CONTEMPT OF COURT

LAW COMMISSION CONSULTATION PAPER 209

RESPONSE TO CONSULTATION ON BEHALF OF THE CRIMINAL BAR ASSOCIATION

Introduction

1. The Criminal Bar Association (CBA) represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

2. Note that we have followed the numbering system for questions which is used in the Law Commission consultation at chapter 6 (at page 125 of the consultation), according to which the first question for consultees to answer is identified as 6.2. For ease of reference, we have flagged the relevant paragraphs in the consultation where questions for consultees are proposed and discussed, in square brackets at the close of each question.

CHAPTER 2 – CONTEMPT BY PUBLICATION

6.2: Do consultees agree that the current triggers of active proceedings as contained in the 1981 Act should remain? [paragraph 2.19]

Yes. We agree that there is not *"a compelling case"* for revision of the current triggers of active proceedings, for the reasons set out in the consultation (at 2.19; the current triggers of active proceedings are identified at 2.9). We agree that the potentially broad application and availability of the section 3 defence adequately allays concerns that publishers are unfairly exposed to unacceptable risk and uncertainty (see, also, chapter 3 of the consultation, at 3.42 and 3.71). We agree (as observed at 2.15) that *"establishing the defence may depend on what information the media representative has which led them to make such enquiry and whether they, therefore, have "reason to suspect" that proceedings are active, as required by section 3".* Success or failure in establishing the defence will fall to be determined on a case-by-case analysis, in all the prevailing circumstances as the publisher knew, or reasonably expected, them to be. We do not consider that this is likely to breach any applicable human rights guarantees, including Article 7 of the ECHR. That provision guarantees the right to sufficient legal precision and clarity as to what the law requires of an individual (or individuals). We consider that the practical conditions of the defence under section 3 – broadly, to show reasonable diligence, to exercise all due caution, and to access adequate information – are fair, reasonable, and workable in practice.

6.3: Do consultees agree that there should be a consistent policy adopted by police forces about whether to release information about arrestees, with appropriate safeguards? [paragraph 2.20]

Yes. There is no logical contrary argument. We agree (at 2.20) that *"the Home Office [should] request that the Association of Chief Police Officers issue guidance, for dissemination to police forces, which would encourage the police to adopt consistent*

decision-making about whether to release information about arrestees following a request from the media to identify the arrestee". We agree (also at 2.20) that the release of names of arrestees should be accompanied by *"appropriate safeguards"*, such that *"some names are withheld"*. The easiest and clearest cut case is *"where the arrestee is a youth"*: we do not propose to comment on that because it is not a contentious example. However, two considerably more troublesome – because complex and disputed – examples (given at 2.20) are *"where it would lead to the unlawful identification of a complainant"* and *"where an ongoing investigation may be hampered".* There seems considerable force in classifying sex complainants at large as a category of complainants whose identification should not risk exposure with the release of names of arrestees. We recognise that this suggestion necessarily encompasses a very wide subset of complainants, and, it follows, arrestees. Further, we have reservations that reference to the hampering of an ongoing investigation is potentially unlimited in application. We suggest that the (superintending) officer in the case should be required to sign a specific declaration in the Custody Record of the arrestee to identify that (s)he is satisfied as a matter of good faith that release of the name of an arrestee would hamper the ongoing investigation. We further suggest that generic tick-boxes are included which address reasons – such as "witnesses", "evidence" – to ensure that analysis has been applied to the decision. We agree (also at 2.20) that *"such safeguards should be widely defined given that once a name is released, it may not be possible to retract it".* This follows as a reason borne of pragmatism and, properly, out of an abundance of all due caution.

6.4: Do consultees agree that the issue of an arrest warrant should trigger the active period in extradition cases? [paragraph 2.22]

Yes. We agree for reasons which are clearly and adequately set out in the consultation at 2.21 and 2.22.

6.5: Do consultees agree that active proceedings under the 1981 Act should be amended to end at the delivery of the final verdict in the case? [paragraph 2.24]

Yes. We note the force of the observations in the consultation (at 2.24) as follows: *"There is evidence to suggest that many reputable publishers treat the final verdict as the end of the active period. There is clearly an argument for bringing the law into line with current practice".* We agree with this analysis. We do not consider that the period of the active proceedings should be determined or dictated by (at 2.24) *"the perception that a judge or magistrate has been inappropriately influenced by prejudicial material when passing sentence"* – even in what are aptly recognised as *"notorious cases".* We are fortified in this view because sentencing is foremost a judicial exercise, and submissions by the parties are constrained by the parameters of a judicial exercise. Not least, we are reassured that most major offences, now with few noteworthy exceptions, are subject to updated (often "definitive") sentencing guidelines. In the absence of sentencing guidelines, we are reassured that there is usually a clear line of appellate authority with which to best constrain and articulate sentences. In notorious or widely famed cases, it is no doubt important that the sentencing court prefaces and reinforces its sentencing remarks in terms that aggravating and mitigating factors are ultimately matters of fact for the court – and not for publishers.

