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Reforming the law

Contempt of Court

Chapter 3: Publications, Publishers and the New Media

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CHAPTER 3
PUBLICATIONS, PUBLISHERS AND THE NEW MEDIA

INTRODUCTION

3.1 This chapter assesses the extent to which the Contempt of Court Act 1981 can operate effectively in the world of digital media and communication technologies. Many people regard the creation of the internet and the World Wide Web (the "web") as having produced as significant a change to human communication as did the invention of the printing press. The volume of material that can now be stored, the ease with which it can be communicated and redistributed, the size of the audience that can be reached, and the global accessibility of information brings many new challenges, including for the law of contempt. While prejudicial information may historically have faded with the newspaper print, as well as from our collective memory, as data it is now processed, archived and is retrievable for very much longer periods of time.

3.2 The manner in which people access and disclose information has changed radically over recent years. In 2012, the Office of National Statistics reported that some 84% of adults in the UK have used the internet at some time.[1] According to Ofcom, 80% of UK households have internet access, while 39% access the internet through a mobile phone.[2] The most popular websites in the UK are Google Search, Facebook and YouTube, enabling millions to find, share and consume information.[3] UK users of Facebook alone are estimated at over 30 million,[4] while Twitter has 10 million active users.[5] These statistics are illustrative of the phenomenal shift that has taken place from the conditions present when the 1981 Act was passed.

3.3 Thus far, the modern media is an issue with which the law of contempt has had little cause to grapple. There appears to have been only one contempt by publication case involving the new media, where an incriminating photograph on a newspaper's website was held to amount to a contempt.[6] In other contexts, the general criminal law is also considering the impact of the modern media,[7] but the law here too is in its infancy. In consequence, there are significant ambiguities about how the law of contempt relates to the modern media, aspects of which we consider in this chapter. In light of the impact of the internet on daily life that we have explained above, we anticipate that this is a topic which is likely to be of

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

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

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

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

5 Announced on @TwitterUK, 15 May 2012.

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

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

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

3.4 In this chapter we address several specific questions:

(a) what is a publication?

(b) when is a publication addressed to the public at large or any section of the public?

(c) who is responsible for the publication?

(d) when does a publication occur?

(e) where does the publication take place?

PUBLICATION

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

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

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

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

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

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

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

[12] See paras 3.30 and following below.

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

Speech

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

Writing

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

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

3.11 In the context of the offence of incitement to racial hatred, "written material" includes "any sign or other visible representation".[16] This has been examined by the courts recently. In *Sheppard*,[17] the offending material was hosted on a web server in California, but was accessible in England and Wales. The Court of Appeal rejected an argument that the written material had to be "in visible, comprehensible form with some degree of permanence".[18] Lord Justice Scott Baker approved the view of the trial judge that what was on the computer screen was first of all "in writing" or was written and secondly that the electronically stored data which is transmitted also comes within the definition of written material because it is written material stored in another form.

3.12 Although the 1981 Act has no provision defining "writing" in terms of any sign or other visible representation, it appears likely that the wide approach in *Sheppard* would be adopted in the contempt context should the issue arise.

Programme included in a programme service

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

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

[14] Section 115(1).

[15] Schedule 1.

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

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

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

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

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

> any other service which consists in the sending, by means of an electronic communications network (within the meaning of the Communications Act 2003), of sounds or visual images or both either—
>
> (i) for reception at two or more places in the United Kingdom (whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service); or
>
> (ii) for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons.[21]

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

3.16 As Collins notes,

> there can be no doubt that internet communications are conveyed by the use of electrical, magnetic, or electro-magnetic energy, and are thus transmitted by electronic communications networks within the meaning of this definition and for the purposes of … the Broadcasting Act 1990.[23]

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

[19] Section 202(1).

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

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

[22] Communications Act 2003, s 32.

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

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

Communication in whatever form

3.18 The ordinary meaning of "communication" is very wide indeed, all the more so when one adds the words "in whatever form". In contempt at common law, a wax model could be a publication, suggesting a similar breadth.[25] The new media exist to facilitate the intentions and desires of people to communicate in various forms, to update, educate, cement a friendship, argue, insult, edify, share experiences, insights and opinions and so on. While the media are new, the purposes of communication are familiar.

3.19 The term "communication" features heavily in the different statutory context of the Regulation of Investigatory Powers Act 2000. There, "communication" can include "anything comprising speech, music, sounds, visual images or data of any description" and "signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus".[26] The breadth of the term is marked especially by the words "the impartation of anything between persons". Beyond that, it also applies to communications between things. An automated "news feed" appears to be an example.[27] Plainly this definition from the 2000 Act is not directly applicable to contempt, but it shows a context in which the statutory understanding of communication is as wide as the ordinary meaning of the term.

