HIV status during criminal proceedings. The court held that the applicant's right to have such information kept confidential had to be balanced against "the interests of the public in investigating and prosecuting crime and having public court proceedings".[228] Ultimately, the court held that whilst the use of the applicant's medical information during the proceedings was justified, the decision to allow her to be publicly identified some years later was not, and therefore was in breach of article 8. The prevention of crime as a legitimate aim would, therefore, appear to encompass the wider criminal justice system as a mechanism for deterring crime, rather than merely preventing specific crimes.[229]

B.168 Protecting the "rights and freedoms of others" as a legitimate aim has in particular been cited in relation to the protection of others' article 10 rights. For example, the interference with article 8 of publishing information about aspects of someone's private life may be justified by reference to the publisher's freedom of expression under article 10, where there is a public interest in publishing.

B.169 In *Craxi v Italy*,[230] the case concerned the violation of the applicant's article 8 rights by the publication of transcripts of his telephone calls in the press. Some, but not all, of the transcripts which were published had been read out in open court, and the case had attracted considerable media attention because the applicant was a high profile Italian politician. The ECtHR looked at the balance to be struck between article 8 and 10, and held that article 8 had been violated by the publication of the private conversations unconnected with the criminal proceedings.

B.170 The court held that:

> It is to be pointed out that there is general recognition of the fact that the courts cannot operate in a vacuum. Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large … .

[227] (1998) 25 EHRR 371.

[228] Clayton and Tomlinson para 12.362.

[229] As appears to be the case in relation to art 10.

[230] (2004) 38 EHRR 47 (App No 25337/94).

> However, public figures are entitled to the enjoyment of the guarantees set out in article 8 of the Convention on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which are [sic] likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons.[231]

B.171 There seems to be no reason why other rights within the Convention, such as article 6, could not also be relied upon as an aspect of the legitimate aim of protecting the rights and freedoms of others.

"Necessary in a democratic society" and the margin of appreciation

B.172 As Clayton and Tomlinson explain, "the term 'necessary' is not synonymous with 'indispensible' but does not have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'".[232] It is also for the state to show that there is a "pressing social need" for the interference and that the interference "is 'proportionate' to the legitimate aim".[233] As with article 10, it is necessary to interpret the restrictions on the exercise of article 8 rights within article 8(2) narrowly.[234]

B.173 The margin of appreciation will vary depending on the importance of the legitimate aim. Furthermore, the implied procedural safeguards may also impact on the width of the margin of appreciation,[235] since the court may be more ready to interfere where there are insufficient procedural protections.

B.174 We now consider the specific impact of article 8 in relation to the matters raised in our consultation paper.

CONTEMPT BY PUBLICATION

B.175 Article 8 may be relevant to contempt by publication in cases where a court makes a section 11 orders under the 1981 Act.[236] As we explained at the outset of this appendix, section 11 contains a power to give "directions prohibiting the publication" of any matter which was "withheld from the public" during the proceedings. Indeed, following the example of *Z v Finland*,[237] the courts may in some cases be required to prohibit publication in order to protect the privacy of an individual,[238] particularly where the confidentiality required is especially important, as in relation to medical information. Obviously, the article 8 rights of

[231] (2004) 38 EHRR 47 (App No 34896/97) at [63] and [65].

[232] Clayton and Tomlinson para 12.342, citing *Handyside v UK* (1979) 1 EHRR 737 (App No 5493/72) at [48] and *Silver v UK* (1983) 5 EHRR 347 (App No 5947/72 and others) at [97].

[233] Clayton and Tomlinson para 12.342.

[234] *Silver v UK* (1983) 5 EHRR 347 (App No 5947/72 and others) at [97]; *Funke v France* (1993) 16 EHRR 297 (App No 10828/84) at [55]; and *Klass v Germany* (1979) 2 EHRR 214 (App No 5029/71) at [42].

[235] Clayton and Tomlinson para 12.344.

[236] See Ch 2 at para 2.92 and following.

[237] (1998) 25 EHRR 371 (App No 22009/93).

the person concerned would need to be balanced against article 10 and the public interest in publication. Clearly, any such order would need to be the minimum necessary to protect article 8, as the case law, which we detail in Chapter 2, explains.

B.176 Additionally, article 8 may be relevant in relation to the release to the media of names of arrestees by the police. In Chapter 2, we propose that guidance be introduced to ensure that all police forces have a consistent policy about the circumstances in which an arrestee will be named, if the media requests to know whether someone has been arrested. In addition, other articles such as the right to life under article 2 and the prohibition on torture, inhuman or degrading treatment under article 3 may also be relevant. For example, this could be the case where the disclosure of the name of an arrestee could put another person at risk of death or serious injury, where the arrest was made as a result of an undercover police operation, and the undercover officer could be at risk if it was publicly known that an arrest had been effected. We would anticipate that the guidance we propose be issued to police forces would take account of their ECHR obligations, and help ensure that policies on naming arrestees are compliant.[239]

B.177 Finally, the application of the normal rules of criminal investigation and procedure to contempt by publication will also help to ensure article 8 compliance.

JUROR CONTEMPT

B.178 We make proposals in Chapter 4 in relation to jurors' possession and use of mobile phones and other internet-enabled devices at court. We consider that internet-enabled devices should not automatically be removed from jurors throughout their time at court, but that judges should have the power to require jurors to surrender their internet-enabled devices and that they should always be removed from jurors whilst they are in the deliberating room. There may also be other times where the judge considers that he or she needs to use the discretion to remove such items whilst the juror is at court. We consider that article 8 may be engaged here in relation to the right to correspondence, which has been held to include phone calls[240] and electronic correspondence,[241] given that the removal of jurors' internet-enabled devices will obviously prevent the jurors from making telephone calls and sending emails during the period that they are in the jury room (albeit no doubt they would be able to use a phone at court in the case of an emergency).

B.179 We consider that such restriction would be in accordance with the law, given our proposal to empower judges to remove such devices, and would meet the legitimate aims of preventing crime (in the sense of upholding public confidence in the criminal justice system) and protecting "the rights and freedoms of others", namely their right to a fair trial by an independent and impartial tribunal. Such removal of internet-enabled devices would normally only be for the period that the jurors are deliberating – usually no more than a few hours or days – and the

[238] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 227.

[239] See Ch 2 at para 2.20.

[240] Clayton and Tomlinson para 12.313.

[241] *Wieser v Austria* (2008) 46 EHRR 54 (App No 74336/01) at [45].

devices would obviously be returned to the jurors at the end of the court day. Even in exceptional cases where the devices were removed before deliberations began, there is no question of jurors being prohibited from having access to their devices outside of the time that they are at court. In consequence, we consider that any such interference would be a proportionate restriction on article 8 rights.

B.180 Again, the application of the normal rules of criminal investigation and procedure to juror contempts will also help to ensure article 8 compliance.

ARTICLE 5: THE RIGHT TO LIBERTY

INTRODUCTION

B.181 Article 5 is clearly relevant to the law on contempt of court given that alleged contemnors may be arrested, remanded in custody and may be punished by a prison sentence. After examining the ECtHR's interpretation of article 5, we consider in this section whether the procedures for dealing with bail in respect of contempt by publication, contempt by jurors and contempt in the face of the court are compliant with the right to liberty.

B.182 Article 5 provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> > (a) the lawful detention of a person after conviction by a competent court;
> >
> > (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> >
> > (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

B.183 The purpose of article 5 is to prevent "the arbitrary deprivation of liberty".[242] In consequence, in interpreting the wording of the article, the ECtHR has held that liberty and security do not have separate meanings.[243] Under the jurisprudence of the court, any detention, even for short periods of a few hours, can amount to a deprivation of liberty. Much will depend on the facts of the case: in making an assessment of whether the threshold of deprivation has been reached, the court will consider "'a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question".[244] It has been held that mere questioning by the police, without arrest or detention in a cell, for a short period will not breach article 5.[245] In making an assessment of whether there has been a deprivation of liberty, the characteristics of the detention and the detainee may be relevant. Likewise, the intention of the detaining authorities may be relevant.[246]

B.184 Given the purpose of article 5, it must be narrowly interpreted.[247] Accordingly, in order for the state to justify a deprivation of liberty, it is necessary to show that the detention occurred via "a procedure prescribed by law", and that "on substantive and procedural grounds" (at least) one of the criteria from articles 5(1)(a) to (c) is met.[248] Additionally, article 5 also contains an implied duty "on the state to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities".[249]

B.185 Furthermore, the requirements of article 5 are related to the protection of other Convention rights. In particular, where other ECHR rights include guarantees such as "prescribed by law" (as required by article 10) or "in accordance with the law" (article 8), a finding that article 5 has been violated may lead to the conclusion that the guarantees of the other article have also been breached. Where an interference falls within the ambit of article 5 and another article, and the court finds that the requirements of article 5 have not been met, this will almost always lead to a finding that the interference with the other article is not in accordance with the law. In that sense, "in accordance with the law" or

[242] *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15 (App No 332/57) at [6]; *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71 and others) at [58]; *Winterwerp v The Netherlands* (1979) 2 EHRR 387 (App No 6301/73) at [37] and [49]; *Bozano v France* (1987) 9 EHRR 297 (App No 9990/82) at [71]; *Johnson v UK* (1999) 27 EHRR 296 (App No 22520/93) at [56]; and *Guzzardi v Italy* (1981) 3 EHRR 333 (App No 7367/76) at [92], amongst other cases.

[243] Clayton and Tomlinson para 10.156.

[244] *Guzzardi v Italy* (1981) 3 EHRR 333 (App No 7367/76) at [92]. See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.2.

[245] *X v Germany* App No 8819/79 (Commission decision).

[246] Clayton and Tomlinson para 10.160 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.4.

[247] *Winterwerp v The Netherlands* (1979) 2 EHRR 387 (App No 6301/73); *Guzzardi v Italy* (1981) 3 EHRR 333 (App No 7367/76); *Quinn v France* (1996) 21 EHRR 529 (App No 18580/91) at [42].

[248] Clayton and Tomlinson para 10.171. Art 5(1) also contains criteria (e) and (f) relating to detention of those with communicable diseases, mental ill-health, drug or alcohol problems and to immigration or extradition detention respectively. They are not relevant for these purposes.

[250] *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94) at [110].

"prescribed by law" for the purpose of article 8 and 10 can be said to inherently include the guarantees enshrined in article 5.[250]

"A procedure prescribed by law"

B.186 This requirement is to meet the aim of article 5 in ensuring that detention is not "arbitrary".[251] In consequence, all aspects of the detention, including the process of arrest[252] and the judicial procedures followed when a court orders detention[253] must be prescribed by law. As with article 10,[254] requiring the procedure to be "prescribed by law" means that the consequences of certain conduct must be reasonably foreseeable to an individual, although it may be necessary for the individual to obtain legal advice in order to understand what those consequences might be.[255] Article 5 has also been interpreted to include an implied right to a degree of procedural fairness, including "adequate legal protections" for the detainee.[256]

Article 5(1)(a): the lawful detention of a person after conviction by a competent court

B.187 It is the lawfulness of the detention, not the conviction itself, which the court will examine in relation to article 5(1)(a).[257] Detention will be lawful where it executes a sentence which has been imposed by a court, unless the court acts in a way which has "no basis in domestic law",[258] such as imposing a sentence over the maximum permitted by legislation. The term "conviction" has been interpreted as "a finding of guilt".[259]

B.188 A "competent court" is a body which has the significant characteristics of a court, such as independence and impartiality. The body must also follow a legal procedure and have jurisdiction to hear the proceedings in order to be deemed "a competent court".[260] This may mean that a finding that article 6 was violated in

[251] *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15 (App No 332/57); *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71 and others); *Winterwerp v The Netherlands* (1979) 2 EHRR 387 (App No 6301/73); *Bozano v France* (1987) 9 EHRR 297 (App No 9990/82); *Johnson v UK* (1999) 27 EHRR 296 (App No 22520/93); and *Guzzardi v Italy* (1981) 3 EHRR 333 (App No 7367/76).

[252] *Fox v UK* (1991) 13 EHRR 157 (App No 12244/86 and others).

[253] *Van der Leer v The Netherlands* (1990) 12 EHRR 567 (App No 11509/85).

[254] See para B.38 and following above.

[255] *Steel v UK* (1999) 28 EHRR 603 (App No 24838/94) at [54]; *Kawka v Poland* App No 25874/94 at [49]; *Laumont v France* (2003) 36 EHRR 35 at [45]; *Gusinskiy v Russia* (2005) 41 EHRR 17 (App No 70276/01) at [63] to [64].