6.6: Do consultees consider that the right relationship between the degree of prejudice or impediment and the degree of risk is achieved in the current section 2(2) test? [paragraph 2.45]

We share the concern with the consultation (at 2.45) that it is *'not clear that the degree of risk, "and the severity of impact" required under section 2(2) are currently ECHR compliant.'* In particular, we are concerned that lack of sufficient legal precision and clarity is likely to risk breach of Article 7, ECHR, the guarantee of sufficient legal precision in the interpretation of liability for a criminal offence. The media (and potential media defendants) must be able to predict with a greater degree of certainty whether requisite prejudice or impediment will be deemed to have been shown. We agree that the practical result is that the test should encompass more than merely *'a substantial risk'*. We agree that *'a serious risk'* may well set the bar too high, but our concern is that

inquiries as to *'likelihood of risk'* are likely to be circular and question-begging rather than informative and practical. In the absence of a formula which is more satisfactory than *'likelihood of risk'*, we prefer *'a serious risk'* – not least, in the light of the imperative that the courts have regard for their ECHR interpretative obligations.

6.7: Do consultees consider that the relationship between the terms "prejudice" and "impede" warrants clarification? [paragraph 2.46]

No, those terms do not warrant clarification. The reality is that legal practitioners and the courts are more likely to be hampered than assisted if the terms "prejudice" and "impede" in section 5 are defined. If any definition is required, it should be limited to stating that those terms enjoy their natural and plain meaning in English. A jury may well be assisted by an appropriate reminder of the plain English meaning of those terms, which can be taken directly from the first and most immediate sense of those words as identified in the *Oxford English Dictionary*. There seems no advantage in particularising either term. What is otherwise likely to result is that any such definitions will become overly and legalistically developed. There is no obvious advantage to the public in that. Section 5 could, however, benefit from definition in one other respect, insofar as the phrase "*merely incidental to the discussion*" would seem to warrant definition. "Incidental to" potentially bears two apparently different meanings: "tangential with" and "ancillary to". Both these go the issue of proximity in terms of cause and harm. Again, however, we recognise that the courts may well be best placed to further define the words "incidental to", in that each case will turn on an assessment as to its facts, and we would remit to the courts the decision as to whether further clarification is required.

6.8: Do consultees think that section 2(2) should be split into two provisions, one dealing with prejudice, and the other with impediment? [paragraph 2.47]

No. There seems no practical benefit in terms of compartmentalising section 2(2) by splitting it into two provisions. Inevitably, the courts will compare and contrast the two terms in question, as part of any interpretation exercise. We disagree with the analysis in the consultation (at 2.47) that the Attorney General should *"be required to specify the*

basis on which the respondent was in contempt – whether under one of the tests or perhaps both". We are not persuaded that any such divisible formula would (as observed at 2.47) *"ensure that the respondent understood the case to answer".* Where there is any real doubt about the way in which the prosecution has elected to frame its case, the practical remedy is surely a court order for service of a case summary. We do not consider that any such splitting exercise would promote and clarify the development of a body of jurisprudence in this area. Any such jurisprudential growth will surely follow the ascendancy of the expanding jurisdiction and growing political impetus to prosecute cases. On the other hand, we take the view that there is little practical effort involved in splitting into two separate provisions the terms in issue. To that extent, we are not particularly wedded to any such canvassed development – and neither are we particularly against it.

6.9: Do consultees agree that the tests for whether there has been an abuse of process because of prejudicial media coverage and whether there has been a breach of section 2(2) should remain distinct? [paragraph 2.49]

We agree that the two tests should not be conflated, but should remain distinct, for the reasons which are cogently set out in the consultation (at 2.49).

6.10: Do consultees agree that section 5 should be retained in its current form? [paragraph 2.54]

Yes. The reasons set out in the consultation at 2.54 are clearly identified and persuasive, and we do not propose to amplify those reasons.

6.11: Do consultees consider that the common law of intentional contempt by publication should be defined in statute? [paragraph 2.57]

Yes. We agree that there are what the consultation identifies (at 2.57) as "*ambiguities*", and we are concerned that those ambiguities should not persist insofar as those ambiguities can and should be resolved by statutory interpretation and definition. We note that Arlidge, Eady and Smith [cited at 2.57, fn 82] observe as follows: *"The conclusion is that we are driven back to an (admittedly very uncertain) common law for guidance upon the ingredients of mens rea in the law of contempt [...]"* (Arlidge, Eady and Smith on Contempt para 5-138 to 5-139, and para 5-200). We think it imperative to avoid any such "very uncertain" guidance, and propose that parliament should address and identify what comprise the constituent elements of the common law offence of intentional contempt (assisted, perhaps, by a steering document produced by the Law Commission).

6.12: Do consultees consider that a list of the factors considered by the Attorney General when deciding whether to bring proceedings should be published? [paragraph 2.63]

Yes. We recommend that any such factors would most usefully be divided into those factors tending against, and those factors tending in favour of, prosecution. A useful blue-print for this might be (for example) the DPP's guidelines on factors tending against, and factors tending in favour of, prosecution in cases of assisted suicide. A series of short and functional case studies, by way of illustration, would serve to practically show how and why the Attorney General is likely to exercise his jurisdiction in decisions regarding whether or not to bring a prosecution. With the growing accumulation of a body of case law, we propose that those most practical examples of case studies are replaced or complemented by examples drawn from cases in which the Attorney General has exercised (or declined to exercise) the power to prosecute (subject to legal privilege, and incorporating anonymity of all parties).

6.13: Do consultees consider that contempt by publication under section 2(2) should be tried subject to these procedural safeguards associated with a trial on indictment? If not, why not? [paragraph 2.71]

Yes. No distinction whatsoever should be drawn between the procedural safeguards applicable to trial of the issues in a contempt by publication and the procedural safeguards which are guaranteed in trials on indictment.