3.20 The term "communication in whatever form" is so wide that it seems on its own to cover comprehensively or near comprehensively the new media. A random (though of course non-exhaustive) list of the new media seems always to reveal a communication in *some* form. A Facebook posting, a tweet, a Flickr photograph (with or without comments), a video on YouTube, Delicious[28] or Digg[29] or words on a website are all likely to be publications by virtue of being "communications in whatever form" and usually writing and sometimes speech as well. In what is thought to be the first (and thus far only) internet contempt by publication case in England, it was not disputed that a photograph online was a publication.[30]

3.21 Parliament plainly intended the definition of publication to be as wide as the analysis above suggests.

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

[26] Section 81.

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

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

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

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

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

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

3.23 A publication must be addressed to the public at large or any section of it. This clearly covers national and local newspapers and broadcasters.

3.24 There appears to be no definitive rule or standard that can determine whether a publication is addressed to the public or a section of it. Rather, the matter falls to be decided on a case-by-case basis. Likely relevant factors when making such assessment include the size of the group, the nature and function of the group, the means of control over access to the group or the specific publication and the context in which the publication was made.[31] The essential contrast is with private communications.[32]

3.25 The number of recipients is significant. It would be unlikely that a section of the public could be made up of just one person, since the phrase "addressed to … any section of the public" implies an intention to communicate to more than a single individual. Arlidge, Eady and Smith argues that "such a limited publication would not fall within the wording of the section".[33]

3.26 This issue has arisen in the related context of the Public Order Act 1986. In *Sheppard*,[34] the question arose whether there was publication to the public or a section of the public when material was made generally accessible via the web. The court held that the judge had been correct in holding that it was sufficient that

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

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

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

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

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

3.27 This is consistent with the position that could arise in relation to contempt. We agree with Arlidge, Eady and Smith that a publication addressed to one person cannot be deemed to be addressed to a section of the public.[36] For example, an email sent from one person to one other person is not addressed to a section of the public. The material in *Sheppard* was available to the public at large – anyone in the world *could have* accessed it had they visited the website – it just so happened that only one person *did* access it (or at least, there was only proof of one such access – by a police officer).

3.28 Considerations of whether the use of an internet service constitutes publication to the public or a section of it will vary significantly both between the various services and depending on how a service is used. Email, for example, would generally seem analogous to private correspondence.[37] Social networking sites, such as Facebook and Twitter,[38] usually have privacy settings that enable a user to restrict access to their publications, but users may fail to utilise them.

3.29 We consider that the law in this area should be left to develop on a case-by-case basis since there are no hard and fast rules about what can amount to "a section of the public" and, in practice, this issue appears thus far to have generated limited litigation. **Do consultees consider that the lack of a statutory definition of "a section of the public" is creating problems in practice? If so, can they provide examples?**

WHO IS RESPONSIBLE FOR A PUBLICATION?

3.30 The 1981 Act focuses attention on whether there is a publication, rather than who is a publisher. The term "publisher" is not defined in the 1981 Act. The closest the Act comes to a definition of "publisher" is the statement that "publish" is to be construed in accordance with the meaning given to "publication" in section 2(1) of the Act.[39]

3.31 There are many ways in which a person can be involved with a publication: it can be authored, edited, drafted, solicited, censored, approved, modified, transmitted, and retransmitted and so on. It will normally be transmitted and communicated by complex means which themselves need to be created, managed and maintained. This raises interesting questions about whether any intermediary or anyone with any involvement, however technical, is considered the publisher of a communication for the purposes of contempt of court.

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

[36] Paras 4-38 to 4-39.

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

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

[39] Section 19.

3.32 These questions have taken on an enhanced significance in the light of recent technological developments. The internet enables information to be communicated across the globe. This can be by e-mail from one sender to one or more recipients. The sender makes a connection to their own internet access provider (IAP), and sends their message through their email client/Mail User Agent (MUA). The MUA will transfer the email to a Mail Delivery Agent, which is forwarded to a Mail Transfer Agent, and then routed to the receiving MTA. The MTA on the destination server then passes the email to the MDA for delivery to the user's mailbox. The recipient will connect to his MUA utilising his access provider, and read the mail.[40] Information might also be communicated by one person to others by posting material on web pages on the web. An individual's online "blog" is an example of such a web page. Some service providers, such as Facebook and Twitter, facilitate this interaction between individuals and numerous others. Individuals who create their own websites may engage numerous service providers: they will send content through their IAP; they will register a domain name through a domain name registrar; and they may use a hosting provider to host the information on servers based abroad.