[256] Clayton and Tomlinson para 10.170.

[257] *Krzycki v Germany* App No 7629/76 (Commission decision).

[258] Clayton and Tomlinson para 10.173. See *Van der Leer v The Netherlands* (1990) 12 EHRR 567 (App No 11509/85); and *Artico v Italy* (1981) 3 EHRR 1 (App No 6694/74).

[259] *James v UK* App Nos 25119/09 and others at [189]; *M v Germany* (2010) 51 EHRR 41 (App No 19359/04) at [87]; *Grosskopf v Germany* (2011) 53 EHRR 7 (App No 24478/03) at [43]; *X v United Kingdom* (1982) 4 EHRR 188 (App No 6998/75) at [39]; *B v Austria* (1991) 13 EHRR 20 (App No 11968/86) at [38]; and *Guzzardi v Italy* (1980) 3 EHRR 333 (App No 7367/76) at [100]. See also Clayton and Tomlinson para 10.174 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.16.

[260] See *X v Austria* App No 3245/67 (Commission decision); *Eggs v Switzerland* App No 10313/83 (Commission decision); and *De Wilde v Belgium (No 1)* (1979-80) EHRR 373 (App Nos 2832/66, 2835/66 and 2899/66).

significant measure will lead to the conclusion that article 5(1)(a) has been breached, because the detention was not at the hands of a competent court.[261] The requirement that the detention be imposed *after* the conviction has been held to require that the detention must be caused by the conviction.[262]

Article 5(1)(b): the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

B.189 According to Clayton and Tomlinson, this criterion "applies to arrest and detention *both* for offences of a criminal nature and for breaches of the civil law such as failure to comply with an injunction or contempt proceedings".[263] Under the first part of article 5(1)(b) (non-compliance with the lawful order of a court), it is clear that there is obviously required to be such an order if the detention is to be justified.

B.190 In relation to the second part (in order to secure the fulfilment of any obligation prescribed by law), the stated obligation must be one which is a "specific and concrete obligation which he [the individual involved] has until then failed to satisfy".[264] Whether the obligation meets this test will depend on the facts of the case, and therefore it is not possible to discern hard and fast rules from the ECHR jurisprudence. However, a general obligation not to break the law is clearly insufficiently specific.[265] The ECtHR will try to balance the importance of the obligation which requires fulfilment with the importance of protecting against arbitrary detention,[266] which may include taking into consideration the length of detention.[267]

Article 5(1)(c): the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

B.191 Article 5(1)(c) permits a person to be remanded in custody whilst they await trial.[268] It is clear from the wording of article 5(1)(c) that the provision "is clearly

[261] *Drozd v France* (1992) 14 EHRR 745 (App No 12747/87) at [110]. Although "the judicial guarantees required by art 5(1)(a) are not necessarily the same as those required by art 6": A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.17.

[262] *James v UK* App Nos 25119/09 and others at [189]; *Weeks v United Kingdom* (1988) 10 EHRR 293 at [42]; and *B v Austria* (1991) 13 EHRR 20 (App No 11968/86) at [38].

[263] Clayton and Tomlinson para 10.180 (emphasis in original).

[264] *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71 and others) at [69].

[265] *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71 and others) at [69] and *Airey v Ireland* (1979-80) 2 EHRR 305 (App No 6289/73).

[266] *Reyntjens v Belgium* App No 16810/90 (Commission decision).

[267] *McVeigh v UK* (1983) 5 EHRR 71 (App Nos 8022/77, 8025/77 and 8027/77) (Commission decision) at [186] and *Vasileva v Denmark* (2005) 40 EHRR 27 (App No 52792/99) at [37].

[268] Clayton and Tomlinson para 10.187.

limited to the arrest or detention of persons for the purpose of enforcing the criminal law".[269]

B.192 The first circumstance is limited to reasonable suspicion of having committed a criminal offence.[270] For reasons explained below,[271] this would include the types of contempt considered by the consultation paper.[272] Reasonable suspicion has been held to amount to "facts or information that would satisfy an objective observer that the person concerned may have committed the offence".[273] Of course, what is reasonable will depend on the facts of the case, as they are known at the point that the detainee is arrested.[274]

B.193 The second circumstance (reasonably considered necessary to prevent his committing an offence) has been interpreted so that it precludes preventive detention since the detention must be with the aim of initiating criminal proceedings.[275] Clayton and Tomlinson argue that the third circumstance (reasonably considered necessary to prevent his fleeing after having committed an offence) is largely redundant, given that it requires a risk that a person will flee "after having" committed an offence, which therefore means that they will also fall under the first circumstance.[276]

Article 5(3)

B.194 Article 5(3) is also relevant because it relates to those detained in accordance with article 5(1)(c). Article 5(3) ensures judicial oversight of those detained by the state.[277] In addition to the "reasonable suspicion" criterion for detention under article 5(1)(c), article 5(3) requires that the detainee be brought before a judge, who must make an assessment of whether the continuing detention can be justified on various public interest grounds.[278] At that point, there needs to be more than reasonable suspicion alone. This provision is obviously relevant to the law regulating bail.

B.195 The jurisprudence of the ECtHR establishes that the right to be brought promptly before a judge "must be automatic".[279] Therefore, it cannot be dependent either on the detainee requesting to be brought before a judge nor can it be satisfied by the mere *availability* of a judicial remedy.[280] That remedy must, in fact, be activated by the executive. Once brought before a court to consider continuing

[269] Clayton and Tomlinson para 10.188, citing *Ciulla v Italy* (1991) 13 EHRR 346 (App No 11152/84).

[270] *Ciulla v Italy* (1989) 13 EHRR 346 (App No 11152/84).

[271] See para B.235 and following below.

[272] See para B.240 below.

[273] *Fox v UK* (1991) 13 EHRR 157 (App Nos 12244/86, 11245/86 and 12383/86) at [32]. See also *Murray v UK* (1995) 19 EHRR 193 (App No 14310/88) (Grand Chamber decision) at [55].

[274] *Nielsen v Denmark* App No 343/57 (Commission decision).

[275] *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15 (App No 332/57).

[276] Clayton and Tomlinson para 10.193.

[277] *Brogan v UK* (1989) 11 EHRR 117 (App Nos 11209/84 and others) at [58].

[278] *Stögmuller v Austria* (1979-80) 1 EHRR 155 (App No 1602/62).

[279] Clayton and Tomlinson para 10.224.

[280] *Sabeur Ben Ali v Malta* (2002) 34 EHRR 26 (App No 35892/97) at [31].

detention, the presiding judge must be independent and impartial,[281] criteria which we consider in more detail in relation to article 6, below.[282]

B.196 Whether the appearance before that judge is sufficiently prompt to satisfy article 5(3) will depend on the facts of the case.[283] Delays involving a period of a few days have in some circumstances been deemed not to breach article 5(3),[284] whilst in other circumstances the ECtHR has emphasised that such a delay would only be acceptable in exceptional cases.[285]

B.197 The right to release whilst awaiting trial under article 5(3) is effectively a right to bail, albeit that the grant of such bail may be conditional.[286] To justify the refusal of bail, the state must show "relevant and sufficient" reasons which justify the detention.[287] It has been established by the ECHR jurisprudence that bail may only be refused on one of five bases:[288]

(a) where there is a risk of absconding;[289]

(b) where there is a risk of interference with the course of justice;[290]

(c) to prevent crime;[291]

(d) to preserve public order;[292]or

(e) to protect the detainee.[293]

B.198 Additionally, article 5(3) includes the right to a trial within a reasonable time. This has been held to mean that when the state detains a person pending trial, it must consider whether there are alternative ways of ensuring that that person attends for trial, instead of automatically resorting to detention.[294] Again, what amounts to

[281] *Huber v Switzerland* App No 12794/87 (Commission decision).

[282] See para B.246 and following below.

[283] Clayton and Tomlinson paras 10.225 to 10.227. See also *Brogan v UK* (1989) 11 EHRR 117 (App Nos 11209/84 and others) at [59]; and *Koster v The Netherlands* (1992) 14 EHRR 396 (App No 12843/87) at [24].

[284] See *Brannigan and McBride v UK* (1994) 17 EHRR 539 (App No 14553/89).

[285] *Taş v Turkey* (2001) 33 EHRR 15 (App No 24396/94) at [86]

[286] See Clayton and Tomlinson at para 10.235 for examples of acceptable conditions. Broadly speaking, the case law appears to follow the usual conditions imposed by courts in England and Wales, such as a residence requirement or the surrender of travel documents.

[287] *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App No 2122/64) at [12]; *Yagci v Turkey* (1995) 20 EHRR 505 (App Nos 16419/90 and 16426/90) at [52].

[288] Clayton and Tomlinson para 10.229 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.51 and following.

[289] See *Stögmuller v Austria* (1979-80) 1 EHRR 155 (App No 1602/62) at [15] and *Goral v Poland* App No 38654/97.

[290] See *Clooth v Belgium* (1992) 14 EHRR 717 (App No 12718/87) at [44].

[291] See *Matznetter v Austria* (1979-80) 1 EHRR 198 (App No 2178/64) at [9] and *Muller v France* App No 21802/93 at [44].

[292] See *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86).

[293] See *Stögmuller v Austria* (1979-80) 1 EHRR 155 (App No 1602/62) at [15].

[294] *Jablonski v Poland* (2003) 36 EHRR 37 (App No 33492/96) at [83].

a reasonable time will depend on the circumstances of the case.[295] In this regard, article 5(3) and article 6(1), which requires "a fair and public hearing within a reasonable time by an independent and impartial tribunal", are obviously related.[296]

Article 5(2)

B.199 Article 5(2), (4) and (5) sit together to allow anyone, detained for any reason, to challenge that detention and to obtain compensation if the challenge is successful.[297] Article 5(2) is not, therefore, limited to detention in respect of the criminal justice system, but is designed to ensure an individual understands why they are being held, so that if necessary, they may challenge that detention. A breach of article 5(2) will render the detention unlawful, even where it meets one of the tests within the article 5(1) criteria.[298]

B.200 The requirement under article 5(2) is that the detainee "be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". This information may be provided in oral or written form, and should cover the "legal and factual grounds" for the arrest.[299] Whether the information provided is "sufficient" can only be determined on a case by case basis,[300] although *Fox v United Kingdom*[301] appeared to hold that information will be sufficient where a detainee can discern the reasons for the detention from the circumstances of the arrest.[302]

B.201 Likewise, whether the information has been provided "promptly" will also depend on the facts of the case – periods of hours in detention before the provision of information have been held to be acceptable.[303] In addition to the right to be informed in a language the detainee understands, if the detainee is incapable of understanding the information provided (for example, because of age or mental disorder), they must have the information provided to a guardian or other representative.[304]

Article 5(4)

B.202 Article 5(4) gives the detainee the right to "take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release

[295] Clayton and Tomlinson paras 10.236 to 10.239.

[296] See paras B.241 to B.267 below.

[297] Clayton and Tomlinson para 10.215.

[298] Clayton and Tomlinson para 10.216.

[299] Clayton and Tomlinson para 10.219, citing *Fox v UK* (1991) 13 EHRR 157 (App No 12244/86, 12245/86 and 12283/86) at [40]. See also *Lamy v Belgium* (1989) 11 EHRR 529 (App No 10444/83) at [31].

[300] Clayton and Tomlinson para 10.219.

[301] *Fox v UK* (1991) 13 EHRR 157 (App Nos 12244/86, 12245/86 and 12283/86).

[302] *Fox v UK* (1991) 13 EHRR 157 (App Nos 12244/86, 12245/86 and 12283/86). This decision has been criticised by Clayton and Tomlinson: see para 10.220.

[303] Clayton and Tomlinson para 10.221.

[304] Clayton and Tomlinson para 10.218.

ordered if his detention is not lawful". It essentially provides for the right to habeas corpus.[305]

B.203 In determining lawfulness, the court is required to "conduct a review which is wide enough to bear on all the conditions which are essential to the lawfulness of the detention".[306] As in relation to other provisions of article 5, the court must be an independent, impartial and competent judicial body.[307] It is unclear whether there is a right to an oral hearing and to representation at the hearing under article 5(4), although it appears that this will generally be required.[308] There is also a requirement for legal advice and representation prior to the hearing (free of charge if necessary), to time and facilities for the preparation of the detainee's case, and to equality of arms between the parties.[309]

B.204 The detainee must have the right to bring proceedings "speedily" after the commencement of their detention – for example, with no enforced waiting periods before a claim can be issued[310] – and once proceedings have been brought by the detainee, the court must also make the assessment of lawfulness "speedily".[311] Again, however, whether the process is sufficiently speedy will depend on the nature of the case.[312]

B.205 Article 5(4) does not include a right to appeal, although if there is one, it too should meet the procedural requirements of the article.[313] Article 5(5) enshrines the right to compensation for detention in violation of the right to liberty.[314]

B.206 We now turn to examine the article 5 implications for the law on contempt of court.