6.14: Do consultees agree that it would be beneficial to clarify through legislation, for the avoidance of doubt, that the jurisdiction of the Divisional Court to deal with strict liability and intentional contempt by publication had been ousted? [paragraph 2.72]

This clarification can be made legislatively with minimal impact on the time of parliamentary draftsman – especially if it is plumbed into legislation the kind of which is proposed in the consultation. We see no disadvantage to this clarification being made legislatively, even if, as we suspect, practitioners will be informed as to which court enjoys, and does not enjoy, jurisdiction to deal with strict liability and intentional contempt by publication.

6.16: Do consultees consider that contempt by publication (under section 2(2) and intentional contempt at common law) should be tried on indictment by a judge and jury in the usual way or should it be tried as if on indictment by a judge sitting alone? If consultees consider that trial should be by a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis? [paragraph 2.76]

For reasons given previously by us in respect of trial of contempt by publication under section 2(2) [see 6.13, above], we do consider that contempt by publication (under section 2(2) and intentional contempt at common law) should be tried on indictment by a judge and jury in the usual way. Given that contempt by publication is a criminal offence, there is no good reason in principle or in practice not to try it on indictment. Further (although this is not canvassed in the consultation), we think that there is force in allocation of contempt by publication trials to a High Court judge, sitting with a jury, in the way that other unusually complex or highly specialist criminal cases (including terrorism offences) are tried by High Court judges with juries. We think there is reason to consider that contempt by publication is reasonably likely to involve trial of issues including those founded on relatively complex legal arguments underpinning various ECHR guarantees.

6.17: Do consultees consider that it would be necessary to set out in statute the basis for corporate liability if intentional contempt and contempt under section 2(2) were tried on indictment or as if on indictment? [paragraph 2.77]

We agree with the consultation (at 2.77) that *"consideration may need to be given to the most appropriate means of establishing corporate liability for contempts"* – in that we have reason to think that corporate liability should be seen as a specific subset, or distinct area, of the general doctrine of vicarious liability. With reference to other areas of the criminal law, we note that it was considered necessary and appropriate that liability for corporate manslaughter was put on a statutory footing in preference to the common law offence (albeit that recourse can still be had to the common law in prosecutions for corporate manslaughter). We propose that the same model of statutory formulation might be proposed, in that the common law may well have a subsisting and enduring value in the prosecutorial armoury.

If not, why not? Do consultees agree that the current triggers of active proceedings as contained in the 1981 Act should remain?

N/A. See our answer 6.17, immediately above.

6.18: Do consultees agree that a scheme for notifying publishers about the existence of section 4(2) orders should be created? [paragraph 2.104]

Yes. We agree that there is not a *"compelling case"* for revision of the current triggers of active proceedings, for the reasons set out in the consultation (at 2.19; the current triggers of active proceedings are identified at 2.9). We agree that the potentially broad application and availability of the section 3 defence substantially allays any concerns that publishers are unfairly exposed to unacceptable risk and uncertainty (see, also, chapter 3 of the consultation, at 3.42 and 3.71). We agree (as observed at 2.15) that *"establishing the defence may depend on what information the media representative has which led them to make such enquiry and whether they, therefore, have "reason to suspect" that proceedings are active, as required by section 3".* Success or failure in establishing the defence will fall to be determined on a case-by-case analysis, in all the prevailing circumstances as the publisher knew, or reasonably expected, them to be. We do not consider that this is likely to breach any applicable human rights guarantees, including Article 7 of the ECHR. That provision guarantees the right to sufficient legal precision and clarity as to what is required of an individual (or individuals in an organisation). We consider that the practical conditions of the defence under section 3 – to show reasonable diligence, to exercise all due caution, and to access adequate information – are fair, reasonable, and workable in practice.

6.19: We would welcome consultees' views on the possible expansion of the scheme for section 4(2) orders to other types of order. [paragraph 2.105]

We consider that the time to appraise and review whether the scheme should be expanded to other types of orders is following implementation and the 'bedding in' of any such scheme. The benefits or otherwise of any such expansion remain only moot and speculative at this stage.

6.20: Do consultees consider that the current maximum sentence for strict liability contempt is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction? [paragraph 2.114]

Notwithstanding that a penalty of imprisonment may well appear draconian (as identified in the consultation at 2.113), we are of the view that the maximum sentence should remain as before. We think that punishment will be decided on a case-by-case basis, and that the courts should retain the threat and sanction of imprisonment – both as deterrence and as a means to reflect the nature, gravity and resulting seriousness (in all the circumstances) in appropriate cases. We take the view that the sentencing panoply available to the courts should not be reduced, even though strict liability offences are absent fault and culpability requirements – and there has been a *de facto* moratorium for some sixty years on imprisonment in this context (as identified in the consultation at 2.113). Cases may well arise where the resulting (if inadvertent) harm is so very serious that no lesser penalty than a custodial term is appropriate, and this will be case-specific. We note the observation in the consultation (at 2.113) that this creates a disparity between the maximum available sentence for contempt by publication and the sanctions for other types of reporting restrictions (which, the consultation records, at 2.113, are generally limited to a fine). We think that disparity is a justifiable one which should remain, given the additional seriousness with which contempt by publication is viewed, in comparison with a number of lesser offences in connection with reporting restrictions.

