



**Law
Commission**
Reforming the law

Contempt of Court

Chapter 2: Contempt by Publication

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CHAPTER 2

CONTEMPT BY PUBLICATION

INTRODUCTION

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

THE RATIONALE FOR CONTEMPT BY PUBLICATION

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

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

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

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

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

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

⁵ More detail can be found in Appendix B.

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

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

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

2.6 Article 10 of the ECHR provides:

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

2.7 However, the right may be restricted:

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

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

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

⁷ See Appendix B generally.

ACTIVE PROCEEDINGS UNDER THE 1981 ACT

Present law

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

Problems and potential solutions

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

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

⁹ As broadly defined in Sch 1, para 6.

¹⁰ Schedule 1, para 5.

¹¹ Schedule 1, paras 12 and 13.

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

¹³ Section 20.

¹⁴ Schedule 1, para 15.

¹⁵ Schedule 1, para 16.

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

¹⁷ See Ch 3 at paras 3.42 and 3.71.

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

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

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

¹⁹ See Ch 3 at paras 3.42 and 3.71.

²⁰ The Phillimore report para 123.

²¹ Miller para 6.20.

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

- 2.19 We consider that the difficulty lies in ensuring that publishers are not unfairly at risk of committing contempt by publishing matters about an arrestee of whose identity they are unaware or about a person whom the publisher is unaware has been arrested. In part, that concern is met by the section 3 defence.²³ We do not consider that there is a compelling case for changing the commencement of active proceedings to the point of charge and are in favour of retaining the current triggers of arrest; the issue of a warrant or summons. **Do consultees agree that the current triggers of active proceedings as contained in the 1981 Act should remain?**
- 2.20 However, we believe that further reforms can be introduced to ensure the fair application of the Act and to ensure greater certainty and consistency in its application. We propose that the Home Office request that the Association of Chief Police Officers²⁴ issue guidance, for dissemination to police forces, which would encourage the police to adopt consistent decision-making about whether to release information about arrestees following a request from the media to identify the arrestee. We consider that such policy should establish that, generally, the names of arrestees will be released but that appropriate safeguards will need to be put in place to ensure that some names are withheld, for example, where it would lead to the unlawful identification of a complainant, where the arrestee is a youth or where an ongoing investigation may be hampered. We consider that such safeguards should be widely defined given that once a name is released, it may not be possible to retract it. **Do consultees agree that there should be a consistent policy adopted by police forces about whether to release information about arrestees, with appropriate safeguards?**
- 2.21 Finally, in relation to the commencement of active proceedings, we consider the position in respect of extradition to England and Wales, that is to say, mechanisms to bring a person into the domestic jurisdiction from a foreign jurisdiction. In respect of cases concerning returns from the European Union or Gibraltar (category 1 states under the Extradition Act 2003), a domestic arrest warrant is required to be issued prior to the issue of the European Arrest Warrant (EAW).²⁵ In respect of returns from other states (category 2 territories, which are certain designated states outside the EU), no extradition warrant is needed but a domestic arrest warrant will be issued and sent with the request for extradition to the foreign state. In either of these circumstances, the active period would be triggered by the issue of the domestic arrest warrant.
- 2.22 There may be concerns that, in extradition cases, significant delay may occur before the suspect can be apprehended and returned to this jurisdiction. This may mean that there is an extended period during which media coverage is

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

²³ See Ch 3 at paras 3.42 and 3.71.

²⁴ Or by the College of Policing, if appropriate.

²⁵ Extradition Act 2003, s 142(2)(b).

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

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

SUBSTANTIAL RISK OF SERIOUS PREJUDICE OR IMPEDIMENT UNDER THE 1981 ACT

Who can be prejudiced?

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

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

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

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

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

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

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

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

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

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

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

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

Present law

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

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

Substantial risk of serious prejudice

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

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

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

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

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

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

³⁶ [1997] Entertainment and Media Law Reports 284.