CONTEMPT BY PUBLICATION

B.207 Concerns have been raised that the current procedure for dealing with contempt by publication – both under section 2(2) and at common law – raises questions about article 5 compliance.[315] In particular, if the Divisional Court, the court of first

[305] Clayton and Tomlinson para 10.240.

[306] Clayton and Tomlinson para 10.242, citing *E v Norway* (1994) 17 EHRR 30 (App No 11701/85) at [50].

[307] *Weeks v UK* (1987) 10 EHRR 293 (App No 9787/82). See also para B.246 and following below.

[308] Clayton and Tomlinson para 10.247. In a domestic context, see *Osborn v Parole Board* [2010] EWCA Civ 1409, [2011] United Kingdom Human Rights Reports 35 and *Smith v Parole Board (No 2)* [2005] UKHL 1, [2005] 1 WLR 350 on this point.

[309] Clayton and Tomlinson paras 10.248 to 10.250 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) paras 4.5.60 to 4.5.61. We consider these matters in more detail in relation to art 6, see paras B.289 to B.301 below.

[310] *De Jong v The Netherlands* (1986) 8 EHRR 20 (App Nos 8805/79, 8806/79 and 9242/81).

[311] *Van der Leer v The Netherlands* (1990) 12 EHRR 567 (App No 11509/85).

[312] *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71 (App No 9862/82) at [55]. See the various different periods of time considered by the court in Clayton and Tomlinson at paras 10.255 to 10.256 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.5.63.

[313] *Rutten v The Netherlands* App No 32605/96 at [53]; *Navarra v France* (1994) 17 EHRR 594 (App No 13190/87) at [28].

[314] This right is also enshrined in the Human Rights Act 1998, s 9(3).

[315] See Ch 2 at para 2.66.

instance, were minded to remand the alleged contemnor in custody, or impose bail conditions (for example, because of the circumstances of the offence or the characteristics of the offender), it is not clear what powers the court would have to do this, nor whether the Bail Act 1976 would apply.

B.208 The Bail Act only has application where there are "proceedings for an offence"[316] and it is not clear whether this would include contempt proceedings. If the Bail Act does not apply, the common law of bail may do so (along with section 2 of the Habeas Corpus Act 1679), but there is a lack of legal clarity about this. Some question whether it is clear that detention would be article 5 compliant: whilst a person reasonably suspected of having committed a contempt by publication would appear to fall within article 5(1)(c), the uncertainty over the application of the Bail Act means that there may not be a "procedure prescribed by law".

B.209 Historically, this has not generated difficulty in practice given that most publication contempt proceedings have been brought against corporate media organisations or professional journalists. However, the advent of the modern media may mean that individuals or "citizen journalists" are more likely to come before the court for contempt proceedings, and depending on the circumstances, the court may need to consider the grant of bail to that person. For example, an intentional contempt by publication could be committed if a person deliberately tweeted to a jury prejudicial messages about a defendant. In such circumstances, the court may consider it necessary to impose conditions prohibiting contact between the tweeter and the parties and jurors in the case. We anticipate that these types of situations would be rare. Nonetheless, it is clear that if such circumstances were to arise, it would be necessary to ensure that in accordance with article 5, the appropriate power to deal with the alleged contemnor was clear and accessible, and the right to liberty was thereby protected.

B.210 This is one of the reasons for the proposal in Chapter 2 that contempt by publication under section 2(2) or at common law be tried on indictment or "as if on indictment" before a judge alone. That would ensure that the alleged contemnor has the protections which come with trial on indictment, including in relation to bail.[317] We make a similar proposal in relation to the new contempt which we propose in Chapter 3, whereby a court orders the removal of material that was first published before proceedings became active, the material creates a substantial risk of serious prejudice, and the order is not complied with. Again, this will help protect the article 5 rights of those alleged to be in breach of the order.

B.211 The application of the normal rules of criminal investigation and procedure to dealing with contempt by publication will also help to ensure article 5 compliance.

JUROR CONTEMPT

B.212 Similar concerns have been raised about article 5 in relation to juror contempts, where a juror has undertaken research of their own about the case or because a person has breached section 8 of the 1981 Act. Again, it is not clear what powers the court would have to remand the alleged contemnor in custody or impose conditions pending trial. It is uncertain whether the Bail Act 1976 or the common law of bail applies. As with contempt by publication, reasonable suspicion would

[316] Bail Act 1976, s 1(1).

[317] See Ch 2 at paras 2.73 to 2.76.

mean that the alleged contemnor falls within article 5(1)(c). However, some have expressed concern that the lack of clarity in the law on bail may not be in compliance with "a procedure prescribed by law" and the necessity for both reasonable foreseeability and procedural fairness.

B.213 One of our provisional proposals in Chapter 4 is the creation of a new offence where jurors intentionally seek information related to the case that the juror is trying, triable on indictment or "as if on indictment" before a judge alone. This would ensure that alleged contemnor jurors come within the provisions of the Bail Act. In that chapter, we also seek consultees' view on alternative suggestions as to how the existing procedure before the Divisional Court can be amended to ensure compliance with the right to liberty.

B.214 Again, the application of the normal rules of criminal investigation and procedure to juror contempts will also help to ensure article 5 compliance.

CONTEMPT IN THE FACE OF THE COURT

B.215 As with cases of contempt in relation to jurors, above, there are concerns about the compatibility with article 5 of current procedures for dealing with contempt in the face of the court. Where a judge orders the detention of an alleged contemnor pending an enquiry, it is unclear whether the Bail Act 1976 applies in these circumstances. If it does not, the common law of bail would appear to apply instead, but it is unclear how this might work in practice. This again has promoted some to question the extent to which the bail procedure can be said to be "prescribed by law" given the requirements of reasonable foreseeability and procedural fairness.

B.216 The situation in the Crown Court is further complicated by the requirement that the detainee be brought before the court no later than the next business day. This could lead to a significant period of time before bail is considered. This would be a particular problem if, for example, the person were first detained on the Friday before a bank holiday weekend. The hearing would be the following Tuesday. This delay risks being non-compliant with article 5. In consequence, we provisionally propose in Chapter 5 that detention must be reviewed no later than the end of the day on which detention was first ordered.[318] At that point, the court must grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out. This will ensure compliance with article 5.[319]

B.217 Additionally, we propose that anyone subject to immediate temporary detention on suspicion of having committed a contempt in the face of the court should have certain entitlements. This includes the right, if the detainee so requests, to consult a legal representative in private at any time. This will obviously meet the requirement for legal advice and representation prior to the bail hearing as required by article 5.[320]

B.218 In relation to the magistrates' court, there is currently no power of the magistrates to remand an alleged contemnor in custody overnight because there is no power

[318] See Ch 5 at para 5.96.

[319] See Ch 5 at paras 5.33 to 5.55.

[320] Clayton and Tomlinson paras 10.248 to 10.250 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) paras 4.5.60 to 4.5.61. We consider these matters in more detail in relation to art 6, at para B.288 below.

to adjourn beyond that court sitting. We ask consultees whether they think the magistrates should have the power to adjourn the hearing for contempt beyond the rising of the court to the next business day. If so, we ask consultees whether the magistrates should have the power to order that the alleged contemnor be detained but be required to review the alleged contemnor's bail position no later than the end of the court day (with a view to considering whether the contemnor should be released on bail). In the alternative, we ask consultees whether the magistrates should have the power to grant bail (conditional or unconditional) until the adjourned contempt hearing but without the power to remand the alleged contemnor in custody. Either way, we consider that the requirements of article 5 will be met. This is because the alleged contemnor will either have to be released, or the court will have to review the decision to detain and establish that an exception to bail has been made out in order to justify the continuing detention.

ARTICLE 6: THE RIGHT TO A FAIR TRIAL

INTRODUCTION

B.219 This section examines the right to a fair trial. Again, the case law in this area is vast, and therefore it is only possible to provide below a summary of the relevant provisions. We have focused in this part of the appendix on the relevance of article 6 to four issues: (1) the role of contempt by publication in protecting article 6 rights; (2) the need to ensure protection of article 6 rights if publishers are themselves on trial for allegedly committing contempt by publication; (3) the role of contempt by jurors in protecting the article 6 rights of defendants being tried by those jurors; and (4) the need to ensure protection of article 6 rights if jurors are tried for contempt either by their seeking information about the case that they are trying or by disclosing it in breach of section 8.

B.220 We also consider below whether the forms of contempt considered in the consultation paper are classed as civil or criminal for the purposes of article 6 (the latter ensuring the enhanced protections of article 6(3).)

B.221 Article 6 of the ECHR establishes that:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> > (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> >
> > (b) to have adequate time and facilities for the preparation of his defence;
> >
> > (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> >
> > (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
> >
> > (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The determination of civil rights and obligations

B.222 Article 6 applies to both civil and criminal proceedings, although in different ways. A "determination" of a civil right or obligation or of a criminal charge is required in order to engage the provisions of article 6. In relation to civil proceedings, the ECtHR has held that there is a determination where "the outcome of the proceedings is *decisive* for them".[321] Therefore, article 6 only applies where there is a decision on the merits of a case, not, for example, in relation to applications for interim relief.[322] Having said that, the court has held that article 6 does have application where the interim decision is key to the proceedings as a whole, or where the decision could cause serious prejudice to the applicant.[323]

Any criminal charge

B.223 In relation to criminal proceedings, article 6 applies as soon as the applicant is subject to criminal charge, until the final determination of the case is made. This means article 6 is engaged in relation to appeals (both applications for leave to appeal and the substantive proceedings) and to sentencing hearings.[324]

B.224 The phrase "criminal charges" has an "autonomous" meaning within Convention jurisprudence.[325] The case of *Engel v The Netherlands (No 1)*[326] established that there are three criteria by which the ECtHR will assess whether a particular accusation amounts to a criminal charge. The criteria are:

(a) How the national law classes the allegation.[327]

B.225 If the national law classes the allegation as criminal, this will be decisive. However, it is does not, this is not determinative, but the court will go on to consider the second and third criteria:

(b) Whether the crime relates only to specific people or whether it applies generally, and whether the purpose of criminalisation is to punish or deter certain types of conduct, and whether punishment is imposed after a finding of guilt.

B.226 The case law from the ECtHR establishes that disciplinary proceedings will not usually be deemed criminal, but "'regulatory' offences" and minor road traffic

[321] Clayton and Tomlinson para 11.330 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.7.

[322] *Apis v Slovakia* (2000) 29 EHRR CD105 (App No 399754/98).

[323] *Obermeier v Austria* (1991) 13 EHRR 290 (App No 11761/85) and *Markass Car Hire Ltd v Cyprus* App No 51591/99.

[324] *Monnell v UK* (1988) 10 EHRR 205 (App Nos 9562/81 and 9818/82); *Delcourt v Belgium* (1979-80) 1 EHRR 355 (App No 2689/65); *Eckle v Germany* (1983) 5 EHRR 1 (App No 8130/78); *Neumeister v Austria* (1968) 1 EHRR 91 (App No 1936/63) at [19]; and *Thompson v UK* (2005) 40 EHRR 11 (App No 36256/97) at [42].

[325] Clayton and Tomlinson para 11.358.

[326] (1979-80) 1 EHRR 647 (App No 5100/71 and others) at [82].