6.21: Do consultees consider that the current maximum sentence for intentional contempt by publication committed at common law, contempt under section 4(2) or under section 11 of the 1981 Act is appropriate? If not, what should it be? Do consultees consider that community penalties should also be available as a sanction? [paragraph 2.115]

We do not propose to revise (upward or downward) the maximum available sentence for contempt. We take assurance in the fact that the maximum sentence is reserved for only

the most serious and grave of cases. We see no reason why community penalties should not be made available to the courts, and we think that community penalties are a useful addition to sentencing powers – given that the courts already have available to them both imprisonment and fines.

6.22: Do consultees agree that a sentencing power allowing the courts to impose a fine set at a percentage of the turnover of the publisher should be introduced? [paragraph 2.116]

Yes. The additional power to calibrate a fine according to percentage of turnover would be a significant and meaningful one. It would allow the courts to directly and adequately correlate the imperatives of reflecting harm and seriousness, on the one hand, with the imperatives of deterrence and public communication of sentence, on the other hand. Practically, allowing the courts to impose a fine set at a percentage of turnover has the real advantage of best ensuring that any fine will adequately punish and deter. We think this a progressive and especially useful addition to the courts' sentencing powers.

6.23: Do consultees agree that the Divisional Court should have the power to make an order for wasted costs from the criminal proceedings prejudiced, impeded or intentionally affected by a contempt by publication? [paragraph 2.118]

Yes. Following a finding (or admission) of contempt, the costs of proceedings (including discharge of a jury) should, in principle, be recovered if there is a causal link between the contempt and the incurred wasted costs. It would be of significant benefit to the public purse – and a marker of public confidence in the courts – if public funds which were wasted on aborted proceedings could be recovered following a finding of contempt. All the usual safeguards in connection with recovery of wasted costs should apply, in that any

order for payment of wasted costs should only be made after representations against any such order have been heard.

CHAPTER 3: PUBLICATION, PUBLISHERS AND THE NEW MEDIA

6.24: Do consultees agree with our conclusion that the definition of publication in section 2(1) of the 1981 Act is broad enough to cover things appearing in the new media? If not, why not? [paragraph 3.22]

Yes, for the reasons set out in the consultation – in particular the use of the words "or other communication in whatever form". However, the illustrative examples currently included in section 2(1) (speech, writing, programme included in a programme service), *could* be added to with words such as "on-line communication of any kind".

6.25: Do consultees consider that the lack of a statutory definition of "a section of the public" is creating problems in practice? If so, can they provide examples? [paragraph 3.29]

We do not consider that the lack of a statutory definition of a "section of the public" is creating problems in practice. We agree that the issue as to whether the publication is made to a section of the public is best determined on a case-by-case basis.

6.26: Do consultees consider that section 2 is correctly construed as applying to publications commencing before proceedings were active? [paragraph 3.63]

This question refers to the possibility that publication which arises before proceedings were active could give rise to criminal liability in contempt, based on the notion that publication (especially online publication) is a continuing act. "Active" enjoys a wide definition – defined in Schedule 1 Contempt of Court Act 1981 and proceedings are active if a summons has been issued or a defendant arrested without warrant. Where a warrant has been issued, proceedings cease to be active once twelve months have elapsed

without the suspect's arrest, and where there has been an arrest when the suspect is released without charge otherwise than on bail.

In our view, such a construction is deeply problematic and unfair. The consultation (at 3.54) recognises that *"Holding P liable for the proscribed consequences in such a case seems to be an unusual basis on which to impose liability. It might also be said to strain the language of section 2 and reference to "at the time of publication". Nevertheless, the limited case law to date favours the broad interpretation that publication is a continuing event".*

The consultation (at 3.62) goes on to note, *"In summary, it appears that although Beggs is a decision that has been followed at first instance, on close analysis we cannot be confident that it would be followed by an appellate court in England and Wales. That is clearly a concern."*

It seems to us that section 2 cannot (and should not) be construed in the way it was construed in *Beggs*, despite the fact that the rise of social media and so-called 'citizen journalism' means that 'everyone is a publisher' now". Such citizen journalists would not have the resources or wherewithal of large news corporations or other more traditional publishers to ensure awareness of any legal proceedings that may begin, on a topic about which the person has previously written (and there is the additional problem of "intermediaries"). Whilst there is a defence (or defences) of innocent publication and/or distribution and/or EU Directives, there ought to be much greater protection from the possibility of prosecution. The problem needs to be separately covered by amended legislation with the relevant safeguards in place (as suggested at 3.68 of the consultation).

6.27: Do consultees consider that section 2(3) should be amended to confirm that "time of the publication" is to be interpreted as meaning "time of first publication"? [paragraph 3.67]

Yes (see above).

6.28: We propose that the courts be provided with a power to make an order when proceedings are active, to remove temporarily a publication that was first published

before proceedings became active, which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Such an order shall be capable of being made against any person who is a publisher within the meaning of the 1981 Act and failure to comply with such an order without reasonable excuse shall be a contempt of court. Do consultees agree? [paragraph 3.75]

Yes. However, the order will have no efficacy and may well be unfair if limited to a "publisher", for the reasons outlined in the paper (re: intermediaries and/or jurisdictional problems) and a definition which targets those who have sufficient control over the publication will be more effective.