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

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

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

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

- 2.33 Liability cannot be founded on the collective impact of publicity, that is to say, where different publishers cumulatively create a substantial risk of serious prejudice or impediment, but where no individual publisher, taken alone, does so.⁴³ This is because each individual publisher must be found to have created the substantial risk of serious prejudice. That approach conforms to orthodox criminal law doctrines on liability and ensures article 10 compliance.⁴⁴
- 2.34 Prejudice or impediment can be caused to either the prosecution or the defence. It has been suggested that “‘prejudice’ ... equates to ‘improperly affecting’ the course of proceedings”.⁴⁵

Principle (4) That risk must be substantial.

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

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

⁴⁰ See Ch 3 at paras 3.42 and 3.71.

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

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

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

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

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

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

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

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

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

- 2.37 The criminal burden and standard of proof applies.

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

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

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

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

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

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

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

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

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

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

Substantial risk of serious impediment

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

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

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

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

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

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

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

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

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

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

Problems and potential solutions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 5 OF THE 1981 ACT

Present law

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

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

- 2.51 The court is required to consider first whether the publication creates a substantial risk of serious prejudice or impediment and if it does, whether section 5 applies. The burden is on the prosecution to show that the section does not apply once the respondent has met the evidential burden.⁷⁰
- 2.52 Section 5 has been interpreted liberally: even accusations can be considered part of a “discussion” and the section covers discussion of “controversial matters of general public interest”, in spite of the existence of contemporaneous legal proceedings.⁷¹ The test is “whether the risk created was merely an incidental consequence to the expounding of the main theme” of the publication.⁷²

Problems and potential solutions

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

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

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

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

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

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

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

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

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

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

INTENTIONAL CONTEMPT BY PUBLICATION

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

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

⁷⁵ Section 6(c).

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

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

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

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

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

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

EVIDENCE AND PROCEDURE

Present law

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

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

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

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

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

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

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

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

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

⁸⁹ Civil Procedure Rules, r 81.12(3).

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

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

Problems and potential solutions

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

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

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

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

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

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

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

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

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

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

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

For a very long time now, decisions in all contempt cases have been made by judges who are best equipped to tell whether a contempt has been committed and may very well be able to do so on affidavit evidence alone. It is not, we think, in the best interests of anyone, that a by now almost ancient way of proceeding [on indictment] should be resurrected ...⁹⁹

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

⁹⁸ [1990] 2 AC 154,162.

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

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

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

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

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

¹⁰² See Ch 3 at paras 3.32 to 3.39.

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

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

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

¹⁰⁶ See paras 2.82 to 2.92 and following below.

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

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

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

¹⁰⁷ See Ch 4 at para 4.3.

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

¹⁰⁹ Criminal Justice Act 2003, s 44.

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

REPORTING RESTRICTIONS UNDER THE 1981 ACT

Present law: section 4(1)

- 2.78 The 1981 Act provides:

4.— Contemporary reports of proceedings.

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

- 2.79 Section 4(1) need only be invoked if the publication in question creates a substantial risk of serious prejudice. The burden is on the Attorney General to show that section 4(1) does not apply.¹¹¹
- 2.80 In respect of the requirement for good faith, it has been suggested that this should be interpreted taking into account “the underlying purpose for which the s 4(1) protection is intended, namely, the entitlement of the public to be informed about current legal proceedings”.¹¹² However, there are difficulties in respect of the requirement for “fair and accurate reporting” in that reports of only part of the proceedings may give a misleading picture of the proceedings as a whole. Nonetheless, minor inaccuracies should still be protected by section 4(1).¹¹³
- 2.81 Section 4(3) gives guidance as to what is “contemporaneous”. For the print media, publishing contemporaneously will usually occur if the report appears in the next edition of the newspaper in question.¹¹⁴ Where a section 4(2) order has been made, a subsequent report will be deemed contemporaneous if published “as soon as practicable”¹¹⁵ after the section 4(2) order is lifted or expires.