[327] See also *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84) at [33]; *Demicoli v Malta* (1992) 14 EHRR 47 (App No 13057/87) at [32]; *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92) (Grand Chamber) at [56]; *Öztürk v Germany* (1984) 6 EHRR 409 (App No 8544/79) at [53]; *Lutz v Germany* (1988) 10 EHRR 182 (App No 9912/82) at [50] to [55]; *Bendenoun v France* (1994) 18 EHRR 54 (App No 12547/86) at [47]; *Maaouia v France* (2001) 33 EHRR 42 (App No 39652/98) at [39]; and *Aerts v Belgium* (2000) 29 EHRR 50 (App No 25357/94).

offences have both been held to entail criminal charges.[328] In the alternative to the second criteria,[329] the court will consider the third, namely:

(c) How serious the penalty is.[330]

B.227 Any punishment involving more than a short deprivation of liberty will lead to a finding that the allegation should be treated as a criminal charge.[331]

B.228 However, the case law in relation to contempt of court is highly fact-specific in determining whether such proceedings amount to a criminal charge. In *Weber v Switzerland*,[332] the ECtHR, having considered that it was unclear whether the contempt was classed as criminal or disciplinary within domestic law, went on to consider "the second, weightier criterion [which] is the nature of the offence":

> Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. … As persons who above all others are bound by the confidentiality of an investigation, judges, lawyers and all those closely associated with the functioning of the courts are liable in such an event, independently of any criminal sanctions, to disciplinary measures on account of their profession. The parties, on the other hand, only take part in the proceedings as people subject to the jurisdiction of the courts, and they, therefore, do not come within the disciplinary sphere of the judicial system. As Article 185 [the domestic contempt provision], however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a 'criminal' one for the purposes of the second criterion.
>
> …
>
> As regards the third criterion – the nature and the degree of severity of the penalty incurred – the court notes that the fine could amount to 500 Sfr [approximately £330 at today's exchange rate but without adjustment for inflation] and be converted into a term of imprisonment in certain circumstances. What was at stake was thus sufficiently important to warrant classifying the offence with which the applicant was charged as a criminal one under the Convention".[333]

B.229 By comparison, in the subsequent case of *Ravnsborg v Sweden*,[334] the applicant was fined for making critical and sometimes insulting remarks in his written submissions during court proceedings. Again, the court found the domestic law

[328] Clayton and Tomlinson paras 11.361 to 11.364.

[329] *Lutz v Germany* (1998) 10 EHRR 182 (App No 9912/82) at [55] and *Garyfallou AEBE v Greece* (1999) 28 EHRR 344 (App No 18996/91) at [33].

[330] See *Brown v UK* (1999) 28 EHRR CD 233 (App No 38644/97); *Porter v UK* (2003) 37 EHRR CD8 (App No 15814/02); and *Galstyan v Armenia* (2010) 50 EHRR 25 (App No 26986/03) at [56] to [60].

[331] Clayton and Tomlinson para 11.366.

[332] (1990) 12 EHRR 508 (App No 11034/84).

[333] *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84) at [33] to [34] (footnotes omitted).

[334] (1994) 18 EHRR 38 (App No 14220/88).

inconclusive as to whether the proceedings against the applicant were criminal. Turning to the second criterion, the court then held that the relevant legal provision applied only to:

> improper statements made orally or in writing to a court by a person attending or taking part in the proceedings, but not to such statements made in a different context or by a person falling outside the circle of people covered by that provision.[335]

B.230 This position, it said, was different from *Weber*,

> where the court found [the criminal limb of] Article 6 to be applicable ... . Rules enabling a court to sanction disorderly conduct in proceedings before it are a common feature of legal systems of the Contracting States. Such rules and sanctions derive from the indispensable power of a court to ensure the proper and orderly functioning of its own proceedings. Measures ordered by courts under such rules are more akin to the exercise of disciplinary powers than to the imposition of a punishment for commission of a criminal offence.[336]

B.231 In considering the third criterion, the court found that although the fines imposed on the applicant, which were the maximum penalty of 1,000Skr [approximately £94 at today's exchange rate but without adjustment for inflation] could be converted to a term of imprisonment,

> the possible amount of each fine did not attain a level such as to make it a "criminal" sanction. Unlike ordinary fines, the kind at issue was not to be entered on the police register. A decision to convert the fines [to imprisonment] could only be taken by the District Court in limited circumstances.[337]

B.232 Accordingly, such provisions were not deemed criminal. Subsequently, the court in *Putz v Austria*[338] reached a similar conclusion when the applicant was fined for disrupting court proceedings.[339]

B.233 In 2005 in *Kyprianou v Cyprus*,[340] the applicant, an advocate, was sentenced to five days' imprisonment for contempt in the face of the court. It was accepted by the parties that this contempt was criminal for the purposes of article 6.[341] Most recently, in *Zaicevs v Latvia*,[342] the applicant was sentenced to 3 days' imprisonment for contempt for being rude to and shouting at a judge in chambers. The court held that the seriousness of penalty meant that the contempt was criminal for article 6 purposes.

[335] *Ravnsborg v Sweden* (1994) 18 EHRR 38 (App No 14220/88) at [34].

[336] *Ravnsborg v Sweden* (1994) 18 EHRR 38 (App No 14220/88) at [34].

[337] *Ravnsborg v Sweden* (1994) 18 EHRR 38 (App No 14220/88) at [35].

[338] (2001) 32 EHRR 13 (App No 18892/91).

[339] (2001) 32 EHRR 13 (App No 18892/91) at [33] to [38].

[340] (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision).

[341] (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [64].

[342] App No 10000/99.

B.234 If the proceedings are deemed criminal for the purposes of article 6, the point of charge is "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[343] So, it is from this point that article 6 is activated. This definition is clearly wider than the term "charge" used in English criminal law. In consequence, the determination of a "criminal charge" for article 6 purposes can commence at arrest.[344] Furthermore, "police questioning or investigation of an individual prior to his arrest"[345] can also amount to charge under article 6.

IS CONTEMPT CRIMINAL OR CIVIL FOR ECHR PURPOSES?

B.235 The first issue for consideration is whether the types of contempt of court under English law which are examined in this consultation paper amount to criminal charges for the purposes of article 6. Contempt, historically, has been treated as a class of its own, in many ways neither criminal nor civil within the ordinary meanings of those words in the English justice system.

B.236 Nonetheless, contempt by publication (under section 2(2), intentionally, in breach of a section 4(2) or section 11 order) are all criminal contempts. Likewise, breach of section 8 of the 1981 Act and contempt in the face of the court are both criminal contempts. The status of the contempt committed by jurors who seek information about the case they are trying is unclear, although it seems likely to amount to a criminal contempt.[346] Furthermore, the Court of Appeal in *Daltel Europe Ltd v Makki*[347] held that:

> It is clear that committal proceedings [for contempt] are to be categorised as criminal proceedings for the purposes of article 6, whether the contempt involved is classified as civil or as criminal.[348]

Thus, domestic law regards contempt as criminal for article 6 purposes.

B.237 Even if such findings were not determinative, we can consider the second and third criteria from *Engel v Netherlands* discussed above.[349] It seems apparent that contempt by publication, contempt in the face of the court and breach of section 8 of the 1981 Act are prohibitions which apply generally, with the aim of deterring certain types of conduct. They would, therefore, seem to fall more appropriately within the sphere established in *Weber*, as criminal proceedings, than in *Ravnsborg* which, in the latter case, limited the contempt-type proceedings merely to the parties in the case.

B.238 Whilst contempt (or a replacement statutory offence) committed by jurors who seek information about the case they are trying can obviously only be committed by those on jury service, it should be noted that jurors do not volunteer for jury service, but are generally compelled to undertake it by virtue of being randomly

[343] *Deweer v Belgium* (1979-80) 2 EHRR 439 (App No 6903/75) at [46].

[344] *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App No 2122/64).

[345] Clayton and Tomlinson para 11.371.

[346] On its face, such contempt should be a criminal contempt, given that it interferes with the proceedings to which the juror was not a party (ie the original trial). This is akin to a breach of a s 4(2) order, which is a criminal contempt.

[347] [2006] EWCA Civ 94, [2006] 1 WLR 2704.

[348] [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

[349] See paras B.225 and following above.

selected from the electoral register. In that sense, almost any ordinary member of the public could become a juror.

B.239 Even if such proceedings were deemed disciplinary under the second criterion, considering the issue of punishment would point to contempt by jurors seeking information about the case they are trying being treated as criminal, given the potential sentence of up to two years' imprisonment. In *Dallas*,[350] the contemnor was sentenced to six months' imprisonment, with the Lord Chief Justice commenting that an "effective custodial sentence is virtually inevitable"[351] in such cases.

B.240 Furthermore, all contempts require proof to the criminal standard. Accordingly, we consider that all of the contempts dealt with in this consultation paper will amount to criminal charges for the purposes of article 6, and, therefore, benefit from the enhanced protections of article 6(3), which we discuss below.

ARTICLE 6(1)

"A fair and public hearing"

B.241 At its core, article 6 protects the right to a fair trial, although fairness in this context is something of a flexible concept. The ECtHR has held that the proceedings must be examined as a whole in order to assess the fairness of them. In consequence, where there is a failure to meet one of the requirements of article 6, this will not necessary lead to the conclusion that article 6 as a whole has been violated.[352] Conversely, even where the minimum standards of article 6(3) have been met, the proceedings as a whole may still be deemed unfair.[353]

B.242 Article 6(1) includes the right to a public hearing, in order that proceedings should usually be subject to "public scrutiny"[354] rather than conducted in secret. Therefore, the press should not generally be excluded,[355] although of course the article allows for hearings in private in certain circumstances. These provisions have rarely been tested before the ECtHR and, therefore, are subject to limited authorities,[356] although the court in one case held that the interests of justice can justify exclusion.[357] The exceptions to the requirement for a public hearing should be narrowly construed.[358] As usual, much will turn on the facts of the particular case.[359]

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

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

[352] *Kraska v Switzerland* (1994) 18 EHRR 188 (App No 13942/88) at [30]; *Barberà v Spain* (1989) 11 EHRR 360 (App Nos 10590/83, 10589/83 and 10590/83) at [68]; and *CG v UK* (2002) 34 EHRR 31 (App No 43373/98) at [35].

[353] *Jespers v Belgium* (1983) 5 EHRR CD305 (App No 8403/78) (Commission decision) at [54].

[354] Clayton and Tomlinson para 11.474. See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.40 and following.

[355] *Axen v Germany* (1984) 6 EHRR 195 (App No 8273/78).

[356] Clayton and Tomlinson para 11.475.

[357] *Osinger v Austria* (App No 54645/00) at [47].

[358] *Diennet v France* (1996) 21 EHRR 554 (App No 18160/91) at [34].

[359] *Sutter v Switzerland* (1984) 6 EHRR 272 (App No 8209/78) at [28].

B.243 In addition to the right to a public hearing, article 6(1) includes the right to public pronouncement of the judgment.[360] It is clear from this summary of the provisions of article 6 in relation to open justice that the standards upheld by the English common law go some way beyond the minimum requirements established by article 6.[361]

"Within a reasonable time"

B.244 Article 6 guarantees the right to a hearing within a reasonable time. In criminal proceedings, the time starts to run from the point of "charge"[362] and continues running to include both proceedings in relation to sentence and appellate proceedings.[363] The court's assessment of what amounts to "a reasonable time" will depend on the circumstances of the case.[364]

B.245 In making such an assessment, the ECtHR will consider, amongst other factors,[365] the complexity of the case, the conduct of the defendant (for example, if the delay is due to the defendant absconding then it cannot be claimed that the state has not met its obligation to hold the trial "within a reasonable time"), the conduct by the state, and "what is at stake for the applicant".[366] This last factor would include, for example, whether the defendant is in custody and, therefore, will suffer greater impact from any delay than a defendant at liberty.[367] In most cases involving criminal proceedings where the ECtHR has found that the trial was not within a reasonable time, the length of the delay has run into years.[368]

"An independent and impartial tribunal established by law"

B.246 Article 6(1) includes an entitlement to "an independent and impartial tribunal established by law". A tribunal is required to be independent both "of the executive and also of the parties".[369] In considering whether the tribunal is independent, the ECtHR will assess characteristics such as the appointment of the tribunal's judges, their terms of office, what protection the judges have against external influence and whether they appear independent to the outside observer.[370]

B.247 In relation to impartiality, this requirement has both subjective and objective aspects: justice must both be done (subjective) and be seen to be done

[360] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.44. But see *Pretto v Italy* (1984) 6 EHRR 182 (App No 7984/77) at [26].

[361] See, eg, G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) ch 1.

[362] *Eckle v Germany* (1983) 5 EHRR 1 (App No 8130/78) at [73]. See para B.223 above.

[363] *Crowther v UK* App No 53741/00 at [24] and *Eckle v Germany* (1983) 5 EHRR 1 (App No 8130/78) at [76].

[364] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.48.

[365] Clayton and Tomlinson para 11.455.

[366] Clayton and Tomlinson para 11.455.

[367] *Abdoella v The Netherlands* (1995) 20 EHRR 585 (App No 12728/87) at [24].