6.29: We also provisionally propose that a court should have the power to make an order when proceedings are active, to remove or disable access temporarily to a publication that was first published before proceedings became active, which creates a substantial risk of serious prejudice or impediment. Such an order shall be capable of being made against any person who has sufficient control over the accessibility of the material that they are able temporarily to remove it or disable access to it and failure to comply with such an order without reasonable excuse shall be a contempt of court. Do consultees agree? [paragraph 3.79]

Yes. See our answer to question 6.28, above.

6.30: Who might apply to the court for such an order to be made? We propose that the application should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General. Do consultees agree? What penalty will follow? [paragraph 3.83]

We agree that an application could be made by the prosecution or a defendant without seeking the permission of the Attorney-General. This may well expedite matters. We are of the view that it should be open to the Attorney-General to make such an application

and that the Court should also be able to act on its own motion. Any application (and subsequent hearing) should be made on notice.

6.31: What penalty will follow? Do consultees consider that the current maximum penalty is appropriate? Do consultees consider that the court should have the power to impose community penalties? [paragraph 3.84]

We see no justification for increasing the maximum penalty and consider a maximum sentence of two years imprisonment reserved for the most serious offences to be appropriate. We do consider that the Court should have power to impose community penalties where the offence is serious enough to justify such a disposal.

6.32: Do consultees think that this new contempt should be tried in the Divisional Court under Part 81 of the Civil Procedure Rules or should it be tried on indictment or "as if on indictment" as we propose to try section 2(2) contempts? [paragraph 3.85]

We are of the view that such contempt should be tried on indictment (by a Judge and jury) before the Crown Court. The threat of prosecution may well reinforce the order upon the publisher to remove the material. The fact that the publisher is being dealt with by trial on indictment, as opposed to being tried in the Divisional Court, ought not affect the underlying case because the offending material will either have been removed or not.

We acknowledge the resource implications for this. The matter will require a full investigation and compliance with the disclosure obligations under the Criminal Procedure and Investigations Act 1996 (as amended). In our view the Attorney-General would not be conflicted from prosecuting such cases and the cases could be investigated by a local police force. We further acknowledge that trial on indictment through the full criminal process (Magistrates' Court, Plea and Case Management Hearing, trial) will take longer than proceedings before the Divisional Court, but the new contempt is, in effect, the creation of a new criminal offence, which can be punishable by imprisonment and should be treated and recognised as such.

We have every confidence in the jury system and would not support such cases being tried by Judge alone.

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

> ***(1) should it be necessary that the publication was produced within England and Wales; or***
>
> ***(2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or***
>
> ***(3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad? [paragraph 3.95]***

The harm which prohibition of contempt by publication (online and otherwise) seeks to prevent is *access* to prejudicial material (which tends to interfere with the course of justice), most immediately by jurors themselves, but also by the public at large, as both would impinge upon the fairness of a trial. The act which gave rise to access to such material in England and Wales may not be within the jurisdiction which makes option (1) inappropriate.

As regards option (2), we are of the view that the nature of online publication renders irrelevant any consideration of whether a particular publication was "targeted at a section of the public in England and Wales". Thus, we do not think that option (2) is appropriate.

Accordingly, option (3) seems the most appropriate. However, the access-based approach gives rise to a jurisdictional (rather than substantive) problem in relation to option 3, in the sense that it may entail liability for acts committed abroad.

CHAPTER 4 - JUROR CONTEMPT

Jurors seeking information

6.34: Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced? [paragraph 4.40]

On balance, it is our view that a clearly defined, substantive offence of improperly obtaining information would be preferable to the use of contempt.

The penal sanction should be a last resort. We suggest that if court staff and judges engage with jurors at the beginning of their service, and explain fully what the rules are and why they exist, more jurors will be diverted from the temptation to do their own research.

We agree that it is essential that jurors understand that they must not undertake their own research; this is necessary to ensure a fair trial and to preserve the integrity of the jury system.

It is increasingly becoming the practice that a judicial warning at the outset of the trial makes clear the dangers. Individual judges have referred to the case of *Dallas* and with care and skill to the possible repercussions. We see no difficulty in warning that research is a specific offence in the same way. Judges sometimes refer to offences created by lying in order to excuse jury service at jury selection stage.

Any concerns regarding inconsistency as to application of the law of contempt and/or sentence can be alleviated. There is little information regarding inconsistent application of the law and practice directions offer guidance of how to deal with juror irregularities. In relation to sentence, the case of *Dallas* is a well known case and would provide a starting point for the factors. It may be that this can or should be added to the Compendium of guideline cases as a further tool for consistency

Jurors disclosing information

6.35: Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police

or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice? [paragraph 4.60]

The law of contempt serves to protect the administration of justice. Where it does not in fact do that, we consider that there should be the necessary proviso or defence to ensure that it does. It is plainly in the public interest to prevent miscarriages of justice and the system would be wholly flawed if the administration of justice did not function to prevent such miscarriages or uncover them after they have occurred. We recognise the concerns of Lord Steyn in the case of *Mirza* and consider them valid.

The key question is whether the current allowance for a juror to disclose to the court any such concerns is sufficient, or whether a specific and limited defence is necessary. The clear risk of amending the statute to include a specific defence is that it may reduce the sanctity of jury deliberations by making the juror feel that their views are open to scrutiny by another body. This in turn may diminish the finality of the jury verdict.