3.33 The manner of communication via modern media, including email and social networking sites, is different from the traditional print media that would have involved a journalist writing copy for a newspaper that is printed in hard copy by the corporate body and distributed by that body and other wholesalers and retailers to the readers of the alleged contempt. One of the most important differences is that there is much greater likelihood of the 1981 Act applying in relation to communications by individual citizens. Not only are professional journalists potential publishers for the purposes of the 1981 Act, but so is any citizen who writes a blog or posts emails or tweets to a section of the public.[41] A further difference of significance is that a web-based publication is likely to be more readily available to a section of the public for a far longer period than a printed copy would be.

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

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

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

(1) The author or user who generated the words;[42]

(2) The provider of internet access services,[43] which enable users to transmit or push content to others, either on a bilateral or multilateral basis ("Internet Access Providers");

(3) The providers of hosting or platform services, which store content on behalf of users and enable them to make content accessible to others, such as social networking sites like Facebook and Tumblr ("Internet Platform Providers");

(4) Domain name registrars and registries;

(5) Providers that enable users to locate the content made available by others, for example, search engines such as Google.

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

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

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

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

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

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

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

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

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

3.38 However, the more difficult question relating to which intermediaries are publishers is not solved by stating that a publisher is a communicator, writer or speaker. This difficulty is compounded by the position in relation to the necessary mental element for publication.

3.39 The law of contempt requires intention to publish, but this could have one of two meanings. It could be limited to, for example, mere intention to send or upload the material, regardless of what that material is. Or, the meaning could be broader than this, requiring intention to publish that *particular material*, with knowledge of the content of the publication.

3.40 The case of *Mcleod*[49] is the primary authority for considering the necessary intention but is not particularly helpful in this regard. First, it dealt with the common law contempt of scandalising the court, rather than contempt by publication that we consider here and in Chapter 2. Secondly, in that case, whether knowledge of the contents of the publication was necessary appeared to depend on whether there was a duty on a person to make himself or herself aware of the contents. This seemed to relate to whether he or she was professionally involved in the production of material (for example as a printer) or whether they were a layman who, as in that case, merely handed over a copy of a document which, it turned out, contained material which was said to scandalise the court. Whilst it may be unsatisfactory to define the mental element for contempt by reference to the professional status of the publisher, in practice, it is not clear whether this would absolve the intermediaries of liability on the basis of their lack of knowledge of the contents of the publication, and in other contexts, intending to offer services allowing publication is clearly enough.

3.41 If such intermediaries were deemed to have the necessary intention to publish, despite not knowing the content of the publication, they may, nonetheless, be able to avail themselves of certain defences.

3.42 The first defence that might apply would be that in section 3(1) of the 1981 Act. Under that section no one will ultimately be liable as the publisher of any matter to which the strict liability rule applies "if at the time of the publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active".[50] There is normally no reason to suppose that

[47] We deal with the special complexity of "programme in a programme service" at paras 3.13 to 3.17 above.

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

[49] *McLeod v St Aubyn* [1899] AC 549.

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

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

3.43 Further specific defences would be available under the Electronic Commerce (EC Directive) Regulation 2002[51] (regulations 17 to 19) which implements articles 12 to 14 of the Directive on Electronic Commerce.[52] These provide an additional defence against all liability to certain activities conducted by certain intermediaries. There is, however, an acknowledged degree of "regulatory uncertainty"[53] about which intermediaries the defences relate to (particularly with "new services" such as hyperlinking sites). The European Commission is in the process of evaluating submissions from a public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries.[54]

3.44 The first EC defence applies to those acting as "mere conduits". In simple terms, mere conduits are the intermediate carriers of information sent between computers through electronic communications networks.[55] Regulation 17 provides that a service provider shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of a transmission, provided that the service provider:

(a) did not initiate the transmission;

(b) did not select the receiver of the transmission; and

(c) did not select or modify the information contained in the transmission.

3.45 Some of the activity of intermediaries would qualify for the separate EC defence applying to "caching". Caching is a process that different providers adopt in order to allow the internet to work more efficiently. Under Regulation 18, the act of "caching" is a defence to liability where the relevant information is "the subject of automatic, intermediate and temporary storage". Caching is different from providing a "mere conduit" service, because the act of caching means the content is stored for a period that is "longer than is reasonably necessary for the transmission".[56] However, the storage must be "for the sole purpose of making

[51] SI 2002 No 2013.

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

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

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

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

[56] Regulation 17(2)(b).

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

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

3.46 A third EC defence, under Regulation 19, would be available if the functions of the intermediary amounted to "hosting". This constitutes storing information provided by the recipient of the service, other than under the conditions specified in respect of "mere conduit" or "caching". As Collins explains "intermediaries who 'cache' content are at least one step removed from intermediaries who host content"[59] because they are not the primary storage site for that information. Regulation 19 provides the defence, but only where the provider does not have "actual knowledge" of the unlawful activity or information, or is not aware of the circumstances from which such unlawfulness should have been apparent.