[368] Clayton and Tomlinson para 11.459.

[369] *Ringeisen v Austria (No 1)* (1979-80) 1 EHRR 455 (App No 2614/65) at [95]. See also A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.56.

[370] *Bryan v UK* (1996) 21 EHRR 342 (App No 19178/91) at [37].

(objective) in order to maintain public confidence in the judicial system.[371] The tribunal – whether judge or jury – will be presumed impartial unless it is proved otherwise.[372]

B.248 Subjective bias obviously arises where the tribunal is actually biased. Objective bias – the perception that a tribunal may be biased – will be established where there is "objectively justified" "legitimate doubt" about the tribunal's impartiality.[373] In criminal proceedings, a tribunal is not automatically partial because of having presided over pre-trial matters – it depends on what the matters were.[374] Clayton and Tomlinson explain that "there is likely to be a 'legitimate doubt' about impartiality where the judge's previous involvement in the case might have facilitated the formation of a considered opinion as to the guilt of the applicant".[375] Thus, having considered bail applications or previous cases involving the same parties will not necessarily lead to the conclusion of partiality on behalf of the tribunal.[376]

B.249 In the contempt case of *Kyprianou v Cyprus*,[377] the ECtHR considered whether the judges who had found the applicant to be in contempt of the face of the court could be said to be objectively impartial. The Government and the intervening third parties (of which the United Kingdom was one) explained to the court the common law summary procedure for contempt of court and argued that it was compatible with the ECHR. "The need to use the summary procedure sparingly, after a period of careful reflection and to afford appropriate safeguards for the due process rights of the accused" was acknowledged.[378]

B.250 The court explained that,

> it has found doubts as to impartiality to be objectively justified where there is some confusion between the functions of prosecutor and judge … .

[371] *Ferrantelli v Italy* (1997) 23 EHRR 288 (App No 19874/92) at [58]. See also *Piersack v Belgium* (1983) 5 EHRR 169 (App No 8692/79) at [30]; *Ferrantelli v Italy* (1997) 23 EHRR 288 (App No 19874/92) at [56]; *Bulut v Austria* (1997) 24 EHRR 84 (App No 17358/90) at [31]; and *Thomann v Switzerland* (1997) 24 EHRR 553 (App No 17602/91) at [30].

[372] *Le Compte v Belgium* (1982) 4 EHRR 1 (App Nos 6878/75 and 7238/75) (just satisfaction) at [58]; *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [119]; *Piersack v Belgium* (1983) 5 EHRR 169 (App No 8692/79) at [30]; and *Thomann v Switzerland* (1997) 24 EHRR 553 (App No 17602/91) at [31].

[373] *Hauschildt v Denmark* (1990) 12 EHRR 266 (App No 10486/83) at [46] and [48],

[374] *Fey v Austria* (1993) 16 EHRR 387 (App No 14396/88) at [30].

[375] Clayton and Tomlinson para 11.468. See also the examples listed in A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.58.

[376] *Sainte-Marie v France* (1993) 16 EHRR 116 (App No 12981/87).

[377] (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision).

[378] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [124].

> The present case relates to a contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench.[379]

B.251 Accordingly, concerns about the tribunal's impartiality were found to be objectively justified. The ECtHR then went on to consider the subjective aspect, namely, whether the "the judges concerned acted with personal bias".[380] The court found the following matters to be of note:

> First, the judges in their decision sentencing the applicant acknowledged that they had been "deeply insulted" "as persons" by the applicant. Even though the judges proceeded to say that this had been the least of their concerns, in the court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal embroilment on the part of the judges … .
>
> Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements.
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> …
>
> Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response"… .
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> Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court. After deciding that the applicant had committed the above offence they gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him or to retract. He was, therefore, in fact asked to mitigate "the damage he had caused by his behaviour" rather than defend himself.

[379] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [126] to [127].

[380] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [129].

> Although the court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.[381]

Accordingly, the court was found to be subjectively partial as well.[382]

An independent and impartial jury

B.252 The position in respect of the requirement for an independent and impartial tribunal in relation to trials which are conducted in front of a jury has been considered in various cases before the ECtHR. The principles laid down in case law concerning the independence and impartiality of tribunals, discussed above, apply to jurors as they do to professional and lay judges.[383] The tribunal is presumed to be impartial unless there is evidence to the contrary.[384]

B.253 However, the court has held that the risk that the jury will be biased by prejudicial publicity will be greater than where "professional judges alone determine such matters".[385] The issue, therefore, is how the courts should deal with the risk of partial jurors or juries.

B.254 There is

> an obligation on every national court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision where … this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.[386]

B.255 The extent of the inquiry which the domestic courts must undertake into allegations will be dependent upon the strength of the evidence of alleged bias.[387]

B.256 In undertaking such a check, the issue to be considered has both objective and subjective elements:[388]

[381] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [130] to [131].

[382] See also *Lewandowski v Poland* App No 66484/09.

[383] *Remli v France* (1996) 22 EHRR 253 at [46].

[384] *Piersack v Belgium* (1983) 5 EHRR 169 (App No 8692/79) at [30] and S*ander v United Kingdom* (2001) 31 EHRR 44 (App No 34129/96) at [25].

[385] I Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?" (2000) 7 *Maastricht Journal of European and Comparative Law* 244, 266. See also H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 193.

[386] *Remli v France* (1996) 22 EHRR 253 (App No 16839/90) at [48].

[387] *Miah v UK* (1998) 26 EHRR CD199 (App No 37401/97) (Commission decision).

[388] *Sander v UK* (2001) 31 EHRR 44 (App No 34129/96) at [22].

> When it is being decided whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.[389]

B.257 Where there are legitimate doubts about the impartiality of the jury, the court may be required to consider what safeguards should be put in place. Such safeguards could include everything from issuing a direction to the jury cautioning against bias[390] to the discharge of the entire jury,[391] but the safeguards must be sufficient to address the doubts.[392] Therefore, what is acceptable in a particular case will depend on the circumstances and the nature of the doubts about impartiality.[393] As the ECtHR has explained,

> The court must examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury bearing in mind that the misgivings of the accused, although important, cannot be decisive for its determination.[394]

B.258 The court has accepted that there is a risk that prejudicial publicity before a trial may render the jury partial. However, the fact that there has been "intensive adverse publicity" does not automatically mean that a fair trial is impossible.[395]

B.259 With regard to the risk of actual bias by jurors, the court has considered the fact that jury deliberations are secret, that reasoned judgments are not given[396] and that the common law limits enquiring into the jury's consideration of the case. In consequence, the court has found that it is often,

> not possible to adduce evidence as to the subjective impartiality on the part of one or more jurors. In such circumstances additional importance would, therefore, attach to ensuring that the impartiality of the jury is, "by other means", objectively guaranteed.[397]

[389] *Remli v France* (1996) 22 EHRR 253 (App No 16839/90) at [46].

[390] *Gregory v United Kingdom* (1998) 25 EHRR 577 (App No 22299/93) at [47].

[391] *Sander v UK* (2001) 31 EHRR 44 (App No 34129/96) at [34].

[392] *Hanif v UK* (2012) 55 EHRR 16 (App Nos 52999/08 and 61779/08): "where there is an important conflict regarding police evidence in the case and a police officer who is personally acquainted with the police officer witness giving the relevant evidence is a member of the jury, jury directions and judicial warnings are insufficient to guard against the risk that the juror may, albeit subconsciously, favour the evidence of the police" at [148].

[393] *Sander v UK* (2001) 31 EHRR 44 (App No 34129/96) para 30 and following. See also K Quinn, "Jury Bias and the European Convention on Human Rights: A Well-Kept Secret?" [2004] *Criminal Law Review* 998.

[394] *Szypusz v UK* App No 8400/07 at [81].

[395] *Mustafa (aka Abu Hamza) v UK* (2011) 52 EHRR SE11 (App No 31411/07) (admissibility) at [39].

[396] See *Taxquet v Belgium* (2012) 54 EHRR 26 (App No 926/05), discussed at para B.267 below.

[397] *Gregory v UK* (1998) 25 EHRR 577 (App No 22299/93) at [43].

Article 6(1) implied rights

B.260 Article 6(1) also contains a series of implied rights. In respect of criminal cases, these implied rights must be read with article 6(2) and 6(3) which establish minimum standards for criminal proceedings.[398]

B.261 Article 6(1) contains an implied right of access to a court.[399] In civil proceedings, if legal representation is required (for example, due to the complexity of the case),[400] the state must allow there to be such representation and must pay for it if the applicant cannot afford to do so.[401] However, such legal aid is only needed where the proceedings would be unfair or the claim impossible to achieve without it.[402] Legal representation and funding in respect of criminal proceedings is dealt with by article 6(3).[403]

B.262 There is also a right to be present at the hearing and to participate in it. In criminal proceedings, this means that "each party must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed".[404] This requirement also relates to the right to legal representation (funded if necessary) and the right to cross-examine witnesses, both under article 6(1) and article 6(3).[405]

B.263 Article 6(1) has been held by the ECtHR to enshrine the right to equality of arms. The equality of arms means that no party should be placed at a "substantial disadvantage" in relation to their opponent.[406] Again, this requires that all the parties should have access to the same documentation and evidence. Generally, the parties must also be allowed to cross-examine each other's witnesses,[407] although this can be limited in certain circumstances. For example, in cases involving minors or allegations of sexual offences, the right to cross-examine must be balanced against the witness' right to privacy.[408]

[398] Clayton and Tomlinson paras 11.423 to 11.424.

[399] See the discussion in A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.16 and following.

[400] *Airey v Ireland* (1979-80) 2 EHRR 305 (App No 6289/73).

[401] Clayton and Tomlinson para 11.378. See *Steel v UK* (2005) 41 EHRR 22 (App No 68416/01) but compare *Santambrogio v Italy* (2005) 41 EHRR 48 (App No 61945/00).

[402] *RD v Poland* (2004) 39 EHRR 11 (App No 29692/96) at [49].

[403] See paras B.294 and B.295 below.

[404] Clayton and Tomlinson para 11.426, citing, amongst others, *Mantovanelli v France* (1997) 24 EHRR 370 (App No 21497/93).

[405] See paras B.294 to B.300 below.

[406] *De Haes v Belgium* (1998) 25 EHRR 1 (App No 19983/92) at [53]. *Neumeister v Austria* (1979-80) 1 EHRR 91 (App No 1936/63) at [22]; *Delcourt v Belgium* (1979-80) 1 EHRR 355 (App No 2689/65) at [28]; *Dombo Beheer v The Netherlands* (1994) 18 EHRR 213 (App No 14448/88) at [33].

[407] *X v Austria* App No 4428/70 (Commission decision).

[408] *SN v Sweden* (2004) 39 EHRR 13 (App No 34209/96) at [47] and *W v Finland* App No 14151/02 at [43] to [48].

B.264 In criminal cases, the equality of arms has been interpreted to impose a duty on the prosecution to disclose material to the defence which may demonstrate the accused's innocence or mitigate the sentence.[409]

B.265 There is also an implied right to silence and to the privilege against self-incrimination. The ECtHR has held that a criminal conviction cannot be based wholly or mainly on the defendant's silence.[410]

B.266 Whilst the requirement under article 6 is that first instance courts must ensure the compliance of their procedures with article 6 at trial,[411] in some cases a defect in the fairness of the trial procedure can be remedied on appeal, ensuring that there is no violation of article 6 overall.[412]

B.267 Finally, article 6 also includes the right to "fair presentation of the evidence",[413] and requires that the court examine the case as a whole when reaching its decision.[414] The court is also required to give reasons for its decision, although there is a wide discretion in the way in which judgment is given. Nonetheless, the judgment must show the basis for the decision that was reached with "sufficient clarity".[415] In *Taxquet v Belgium,*[416] the court held that article 6 does not require jurors to give reasons for their decision.[417] Nonetheless, in order to fulfil the requirements of a fair trial and safeguard against arbitrariness, it was vital that the accused and the public were able to understand the verdict. In proceedings conducted before a jury, therefore, article 6 required satisfaction of certain procedural safeguards, such as "directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge".[418] In effect, the judge's summing up of the law and evidence to the jury is the equivalent of the jury's reasons.

[409] *Jespers v Belgium* (1983) 5 EHRR CD305 (App No 8403/78) (Commission decision) at [56].