However, where such scrutiny serves to overturn a wrongful conviction, we consider that this must be in the public interest. In addition we share the concerns expressed in Appendix B, that the law as it stands may amount to a disproportionate interference with Article 10 where the disclosure seeks to uncover a miscarriage of justice. We recognise that if amended, the common law concerning the admissibility of such deliberations would have to develop or be amended in order for the statutory amendment to serve any meaningful use.

We agree that the current procedure for a juror to report their concerns must be made clearer to jurors. However we feel that this does not go far enough and statute should prescribe the very limited circumstances in which a juror is entitled to report concerns by way of the suggested amendment.

6.36: Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research? [paragraph 4.62]

We consider that academics seeking to undertake such research should best be placed to answer the first question. However, opinion is divided. It is of concern that there is this confusion. Notwithstanding this, we do not consider that there is sufficient concern for there to be an amendment to section 8.

If an amendment were made, we agree that it should be highly regulated and restricted. We see benefit of research only being undertaken with the consent of the Lord Chief Justice, the jurors remaining anonymous and there being a strict code of conduct. Further, we see no reason why anyone undertaking such research would need to enter the jury deliberating room and this should remain prohibited.

Evidence and procedure

6.37: Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury? [paragraph 4.69]

If there is to be a specific criminal offence of unauthorised research, we can see no compelling reason for treating it differently from other offences, so that usual safeguards and procedures are applied.

We would support making the full range of sentences available, with a maximum of two years imprisonment, but we doubt if it would be appropriate to pass a prison sentence for the offence unless there were wholly exceptional circumstances.

6.38: Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis? [paragraph 4.72]

No. We do not support a judge-only trial. It is a matter that the jury can properly decide and it is sufficiently serious to merit trial by judge and jury. We do not share

the concerns that the jury would be unwilling to convict other jurors of such offences as they would be given judicial direction as in any other trial and the trial subject matter may only enhance the importance of adhering to such directions. It is important that in safeguarding the trial process we do not undermine or dilute the jury system. Juries are trusted to deal with the most difficult and sensitive cases and can be trusted with dealing with a citizen who, sitting as a juror, is alleged to have committed a criminal offence

6.39: Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis? [paragraph 4.73]

We consider that it should be considered by judge and jury, as above.

6.40: If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in Dallas be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected? [paragraph 4.74]

We do not consider that there are any grounds to distinguish between the way section 8 contempt proceedings are tried and common law contempt proceedings are tried. The same level of protection should be afforded to the alleged contemnor in each case.

The case of *Dallas* goes some way towards providing clarification as to the law. It may assist if the judicial direction to be given by Crown Court judges to the jury not to undertake their own research is regularly reviewed by the Judicial Studies Board to ensure that there is conformity as to the content of the direction.

6.41: Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8? [paragraph 4.75]

We do not consider that there is any need or justification for increasing the current maximum sentence for a breach of section 8. We do consider that the Court should have the power to impose community penalties where the offence justifies such a disposal. Suspended sentences of imprisonment should also be available.

6.42: Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years' imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)? [paragraph 4.76]

If appropriate to introduce the new offence, we do not consider that there is any need or justification for disparity between the maximum sentence applicable to it and the maximum sentence under section 14 of the 1981 Act. We do consider that the court should have the power to impose community penalties where the offence justifies such a disposal.

Preventative measures - Education and pre-trial information

6.43: Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service? [paragraph 4.78]

Yes. In general terms, we are strongly in favour of increasing preventative measures and making those more robust where possible. The more successful the preventative

measures, the less likely jurors are to jeopardise the fairness of the trial and place themselves at risk of being in contempt.

The benefit of greater education as to the role and importance of jury service would assist in instilling greater understanding of the role of the juror within the justice system and the importance of jury service to society. It is hoped that such understanding would result in increased compliance with judicial directions, and greater respect for the juror's role and the jury system as a whole.

In-trial procedures and judicial directions

6.44: Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do? [paragraph 4.83]

Yes we strongly agree that this should be a standard direction . Also, packs should be made available for jurors which explain their duties and provide clear warnings as to the dangers of research (for the juror, the defendant and the trial judge?)

6.45: Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud? [paragraph 4.84]

We do agree that the oath should be amended to include jurors' understanding that they are not permitted to conduct their own research and the requirements set out in section 8. Whilst it would take marginally more time at the start of the trial, it would mean that each juror is required to specifically address their mind to what exactly they can and cannot do. It may also initiate further questions from the juror where there is misunderstanding or uncertainty and thereby increase the overall understanding as to the requirements of the juror.

We disagree that the oath should be written as well. The oral oath is delivered in very formal settings; it is witnessed and assessed by all parties (and, crucially, given in

front of the other jurors) and is recorded on the transcript. It is not thought that there is any need for it to be in writing. In addition this would create a distinction between the oath taken by witnesses and that taken by jurors. This may serve to undermine the oral oath taken by witnesses in the mind of the juror.

6.46: Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so? [paragraph 4.85]

Yes for the reasons set out in the response at ??. This should be explained in detail, including setting out the most obvious practicalities of how to ask questions and of whom.

6.47: Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court? [paragraph 4.87]

Yes, however it should be made clear from the outset the basis on which they are entitled to retain such devices (i.e. in order to assist with the day to day running of their lives as necessary). This should be incorporated in to the advice as to warnings as to using the internet to research matters relating to the case.