Present law: section 4(2)

- 2.82 The 1981 Act further provides under section 4:

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

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

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

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

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

¹¹⁵ Section 4(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Present law: section 11

- 2.92 Section 11 states:

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

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

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

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

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

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

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

¹³⁶ See para 2.100 below.

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

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

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

Procedure

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

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

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

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

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

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

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

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

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

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

2.97 The relevant Practice Direction provides that:

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

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

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

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

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

¹⁴⁸ [1982] 1 WLR 1475.

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

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

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

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

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

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

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

Problems and potential solutions

- 2.100 Many media organisations told us they struggle to obtain information about whether an order is in existence, and if so, what its terms are, because there is no formal system for notifying the media of their existence.¹⁵⁶ This may give rise to a lack of compliance with article 7 and article 10 of the ECHR if the media are unable to regulate their conduct because they cannot find out what their legal obligations are.¹⁵⁷
- 2.101 Some stakeholders raised concerns about whether these orders are used unnecessarily, and/or drawn in terms that are too wide. This could fall foul of the requirements of the ECHR, which necessitates balancing articles 6 (and potentially other articles) and article 10 when making orders under section 4(2) and section 11. It was suggested that the responsibility for drafting an order could fall on the party requesting it, rather than on the court.
- 2.102 We understand that the Judicial College is in the process of developing a standard form for judges making section 4(2) orders, in order to ensure that such orders are in written form and consistent as to their terms. Whilst this will address some of the concerns of media organisations with regard to such orders, and help provide them with clarity and certainty, we consider that further steps could be taken. In particular, an online list of section 4(2) orders made in criminal cases is currently in operation in Scotland.¹⁵⁸ Under that system, an electronic standard form is completed by the court providing the terms of the order. A copy is then emailed to an office at the High Court of Justiciary where the case is entered onto an online list. The list provides limited details about the case (for example, an entry would read: *HMA v John Smith, Sherriff Court, Glasgow, 3 August 2012*). Those who want more information about the terms of the order can telephone the office. Alternatively, members of the media sign up to an email list to be notified each time a new order is entered onto the list, and to be sent a copy of the order. When the case is completed or the order discharged, the court will email the office to have the entry removed from the list on the website. Our understanding

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

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

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

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

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

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

SANCTIONS

Present law

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

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

¹⁶⁰ *Palmer* [1992] 1 WLR 568.

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

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

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

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

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

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

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

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

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

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

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

Problems and potential solutions

- 2.110 Stakeholders held differing views as to the appropriate punishment for contempt by publication. Some stakeholders argued that the level of fines imposed is generally low, particularly by comparison with damages awards and costs in defamation and privacy actions. Low penalties, such stakeholders argued, meant that there was a lack of deterrent effect, particularly considering the potential profits made from a publication. Furthermore, given that proceedings for contempt are now rarely brought against editors and journalists personally, this might justify higher penalties.
- 2.111 By contrast, other stakeholders suggested that there is no direct financial benefit from publishing material that is subsequently held in contempt, in that particular stories do not produce a related rise in sales figures. The advantage of running a particular story is to the publisher's reputation and, therefore, the risk of not reporting for fear of contempt proceedings represented a hazard to the standing of the publisher, particularly if rival organisations proceeded to publish without repercussions. Some stakeholders also cited the increasingly difficult economic climate within which the traditional print media operate and, therefore, the increased impact a substantial fine would have.
- 2.112 Additionally, it must be borne in mind that since the advent of the modern media, every citizen is a potential publisher.¹⁷⁰ In consequence, in the future it may become more common for proceedings to be brought against individuals who are not journalists attached to media organisations. It is obviously important that the courts have the appropriate powers to deal with all types of contemnor.

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

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

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

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

¹⁷⁰ See Ch 3 at para 3.2.

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

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

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

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

¹⁷⁴ See para 2.77 above.

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