[410] See *Murray v UK* (1996) 22 EHRR 29 (App No 18731/91) at [45]; *Heaney v Ireland* (2001) 33 EHRR 12 (App No 34720/97) at [40]; *Condron v UK* (2001) 31 EHRR 1 (App No 35718/97) at [56]; *Beckles v UK* (2003) 36 EHRR 13 (App No 44652/98) at [58]; *Funke v France* (1993) 16 EHRR 297 (App No 10828/84) at [44]; and *O'Halloran v UK* (2008) 46 EHRR 21 (App Nos 15809/02 and 25624/02) (Grand Chamber decision) at [53]. See also Clayton and Tomlinson para 11.438.

[411] *De Cubber v Belgium* (1985) 7 EHRR 236 (App No 9186/80) at [32].

[412] *Adolf v Austria* (1982) 4 EHRR 313 (App No 8269/78) at [38] to [41]; *De Cubber v Belgium* (1985) 7 EHRR 236 (App No 9186/80) at [33]; *Edwards v UK* (1993) 15 EHRR 417 (App No 13071/87) at [34].

[413] Clayton and Tomlinson para 11.323.

[414] *Miailhe v France (No 2)* (1997) 23 EHRR 491 (App No 18978/91) at [43].

[415] *Hadjianastassiou v Greece* (1993) 16 EHRR 219 (App No 12945/87) at [33].

[416] (2012) 54 EHRR 26 (App No 926/05) (Grand Chamber decision).

[417] *Taxquet v Belgium* (2012) 54 EHRR 26 (App No 926/05) (Grand Chamber decision) at [90]. The court cited *R v Belgium* App No 15957/90 (Commission decision); *Zarouali v Belgium* App No 20664/92 (Commission decision); *Planka v Austria* App No 25852/94 (Commission decision); *Bellerín Lagares v Spain* App No 31548/02; and *Göktepe v Belgium* App No 50372/99.

[418] *Taxquet v Belgium* (2012) 54 EHRR 26 (App No 926/05) (Grand Chamber decision) at [92]. The court at [86] cited *Papon v France* (2004) 39 EHRR 10 (App No 54210/00): "the questions formed a framework on which the decision had been based … their precision sufficiently offset the fact that no reasons were given for the jury's answers".

ARTICLE 6(2)

B.268 If the individual is deemed subject to a criminal charge for the purposes of article 6,[419] then the enhanced protections of article 6(2) and 6(3) will apply. Furthermore, article 6(2) and 6(3) must be read with article 6(1) in mind, because many of the provisions cover similar territory.[420]

B.269 Article 6(2) guarantees the presumption of innocence, and, therefore, must be considered in relation to the requirement of an independent and impartial tribunal (for example, a judge expressing views about the guilt of the defendant prior to verdict could breach both the presumption of innocence and the requirement of impartiality). Likewise, article 6(2) could be violated where a politician, police officer or other public official makes public statements about a defendant's guilt before conviction.[421] However, public officials providing factual information to the public about the offence or the offender will not fall foul of the presumption of innocence.[422] In this regard, the court "has distinguished in particular between an official merely saying that someone is *suspected* of guilt, and saying or implying that they are *guilty* of an offence".[423]

B.270 The requirement of the presumption of innocence also has particular relevance for contempt by publication. As Lester, Pannick and Herberg explains,

> In criminal cases, "a virulent press campaign against the accused" is capable of violating the right to a fair trial, particularly if the case is to be tried by a jury. Account must be taken of the fact that some press comment on a trial involving a matter of public interest is inevitable; and of any steps which the judge has taken to counter the effect of the prejudice in his directions to the jury.[424]

B.271 Article 6(2) also contains an implied right that the prosecution will explain the nature of the case against the defendant.[425] Various cases before the ECtHR have considered the issue of strict liability offences and the presumption of innocence. The court has held that strict liability does not, in principle, violate article 6(2).[426]

[419] See para B.223 and following above.

[420] Clayton and Tomlinson para 11.481.

[421] *Allenet de Ribemont v France* (1995) 20 EHRR 557 (App No 15175/89); *Butkevicius v Lithuania* App No 48297/99; and *Baars v The Netherlands* (2004) 39 EHRR 25 (App No 44320/98).

[422] *Krause v Switzerland* App No 7986/77 (Commission decision).

[423] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.63 (emphasis in original). See also *Geerings v The Netherlands* (2008) 46 EHRR 49 (App No 30810/03) at [50]; *Hussain v UK* (2006) 43 EHRR 22 (App No 8866/04) at [19]; *Del Latte v The Netherlands* (2005) 41 EHRR 12 (App No 44760/98) at [32]; and *Bohmer v Germany* (2004) 38 EHRR 410 (App No 37568/97) at [62] to [65].

[424] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.38 (footnotes omitted).

[425] *Barberà v Spain* (1989) 11 EHRR 360 (App Nos 10590/83, 10589/83 and 10590) at [77].

[426] *Salabiaku v France* (1991) 13 EHRR 379 (App No 10519/83), although this judgment has been criticised: P Roberts, "The Presumption of Innocence Brought Home? *Kebilene* Deconstructed" (2002) 118 *Law Quarterly Review* 41, 59. See also A Simester (ed), *Appraising Strict Liability* (2005).

Contempt by publication

B.272 The essence of contempt by publication arises from the obligation on the state to protect the right to a fair trial.[427] Protecting that right clearly requires a multitude of measures. These could include instructions to jurors to consider only the evidence they have heard in court, prohibitions on looking on the internet, and appropriate rules of procedure and evidence. Clearly, contempt by publication is part of this range of measures to ensure a fair trial by an independent and impartial tribunal.

B.273 Obviously, prejudicial publications – whether under section 2(2), the new contempt which we propose in Chapter 3, intentional contempt at common law, or in breach of section 4(2) – create a risk that the tribunal will cease to be impartial because it may in fact be influenced by the publicity. Such publications also create a risk that the tribunal will be *perceived* as impartial, which, if objectively grounded in evidence, will also amount to a breach of article 6. Additionally, publications by public officials – such as statements by police officers or politicians – pointing to the culpability of the accused may also fall foul of article 6(2) which protects the presumption of innocence.

B.274 We have considered the importance of protecting article 6 rights when we examine the definition of active proceedings for the purposes of section 2(2). We have dealt with this issue above, in relation to article 10.[428] We considered in the consultation paper whether the active period should be triggered not at arrest, but later, such as at the time of charge.[429] However, we took the view that this would 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. After all, the purpose of triggering active proceedings at the point of arrest is to ensure that enough time passes for any publicity which may have preceded the arrest to have faded from memory by the time of any trial. As we have explained elsewhere,[430] whilst the advent of digital archives means that such material will still be available, it is less likely to be fresh in jurors' minds if there is a delay (unless they have been actively seeking it out by searching on the internet). In consequence, we consider that the current triggers of active proceedings as contained in the 1981 Act should remain. For similar reasons, we consider that the issue of an arrest warrant in relation to extradition proceedings should also trigger the active period. The delay between the issue of the warrant and the trial in such proceedings will also help protect article 6.

B.275 The implied rights contained within article 6(1) may also be breached where a party is denied "the opportunity to have knowledge of and comment on all evidence adduced"[431] and the right to challenge that evidence before the court. This could occur where the jury is relying on prejudicial publicity in reaching their decision. Furthermore, whilst a jury does not itself give reasons, the judge's

[427] Although consider the views of H Fenwick and G Phillipson, who argue that the law under the 1981 Act is a mixture of the "general aim of protecting the administration of justice" and protection for "the right of the individual to a fair trial": *Media Freedom under the Human Rights Act* (2006) p 246.

[428] See paras B.83 to B.86 above.

[429] See Ch 2 at paras 2.14 to 2.19.

[430] See Ch 3 at para 3.62.

[431] Clayton and Tomlinson para 11.426, citing, amongst others, *Mantovanelli v France* (1997) 24 EHRR 370 (App No 21497/93).

summing up of the evidence and the law is taken in effect to be the reasons on which the jury based its decision. If the jury instead bases its decision on prejudicial publicity, this would also appear to violate the requirement to give reasons.

B.276 Evidently, by virtue of article 1 of the ECHR, the state has a responsibility to ensure that a defendant's article 6 rights are upheld before and during the trial process. This may mean that, in some cases, there is a duty on the state to bring proceedings for contempt in order to protect those article 6 rights.[432] Some have argued that the fact that the consent of the Attorney General is needed to bring proceedings under the 1981 Act (unless the court proceeds on its own motion), and the fact that the decision of the Attorney General not to bring proceedings for contempt by publication cannot be subject to judicial review, could fall foul of article 6.[433]

B.277 However, others take the view that the ability of the trial court and the Court of Appeal to consider the effect of prejudicial publicity and, if necessary, issue a stay on the ground of an abuse of process, or overturn the conviction, provides an adequate remedy.[434] Indeed, if a fair trial were rendered impossible by prejudicial publicity, the trial court or the Court of Appeal would be required to issue a stay or overturn the conviction, in order to ensure article 6 compliance. In consequence, we do not consider the current law to be ECHR incompliant in this respect.

B.278 The article 6 issues raised in relation to section 5 of the 1981 Act are considered above, in the section on article 10.[435]

Juror contempt

Jurors seeking information

B.279 As with contempt by publication, the aim of prohibiting jurors from undertaking their own research about the case that they are trying is evidently to protect the defendant's article 6 rights.[436] There are clearly many ways of protecting those rights. In Chapter 4 we propose a package of measures aimed at dissuading jurors from undertaking such research. We recommend that all jurors 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.[437] The warning should be regularly updated in

[432] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 253.

[433] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 256.

[434] Borrie and Lowe: The Law of Contempt para 13.13.

[435] See para B.110 above.

[436] See Ch 4 at para 4.30.

[437] *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.

order to take account of technological developments[438] and in a manner which is detailed and gives specific examples in order to help jurors to understand the boundaries of acceptable conduct.[439] 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 report it"[440] and that jurors have a duty to report such conduct by their fellow jurors.[441]

B.280 To this end, we propose that the appropriately drafted warning to jurors should be delivered:

(a) in the guide sent to jurors with their summons;[442]

(b) in the jury video which is shown on the jurors' first day;

(c) in the speech by the jury manager on the jurors' first day;

(d) on eye-catching, memorable and well-designed posters situated around the court building and in the jury box, assembly area and deliberating room;[443]and

(e) on conduct cards which jurors should carry with them to use as a reminder.[444]

B.281 Additionally, we make proposals in relation to the removal of internet-enabled devices whilst jurors are deliberating and, if the court deems it necessary, at other times too. Finally, we ask whether, as a last resort, a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced.

B.282 Clearly, jurors seeking information may cease to be impartial within the meaning of article 6 where they are influenced by the material or may be perceived to have been influenced by it, even if they were not in fact biased. Additionally, article 6(1) implied rights may be violated where the defendant (and indeed the prosecution)

[438] 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.

[439] 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.

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

[441] 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.

[442] 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 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, 215.

[443] See, eg, the mobile phone poster used in some Californian courts, http://www.courts.ca.gov/documents/Jury_Poster_11x17.pdf (last visited 1 Nov 2012).

does not have the opportunity to know all of the evidence against them, and to challenge and comment on such evidence.[445] Likewise, a juror relying on such material could violate the duty to give reasons because the parties will not know that the jury's decision has been based on information which was not presented as evidence in the case. The package of measures which we propose aims to prevent jurors from seeking information about the case in order to ensure a fair trial by an independent and impartial tribunal.

Jurors disclosing information

B.283 In respect of breaches of section 8, whilst no domestic court has held section 8 to be article 6 incompliant, there may be concerns about whether section 8 provides for adequate protection of fair trial rights. This concern may arise where the jury lacks independence or impartiality during its deliberations, for example if the verdict is based on extraneous material or is influenced by racist views about the defendant.[446] Whilst a juror in such a scenario could report these issues to the trial court before or after the verdict, this is a very limited opportunity to make such disclosure, which may not be apparent to the juror. Jurors may be deterred from speaking out if they are unclear about which disclosures will fall foul of section 8.