6.48: Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices? [paragraph 4.88]

Yes, this is particularly necessary in relation to the surrender of such devices in the deliberating room where they should be prohibited. This would appear to be standard practice, in any event.

6.49: Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room? [paragraph 4.89]

Yes. We recognise that there may be circumstances where there is need for emergency contact of a juror. However, in all such circumstances, it should be possible for an alternative system to be put in place that does not require internet enabled devices to enter the deliberating room.

6.50: Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge? [paragraph 4.90]

Yes, it is agreed that the trial judge is best placed to decide when it may be necessary to require jurors to surrender such devices on a case by case basis.

6.51: Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns? [paragraph 4.91]

We agree that it should be made as easy as possible for jurors to report their concerns. This includes there being greater explanation from the outset as to how to report such concerns and what their duties are.

6.52: Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be? [paragraph 4.92]

As stated above, we agree that it should be made as easy as possible for jurors to report their concerns. We see the merit in a phone line or email address as it allows reports to be made away from the pressure of the presence of the other 11 jurors. However, in order for such methods to serve any useful purpose, there must be timely and regular checks made for any messages relating to that day or the next days' trial, so that they can be dealt with at the most relevant time.

CHAPTER 5 - CONTEMPT IN THE FACE OF THE COURT

In the Crown Court

6.53: A survey of 100 Crown Court judges in 2012, of whom 43 responded, revealed that they had dealt with only eight cases of contempt in the face of the Crown Court within the preceding 12 months. In consultees' experience, is this representative of the true prevalence of contempt in the face of the Crown Court? [paragraph 5.32]

From a practitioner's perspective, examples of contempt in the face of the Crown Court are not a common occurrence. This may be for a number of reasons, including that most defendants have legal representation. The reduced volume of cases *per* court and *per* court centre, when compared with the Magistrates' Court, may also be a factor.

6.54: Do consultees agree that proceedings for contempt in the face of the court are criminal proceedings to which the strict rules of evidence apply? [paragraph 5.41]

It is accepted that proceedings of this nature should be criminal as opposed to civil proceedings for the reasons identified in the consultation at paragraph 5.38. In particular the conduct arises in the course of criminal proceedings and the type of punishment available to the court.

For these reasons, as a matter of principle, we agree, where appropriate, that the strict rules of evidence should apply. However, the application of this in practice is more problematic. The nature of this limb of contempt is that it may require immediate/summary action. In those circumstances, the Criminal Procedure Rules, Part 62, provide useful guidance. It is important that the application of the strict rules of evidence does not unduly ort unnecessarily serve to elongate those occasions where there is need to proceed summarily.

In the magistrates' courts

6.55: Our survey of 145 District Judges, of whom 52 replied, revealed that 31 respondents had dealt with at least one instance of contempt in the face of the court in a 12 month period in 2011/2012. In consultees' experience, is this representative of the true prevalence of contempt in the face of the magistrates' courts? [paragraph 5.52]

From a practitioner's viewpoint, the greater incidences in the Magistrates' Court may not be surprising because of the higher number of unrepresented defendants and the greater volume of work load including defendants with substance misuse and mental health issues. However, there are concerns that these statistics there may indicate overuse of contempt in the face of the court by District Judges. Often a swift apology is effective in the context of efficient court management.

The immediate enquiry procedure for dealing with contempt in the face of the court

6.56: Should there be specific guidance to courts on when an enquiry into an alleged contempt in the face of the court should be passed to another court, and if so, what factors would consultees identify as making that step desirable? Such factors might be:

(1) when the alleged contempt is directed at the judge or magistrate personally; and/or

***(2) when there are issues of fact to be resolved.* [*paragraph 5.82*]**

Guidance would be of assistance to the judiciary and practitioners. We infer that any such guidance will retain the element of judicial discretion and relate to the exercise of that discretion. Turning to the factors suggested in the consultation, we endorse those factors and can understand that there will be occasions where a serious contempt directed at the tribunal should be dealt with by another tribunal to avoid any perception of bias or injustice. Those occasions are expected in practice to be rare, particularly as the Criminal Procedure Rules endorse the practice of allowing the alleged contemnor time to reflect and to avail of legal advice.

Where there is a factual dispute *and* the tribunal is the witness of the alleged misconduct, again, fairness dictates that an independent tribunal determines the facts, applying the rules of evidence and the appropriate burden and standard of proof.

Provisional proposals for reform: Crown Court

6.57: We provisionally propose a statutory power to deal with intentional threats or insults to people in the court or its immediate precincts and misconduct in the court or its immediate precincts committed with the intention that proceedings will or might be disrupted. [paragraph 5.88]

There appears to be uniform agreement among commentators in this field that the law requires clarification. The consultation sets out three options [at 5.86]. Of these, the option of making no change is the least attractive. We support any provision which brings clarification to the law and, in particular, which sets out what the mental element is (or elements are) of the offence. We infer that the third option (as set out above), would work alongside the common law, thus balancing flexibility with greater clarification.

Detention of the alleged contemnor

6.58: We provisionally propose that where the Crown Court or the magistrates' court order C's immediate temporary detention, C shall be entitled, if he or she so requests, to have one friend or relative or other person told, as soon as is practicable, that he or she is being detained, and, if he or she so requests, to consult a legal representative in private at any time. [paragraph 5.92]

These provisions in part equate to the rights afforded to a detainee in custody in a police station. There is no reason why those rights should not be available to someone detained at court.