B.284 In the consultation paper we ask whether 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 genuine belief that such disclosure is necessary to uncover a miscarriage of justice. We consider that opening up the options for disclosure would increase the likelihood that such cases would come to the attention of the justice system, and increase the possibility that such a miscarriage of justice would be uncovered.[447]

B.285 On the other hand there is clearly a tension here, in that the confidentiality of jury deliberations, with the purpose of allowing jurors to express their opinions freely and frankly without fear of subsequent public ridicule or recrimination, is itself an article 6 protection. This means that, even in notorious cases, jurors can still reach their verdict on the basis of the evidence heard in court, without having to fear public or press reaction to their verdict. If jurors did not feel that they could speak freely in the jury room, they might be more inclined to be influenced by extraneous material because of worries about what the impact on them personally would be if they reached what others might consider to be the "wrong" verdict. To this end, it appears important for article 6 purposes to at least have some limitations on what can be disclosed from the jury's deliberations in order to give jurors confidence that they can reach a verdict which is genuinely their own. It is for this reason that we ask consultees about only a limited modification to section 8.[448]

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

[445] Clayton and Tomlinson para 11.426, citing, amongst others, *Mantovanelli v France* (1997) 24 EHRR 370 (App No 21497/93).

[446] Such as in *Sander v UK* (2001) 31 EHRR 44 (App No 34129/96).

[447] See Ch 4 at paras 4.57 to 4.60.

[448] See Ch 4 at para 4.60.

Contempt in the face of the court

B.286 The main risk in relation to the summary procedure used for contempt in the face of the court is the potential for the tribunal to lack impartiality – whether objectively or subjectively – for example, where the contempt in the face consists of insults aimed personally at the judge, who then also finds the contempt proved via the summary procedure. This was held in *Kyprianou v Cyprus*[449] and *Lewandowski v Poland*[450] to entail a breach of article 6 on the basis that there was a lack of impartiality. Furthermore, even where the judge may not be the "victim" of the contempt in the face of the court, there may also be concerns that he or she lacks impartiality because he or she witnessed the conduct or because he or she is effectively acting as prosecutor in initiating the contempt proceedings. Such circumstances may also give rise to a risk that the presumption of innocence in article 6(2) will be violated.[451]

B.287 As we explain in Chapter 5, it may be arguable that where the alleged contemnor disputes the allegation of being in contempt, the issue should be heard by a tribunal other than the one which initiated the proceedings.[452] Criminal Procedure Rule 62 provides that the enquiry into the alleged contempt may need to be heard by a different tribunal from the one which initiated or witnessed the contempt, if to do otherwise would be "unfair to the respondent".[453] What amounts to unfairness will presumably depend on the circumstances of the case, bearing in mind also the common law test for bias and the perception of bias from *Porter v Magill*[454] (where the court held that "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"[455]).

B.288 We consider that the protections within the Criminal Procedure Rules are likely to be adequate to ensure compatibility with article 6 in most cases.[456] Furthermore, since there is an automatic right of appeal from a finding of contempt,[457] cases from the magistrates' or the Crown Court which fall foul of article 6 are likely to be

[449] (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision).

[450] *Lewandowski v Poland* App No 66484/09 at [45] to [50].

[451] In *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision), the Chamber held that there had been a violation of art 6(2) but the Grand Chamber declined to consider this aspect of the complaint, having already found a violation of art 6(1).

[452] See Ch 5 at paras 5.77 to 5.81. See the discussion in "Crime and Sentencing: Contempt of Court" (2006) 2 *European Human Rights Law Review* 220, 224.

[453] CrimPR, r 62.8(5).

[454] [2001] UKHL 67, [2002] 2 AC 357. See also the art 5 implications of a partial tribunal, at paras B.188 and B.203 above.

[455] *Porter v Magill* [2002] 2 AC 357, [2002] 2 WLR 37 at [103]. Lord Hope thereby approved the "modest adjustment" proposed by Lord Phillips MR at [85] in *Re Medicaments and Related Classes of Goods (No 2)* [2001] WLR 700 to the test in *Gough* [1993] AC 646, with the qualification that the reference to "real danger" should be omitted.

[456] Although consider "Crime and Sentencing: Contempt of Court" (2006) 2 *European Human Rights Law Reports* 220.

[457] Administration of Justice Act 1960, s 13(1) deals with appeals from the Crown Court. The appeal from the magistrates' court is to the Crown Court as with other orthodox criminal proceedings, or by judicial review or case stated to the High Court.

remedied on appeal.[458] Our proposal to allow the magistrates' court to adjourn the proceedings beyond the end of the court day will also strengthen article 6 protections because it provides greater opportunity for the case to be adjourned to a different bench, than if the enquiry must be dealt with on the same day (particularly if the court is small or it is late in the day and there is only one bench sitting at the time).[459]

ARTICLE 6(3): MINIMUM RIGHTS IN CRIMINAL PROCEEDINGS

B.289 In addition to being protected by article 6(1), criminal proceedings also have the benefit of article 6(3) protections. Article 6(3) contains minimum standards for the conduct of criminal proceedings. As explained above, in assessing whether there has been a breach of article 6 rights, the ECtHR will look at the proceedings as a whole (including any appellate proceedings[460]) to determine whether the defendant had a fair trial. Therefore, even if the minimum requirements of article 6(3) are met, the proceedings could still be deemed unfair when looked at in totality.[461]

"Be informed promptly … of the nature and cause of the accusation"

B.290 This aspect of article 6(3) relates to the provisions of article 5(2)[462] which requires a detainee to be informed of the reasons for detention, although of course article 6 also applies to those subject to a criminal charge who are at liberty. The article 6 provision requires more detail about the nature of the allegations against the suspect.[463] The information can be provided orally or in written form,[464] and it is unnecessary to provide the actual evidence against the suspect at this stage. An explanation of the offence, with the date and place at which the offence is alleged to have occurred, is required.[465]

Adequate time and facilities to prepare a defence

B.291 The defendant must be afforded adequate time and facilities to prepare a defence to the case against them. Obviously, this provision goes hand in hand with the requirement of a hearing "within a reasonable time".[466] On the one hand, trials cannot proceed with undue speed to the disadvantage of the defendant. On the other hand, proceedings should not be dragged out for years waiting for resolution.

B.292 As Lester and Pannick explains,

[458] *Edwards v UK* (1993) 15 EHRR 417 (App No 13071/87) at [38] but compare *Lewandowski v Poland* App No 66484/09.

[459] See Ch 5 at para 5.112.

[460] In a domestic context, see *Dodds* [2002] EWCA Crim 1328, [2003] 1 Cr App R 3 on this point.

[461] *Jespers v Belgium* (1983) 5 EHRR CD305 (App No 8403/78) (Commission decision) at [54].

[462] See para B.199 and following above. See also EU Directive 2012/12/EU on the Right to Information in Criminal Proceedings, Official Journal L 142 of 1.6.2012 p 1.

[463] Clayton and Tomlinson para 11.489.

[464] Clayton and Tomlinson para 11.489.

[465] *Brozicek v Italy* (1990) 12 EHRR 371 (App No 10964/84) at [42] and *Mattoccia v Italy* (2003) 36 EHRR 47 at [59] to [60].

[466] See para B.244 and following above.

> The requirement to afford adequate facilities for the preparation of the defence case creates more than a negative obligation on the state to refrain from interference. There is, in addition, a positive obligation to adopt appropriate measures to place the defence in a position of parity with the prosecution.[467]

B.293 How much time is adequate for the purposes of article 6(3) will again depend on the facts of the case, and will vary according to the circumstances.[468] A person who is detained in custody must be able to meet with their lawyers and communicate with them in confidence about the case, in order to undertake the necessary preparation.[469]

To defend oneself in person or through legal assistance, free of charge if necessary

B.294 This provision includes three separate rights for someone subject to a criminal charge: "a right to defend himself in person, a right to defend himself through legal assistance of his own choosing and a right on certain conditions, to be given legal assistance".[470]

B.295 The provisions in respect of state-funded legal aid are far from absolute. Legal aid need only be granted where the defendant is without "sufficient means" to pay for representation themselves and, even then, is subject to the interests of justice.[471] In considering whether the interests of justice require legal aid to be provided to the impecunious defendant, the ECtHR has held that it may be necessary to consider the complexity of the case, the ability of the defendant to defend themselves, and gravity of the offence.[472] It has been held that legal representation should be provided, "in principle", where the defendant could lose their liberty.[473] Whilst there is a presumption that the defendant can instruct the lawyer of their choice, this choice can be limited where the lawyer is paid for by the state.[474] Any legal representation that is provided under legal aid must be effective.[475]

[467] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.68.

[468] Clayton and Tomlinson para 11.490.

[469] *Campbell v UK* (1985) 7 EHRR 165 (App Nos 7819/77 and 7878/77) at [97]. Subject to certain restrictions in extreme cases: Clayton and Tomlinson para 11.491.

[470] Clayton and Tomlinson para 11.492, citing *Pakelli v Germany* (1983) 6 EHRR 1 (App No 8398/78).

[471] Clayton and Tomlinson paras 11.496 to 11.497.

[472] *Granger v UK* (1990) 12 EHRR 469 (App No 11932/86); *Pham Hoang v France* (1993) 16 EHRR 53 (App No 13191/87); *Boner v UK* (1995) 19 EHRR 246 (App No 18711/91); *Maxwell v UK* (1995) 19 EHRR 97 (App No 18949/91); and *RD v Poland* (2004) 39 EHRR 11 (App No 29692/96).

[473] *Beet v UK* (2005) 41 EHRR 23 (App No 47676/99 and others) at [38]; *Quaranta v Switzerland* App No 12744/87 at [33]; *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92) at [61]; and *Hooper v UK* (2005) 41 EHRR 1 (App No 42317/98) at [20].

[474] *Croissant v Germany* (1992) 16 EHRR 135 (App No 13611/88) at [29].

[475] Clayton and Tomlinson para 11.498 and A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.71.

Examination of witnesses

B.296 This provision of article 6(3) requires that the defendant must be able to cross-examine the prosecution's witnesses and call witnesses for the defence to give evidence.[476] As Lester and Pannick explains, within the Convention jurisprudence, "witness" "has an autonomous meaning, and has been held to include a person whose statements are produced as evidence before a court, but who is not called to give oral evidence".[477] The ECtHR has held that, whilst this is not an absolute right, any limitations placed on the defendant's ability to examine and cross-examine witnesses must not breach the principle of equality of arms between the parties.[478] However, the domestic courts have discretion in assessing the appropriateness of calling certain defence witnesses and the content and manner of the questions to be put to them.[479]

B.297 The right to examine witnesses has particular implications for the law on hearsay evidence. The recent case of *Al-Khawaja*[480] established that the admission of hearsay evidence in criminal proceedings will not render the trial unfair provided that there is good reason for the non-attendance of the witness whose evidence was read. The ECtHR has held that there would be good reasons for the non-attendance of a witness where the witness had died,[481] was non-compellable[482] or was absent owing to fear.[483] In the latter case it was said that the admission of hearsay evidence was "a last resort" and that

> before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.[484]

[476] Clayton and Tomlinson para 11.499.

[477] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.6.73 (footnotes omitted).

[478] *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71 and others) at [91]; *Brandstetter v Austria* (1993) 15 EHRR 378 (App Nos 11170/84, 12876/87 and 13468/87) at [45].

[479] *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) at [37].

[480] *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision).

[481] *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [21].

[482] *Asch v Austria* (1993) 15 EHRR 597 (App No 12398/86) at [27], [28] and [31].

[483] *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [122] to [124].

[484] *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [125].

B.298 In addition,

> when a conviction is based solely or to a decisive degree on a statement made by a person whom the accused has had no opportunity to examine or to have examined, the rights of the defence may be restricted to an extent that is incompatible with Article 6.[485]

B.299 In relation to the impact of the hearsay evidence on the conviction, *Al-Khawaja* explained that,

> the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.[486]

B.300 The court will need to scrutinise the proceedings[487] and ensure that there are adequate counterbalancing factors, including procedural safeguards, to offset the prejudice caused by the defendant being unable to cross-examine the witness. In the English context, these procedural safeguards would include the rules on the admission of hearsay evidence under the Criminal Justice Act 2003 and the general power of the courts to exclude evidence under section 78 of the Police and Criminal Evidence Act.[488]

Interpretation

B.301 Finally, the defendant must be provided with a free interpreter if necessary.

Contempt by publication

B.302 Proceedings for contempt by publication under section 2(2) or under the common law are generally brought in the Divisional Court. Whilst the domestic courts have held that the civil procedure for dealing with contempts must comply with article 6(3),[489] there may be questions about the appropriateness of using the civil procedure for contempt proceedings, particularly where they relate to individuals – such as "citizen journalists" – rather than corporate media organisations.

[485] *Unterpertinger v Austria* (1991) 13 EHRR 175 (App No 9120/80) and *Al-Khawaja v UK* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [119]. Although see the decision of the Court of Appeal in *Horncastle* [2009] EWCA Crim 964, [2010] 2 AC 373 on the impact of the "sole or decisive" rule on English law.