6.59: We provisionally propose that the Crown Court should have the following specific statutory powers: (1) to require an officer of the court or a constable to take C into custody for the purposes of immediate temporary detention; (2) following a finding of contempt, to impose a fine and/or a term of imprisonment; (3) to suspend an order of committal; and (4) to revoke an order of committal and to order the discharge of C. [paragraph 5.95]

We endorse these proposed statutory powers. In particular the measures provide the courts greater flexibility.

6.60: We provisionally propose that if the Crown Court orders C's immediate temporary detention then C should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out. [paragraph 5.96]

For the reasons set out in the consultation paper, we agree that it is fair and proportionate that temporary detention should be reviewed no later than the end of the court day. The Bail Act 1976 provides sufficient safeguards to any contemnor. Equally, it allows a judge to adjourn a definitive decision as to bail if there is insufficient information, under paragraph 5, Sch. 1 of the Bail Act 1976.

6.61: Are there other powers which consultees think courts need or duties the court? Should have in relation to sentencing for contempt in the face of the court? [paragraph 5.97]

We think that the Crown Court should possess wider sentencing powers following findings of contempt. In addition to the availability of a power to suspend executions of committals, it should also be able to impose community penalties.

It is apparent that sentences imposed for contempt vary considerably. It seems sensible that formulation of sentencing guidelines should be considered, in order to ensure greater consistency in sentencing.

6.62: For example, do consultees think there is a need for a power to remand a person after a finding of contempt but before sentence, for reports to be provided to inform sentence? paragraph 5.98]

Given the suggestion made above, a corollary of the power to impose community penalty would be the power to remand, either on bail or in custody, for the preparation of a pre-sentence report. It may be that expedited (or 'fast delivery') reports could be prepared, in appropriate cases, in order for contempt matters to be finalised swiftly, where to do so would deal justly with the parties.

6.63: Should the court be required to have regard to the likely penalty which would have followed a conviction? [paragraph 5.99]

We think that some consideration should be given to the issue of proportionality. The proposal made in respect of sentencing guidelines would again be useful in that regard, in order to determine the appropriate course of action.

Some guidance should be given to the courts as to how different contempts should be dealt with, again, to ensure greater consistency, and to ensure that the less serious contempts can be dealt with in a timely manner.

That guidance should include: assistance on the circumstances in which a case should be referred to the Attorney General; and when prosecution for a criminal offence by the Crown Prosecution Service is the more appropriate option.

The maximum penalty

6.64 Do consultees consider that there is any need to reduce the maximum sentence? If so, what maximum sentence would consultees suggest is appropriate? [paragraph 5.100]

We believe that the current maximum sentence is too high. An offence meriting a sentence approaching the maximum would be criminal and should be charged as a criminal offence. We suggest a maximum sentence of 12 months imprisonment.,

Hearsay evidence

6.65: Do consultees think that it should be put on a statutory basis that enquiries into alleged contempts in the face of the court are criminal proceedings to which the strict rules of hearsay evidence apply? [paragraph 5.105]

Given the potential sanctions, we consider that, although contempt proceedings are not exclusively criminal proceedings, and are, in part, a process representative of the Court's capacity to regulate itself, the benefit of strict hearsay rules should apply where there is a contested hearing and/or an allegation of complexity. However, the court should be able to use its self-regulatory discretion not to enforce strict hearsay rules of evidence in a simple straightforward case. The distinction should be placed on a statutory basis, in order to clarify applicable due process.

Other aspects of criminal procedure

6.66: Do consultees think that other aspects of the rules and procedures which apply to criminal proceedings ought to apply to an enquiry into a contempt in the face of the court, and if so, why? [paragraph 5.108]

Given what we have proposed in relation to hearsay evidencem we are of the view that the rules of criminal evidence generally should apply.

We think that Part 62 Criminal Procedure Rules 2012 sets out with sufficient clarity the procedure to be adopted in cases of contempt in the face of the court.

Provisional proposals for reform: magistrates' courts - Power to suspend an order of committal

6.67: We provisionally propose that magistrates should have power to suspend an order of committal made under section 12 of the 1981 Act. Do consultees agree? [paragraph 5.109]

We can see no reason to differentiate between the Magistrates' Court and Crown Court in this regard. There should accordingly be, in our view, a power to suspend the execution of committals. Similarly, they ought to have a power to impose community penalties.

Power to adjourn the enquiry into the contempt and power to remand into custody pending the contempt hearing

6.68: Do consultees think magistrates should have the power to adjourn the hearing for contempt beyond the rising of the court to the next business day? [paragraph 5.112]

We think there should be such a power, provided there is good reason for doing so, for example, in order to avoid the disruption of an ongoing case.

If so, should they have power to order that C be detained until that time but be required to review the alleged contemnor's bail position no later than the end of the court day; or should they have power to grant bail (conditional or unconditional) to C to attend the adjourned hearing but no power to remand C in custody? [paragraph 5.112]

In the event that an alleged contemnor is causing severe disruption to ongoing proceedings, in our view the Magistrates' Court, if so satisfied on the basis of evidence before it, should have the power to remand immediately. The bail position

should be reviewed no later than the end of the court that day, beyond which the court should have the power to remand on bail conditional or unconditional.

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