[486] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [131]. For discussion of the *Al-Khawaja* judgment see J R Spencer, "Hearsay Evidence at Strasbourg: A Further Skirmish, or the Final Round? A Comment on *Al-Khawaja* and *Tahery v UK* in the Grand Chamber (2012) 1 *Archbold Review* 5.

[487] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [147].

[488] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (App Nos 26766/05 and 22228/06) (Grand Chamber decision) at [151]. See also *Horncastle* [2009] EWCA Crim 964, [2010] 2 AC 373.

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

B.303 In particular, the right of the defendant to be informed of the nature of the accusation against them is strengthened by the use of the ordinary criminal procedure, which provides for charges to be laid, indictments served and disclosure undertaken. This ensures that the defendant is aware of the case for the prosecution before being called upon to file a defence case statement or give evidence in defence. Furthermore, the equality of arms in criminal cases imposes a duty on the prosecution to disclose material to the defence which may demonstrate the accused's innocence.[490] Whilst the current civil disclosure regime applies to contempt cases, we consider that the Criminal Procedure and Investigations Act 1996, which is designed to apply to criminal cases, may be a more appropriate way of ensuring that the prosecution has disclosed all material to the defence which may cast doubt on the prosecution case or support that of the defence. The fact that the criminal procedure adopted by trial on indictment is designed to meet the requirements of article 6(3) is why we ask consultees whether it would be more appropriate to try these types of contempt by publication on indictment or "as if on indictment".[491]

B.304 Additionally, in Chapter 3 we propose a power for the court to order the temporary removal of a publication that was first published before proceedings became active, where the publication creates a substantial risk of serious prejudice or impediment. We propose that it would be a contempt to fail to comply with the order without reasonable excuse. For the reasons we have just explained, we also ask consultees whether this contempt should be tried on indictment or "as if on indictment" in order to ensure article 6 compliance.

B.305 The application of the normal rules of criminal investigation and procedure to contempt by publication will also help to ensure article 6 compliance.[492]

Juror contempt

B.306 Proceedings for contempt by jurors such as in *Dallas* or for contempt by a person in breach of section 8 are brought before the Divisional Court. Again, whilst the domestic courts have held that the civil procedure for dealing with contempts must comply with article 6(3),[493] there may also be questions about the appropriateness of using this procedure for these contempt proceedings. For example, under the current procedure, there is no charge sheet or indictment.

B.307 This marks a significant departure from the usual trial process in criminal cases. There, a defendant would not be required to serve affidavit evidence. Whilst a suspect may be interviewed by the police and this interview used as evidence, they may exercise the right to silence in such interview (albeit with the risk of an adverse inference from such silence). During the trial, the evidence of the defendant is given orally, under oath, rather than on affidavit. Furthermore, a defendant who chooses to give oral evidence will only do so at the close of the prosecution case, once it is clear what the case against them is and all of the Crown's evidence has emerged. This is quite different from a case where the

[490] *Jespers v Belgium* (1983) 5 EHRR CD305 (Commission decision) at [56].

[491] See Ch 2 at paras 2.73 to 2.76.

[492] For example, article 6 contains an implied right of access to a solicitor at a police station, which is also guaranteed by the Police and Criminal Evidence Act 1984: Clayton and Tomlinson para 11.216.

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

person accused of the misconduct is required to serve their evidence even before the trial of the matter has begun.

B.308 These factors may call into question the extent to which in some cases the current procedure complies with the right to be informed of the nature of the accusation under article 6(3). Furthermore, under article 6, the equality of arms requires the prosecution to disclose exculpatory material to the defence.[494] Again, this requirement may be more easily met by following the Criminal Procedure and Investigations Act 1996 disclosure regime which is designed to apply to all criminal cases than through the current civil procedure.

B.309 It is for these reasons that we also ask consultees whether it would be more appropriate to try these types of contempt by jurors on indictment or "as if on indictment". If consultees disagree with our proposals for trial on indictment or "as if on indictment", we also ask for views on whether changes need to be made to the existing contempt procedure before the Divisional Court in order to strengthen its article 6 compliance.[495]

B.310 Again, the application of the normal rules of criminal investigation and procedure to juror contempts will also help to ensure article 6 compliance.[496]

Contempt in the face of the court

B.311 As we explain in Chapter 5, article 6 is of critical importance to the summary procedure for dealing with such conduct.[497] Of course, whilst it is important that courts can protect the course of justice, and the purpose of punishing contempt in the face of the court is to do this, if the summary procedure is used to impose the court's authority without the basic requirements of the right to a fair trial, then this will undermine rather than enhance the rule of law.[498]

B.312 Part 62 of the Criminal Procedure Rules requires the alleged contemnor to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them. It also requires that the alleged contemnor be allowed adequate time and facilities for the preparation of a defence. We consider that these provisions ensure compliance with article 6(3).

B.313 Likewise, there is the possibility of legal aid being available. Whilst there is authority to suggest that the summary procedure may be undertaken without legal representation,[499] this case was decided before the enactment of the Human Rights Act 1998, and we doubt that such procedure would today be regarded as article 6 compliant.

B.314 In relation to hearsay evidence, the Criminal Procedure Rules currently permit evidence to be adduced at an enquiry into a contempt in the face of the court

[494] *Jespers v Belgium* (1983) 5 EHRR CD305 (App No 8403/78) (Commission decision) at [56].

[495] See Ch 4 at paras 4.72 and 4.73.

[496] *Öcalan v Turkey* (2005) 41 EHRR 45 (App No 46221/99) (Grand Chamber decision) at [140] to [143]. See also Clayton and Tomlinson para 11.216.

[497] See Ch 5 at para 5.72 and following.

[498] See, eg, *Morris v Crown Office* [1970] 2 QB 114; *Balogh v St Albans Crown Court* [1975] QB 73; and *Powell* [1994] 98 Cr App R 224.

[499] *R v Newbury Justices ex p Du Pont* [1984] 78 Cr App R 255, 260.

without any specified restriction or notice period.[500] As we have seen, article 6 does not prohibit the use of hearsay evidence in respect of the requirement that the accused be allowed to cross-examine witnesses. However, article 6 does require that there be good reason for the absence of the witness and may require other limits on the use of such evidence. It is for this reason that we ask consultees in Chapter 5 whether on an enquiry into an alleged contempt in the face of the court, hearsay evidence should be admissible in accordance with the rules applicable to trials of ordinary criminal offences.

[500] 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.

ARTICLE 7: NO PUNISHMENT WITHOUT LAW

INTRODUCTION

B.315 This section examines briefly the jurisprudence in relation to article 7 of the ECHR and the relevance that this has for contempt by publication, contempt involving jurors and contempt in the face of the court.

B.316 Article 7 provides that:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.[501]

B.317 This provision is designed to protect against retrospective criminalisation and punishment. The article only applies to criminal offences and to penalties imposed in consequence of committing a criminal offence. It cannot be applied, for example, to the rules of evidence[502] or to prior restraints such as interim injunctions. The term "criminal offence" within article 7 has the same meaning as the equivalent provision in article 6.[503]

B.318 In deciding whether a particular measure constitutes a penalty for the purposes of article 7,

> it is necessary to consider whether the measure in question is imposed following conviction for a criminal offence, the nature and purpose of the measure, its characterisation under national law, the procedures involved in its making and implementation and its severity.[504]

B.319 Article 7 also incorporates a requirement for reasonable certainty in the law. This means that a person must "know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".[505] Thus, the "constituent elements of an offence … may not be essentially changed" by the development of case law where the change is to the defendant's disadvantage.[506]

[501] Article 7(2), which provides, "this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations" is not relevant for present purposes.

[502] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.7.2.

[503] Clayton and Tomlinson para 11.508; see para B.223 and following above.

[504] Clayton and Tomlinson para 11.508, citing *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90) at [27] to [28].

[505] *Kokkinakis v Greece* (1994) 17 EHRR 397 (App No 14307/88) at [52].

[506] *X Ltd and Y v UK* App No 8710/79 (Commission decision) at [9].

B.320 The court has, however, held that incremental clarification of the law through judicial precedent is acceptable.[507] In essence, the criminal law needs to be "sufficiently accessible and precise" so that an individual can anticipate whether his or her behaviour will amount to a crime.[508] It is acceptable if the individual requires professional legal advice before being able to make this assessment.[509]

B.321 A high threshold is imposed by article 7 and it is unusual for the ECtHR to find that it has been breached. However, it some cases, legal provisions which lead to consequences which are not reasonably foreseeable may fall within the ambit of other articles which require that the interference with these rights be "prescribed by law" (articles 5 and 10) or "in accordance with the law" (article 8),[510] even where they do not meet the threshold to establish a breach of article 7.

CONTEMPT BY PUBLICATION

B.322 As we have explained, there may be concerns about the compatibility of common law contempt by publication with the ECHR given that some of the elements of this form of contempt are unclear.[511] In particular, there are ambiguities in the law about the necessary mental element of the contempt. Arlidge, Eady and Smith also explains that intentional contempt by publication can apply to proceedings said to be "imminent" in that they are "virtually certain to take place" but have not yet begun.[512] However, it is unclear how a publisher is supposed to know whether proceedings are "imminent" and, indeed, how "imminent" they have to be if they have in fact not yet been commenced. Likewise, it is unclear whether intentional contempt can apply to proceedings which are said to be "on the cards" but not (yet) "virtually certain" to happen. Again, how the publisher is supposed to know that proceedings are "on the cards", and what preliminary steps prior to the commencement of proceedings would be sufficient for them to be deemed "on the cards", is uncertain.

B.323 As we explained in relation to article 10, this issue may not be hugely significant in respect of the day-to-day practice of the media because prosecutions for intentional contempt by publication are exceptionally rare. However, there may be concerns nonetheless that the lack of clarity in the law means it may not be compliant with article 7 in some cases. It is for this reason that we ask consultees whether the common law of contempt by publication should be clarified in statute.

JUROR CONTEMPT

B.324 Some also have concerns about the extent to which the current law dealing with juror contempt in relation to those who look for material related to the proceedings that they are trying can be said to be article 7 compliant. In particular, some argue that the fact that such criminalisation is based on an oral warning from the judge at the start of the case may mean that there is insufficient

[507] *SW v UK* (1996) 21 EHRR 363 (App No 20166/92). See also Clayton and Tomlinson para 11.510.

[508] Clayton and Tomlinson para 11.511.

[509] Clayton and Tomlinson para 11.511.

[510] See paras B.38, B.186 and paras B.163 to B.165 above.

[511] See Ch 2 at paras 2.8 and 2.61.

[512] 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.

certainty about the law, particularly since the directions from the judge may not be given in the same terms in every case. It is highly unusual to establish a criminal charge in relation to judges' directions to jurors, although it is more common for orders to be issued orally in civil courts, breach of which can amount to a contempt. In any event, it is unfair to hold jurors liable for breaching a prohibition unless it was clear to them what they were not supposed to be doing.

B.325 It is for this reason that we propose amending the process by which jurors are warned about their responsibilities, to make such warnings clear, consistent, specific and often repeated.[513] Furthermore, we ask consultees about the option of enacting a specific criminal offence in relation to this conduct, in order to provide greater legal clarity and certainty.[514]

CONTEMPT IN THE FACE OF THE COURT

B.326 There is some uncertainty in the current law in respect of the elements of contempt in the face of the court. For example, the necessary mental element is unclear. It is unknown whether to be held in contempt requires only that the conduct itself was intentional, or whether it is necessary to establish that there was an intention to disrupt the court proceedings. There is further ambiguity about whether being reckless as to the disruption would be sufficient.[515] As we explain in Chapter 5, such uncertainty might justify adopting a definition of contempt which is most favourable to the alleged contemnor, in order to ensure article 7 compliance (namely, specific intention).[516]

B.327 In addition, we propose that there should be a statutory power in the Crown Court 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. Such conduct would need to be committed with the intention that proceedings will or might be disrupted to fall within the provision. We consider that this proposal would provide certainty in respect of these types of contempts in the face of the court.[517] The provisions of section 12 of the 1981 Act in relation to magistrates' courts appear to be sufficiently clear so as to be article 7 compliant.

[513] See Ch 4 at para 4.79 to 4.83.

[514] See Ch 4 at para 4.40.

[515] See Ch 5 at paras 5.9 and 5.10.

[516] See Ch 5 at para 5.59.

[517] See Ch 5 at para 5.88.