3.47 Although not a "publisher", it might be argued that the intermediary should be regarded as a "distributor". Section 3(1) provides a publisher with a defence only on the basis of a lack of knowledge or suspicion as to the status of proceedings being active; it does not create any defence[60] for a publisher on the basis of a lack of knowledge or suspicion about the contents of the publication if proceedings are active. The position is different for distributors. Under section 3(2) a "distributor" is not guilty under the strict liability rule "if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so". Again, that would provide a defence to liability under section 2 of the 1981 Act for the intermediary which constituted a distributor.

3.48 A distributor may also qualify for the additional defences within the EC Regulations depending on the activity in question as described above.

3.49 In summary, internet intermediaries might avoid liability for contempt as publishers because of one or more of the following factors. First, they may lack the necessary knowledge or awareness in relation to either the content itself and/ or the activeness of the proceedings. Second, the intermediary may fall within one or more of the EC Directive defences. There is some overlap between the lack of knowledge defence in section 3(2) and the Directive defences.

[57] Regulation 18(a).

[58] Regulation 18(b)(v).

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

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

THE TIME OF THE PUBLICATION

Present law

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

(1) Publication is a continuing event that begins with the first appearance of the material. Liability under section 2 might, therefore, arise if proceedings become active during the period of continuing publication, although they were not active when publication commenced. Under this interpretation, publication might be held to take place either (a) whenever someone accesses the material available or (b) whenever the material is available; or

(2) No liability can arise if there are no proceedings active at the time of publication, irrespective of whether proceedings become active at some later time and irrespective of whether the publisher is aware of that change of circumstance.

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

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

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

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

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

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

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

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

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

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

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

[63] 2002 SLT 139.

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

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

[66] [2010] VSCA 51.

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

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

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

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

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

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

69 *Harwood* at [37].

70 [2001] QB 201, 208 to 209.

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

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

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

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

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

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

3.64 If consultees consider that section 2(3) is limited to publications which first appear at the date when proceedings are active (that is that *Beggs* may be wrongly decided) that prompts a further question. Ought liability for contempt of court arise where a publication occurs (without intention to prejudice proceedings[75]) before proceedings are active and, subsequently, when proceedings become active the content of that publication, is still available, poses a substantial risk of serious prejudice to the proceedings? It is worth emphasising here that it is the substantial risk of serious prejudice against which the law seeks to guard, including in order to protect the right to a fair trial under article 6 of the ECHR.[76] That, in turn, prompts the question of what, if any, degree of awareness there must be of the fact that proceedings have become active in order for someone to be liable. There is a further question of what responsibility ought to be imposed once the substantial risk of serious prejudice is apparent.

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

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

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

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

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

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

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

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

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

(2) Subsequently, proceedings become active.

(3) The publication is still available to the public at large or a section of the public and creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

(4) To avoid the substantial risk of serious prejudice or impediment to particular proceedings, a court has ordered the publisher to take such steps as are reasonably possible to ensure that the publication should not be available to the public at large or a section of the public.

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

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

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

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

[77] See Ch 4 at para 4.77 and following.

[78] See para 3.55 and following above.

3.71 The scope of potential liability would be much narrower under the new form of contempt than under the present section 2, as interpreted in *Beggs*. Under the current section 2, read with the defences in section 3 of the 1981 Act, liability can arise for any publication unless the publisher had no reason to suspect that proceedings were active. Section 3(1) provides a publisher with a defence only on the basis of a lack of knowledge or suspicion as to the status of proceedings being active; it does not create any defence for a publisher on the basis of a lack of knowledge or suspicion about the contents of the publication if proceedings are active.[79] If P had actual knowledge that proceedings were active, or believed they were, or had reason to suspect they were, P could be liable. Under section 2 there is an obligation on P to show that reasonable steps have been taken to ascertain whether proceedings were active at the time of publication.

3.72 In contrast, under the potential new contempt, there is no possibility of liability based on a publisher's actual or imputed knowledge about the proceedings becoming active after first publication. There is no reverse burden on a publisher. Liability will only arise for a failure of a person to comply with a court order to make such material as is specified in the order unavailable to the public for the specified period. We would expect that period to be the duration of the trial in most cases but it may be longer if there are multiple, related proceedings.

3.73 We consider that such a provision would not place onerous and impractical burdens on publishers. They would have no obligation constantly to monitor their archives for material (which in the case of some media organisations will be vast) to ensure that proceedings have not become active in relation to a person or crime discussed in an earlier publication. Furthermore, if a party had a lawful excuse for not removing the publication that would provide a defence for not complying with the order. There is no question of imposing liability on those who are unable, through no fault of their own, to comply with the terms of the order. We suggest, however, that a publisher ought not to be able to rely on the excuse that a determined individual with sufficient technological ability might be able to acquire access by indirect means.[80] An individual who was determined to republish would commit a contempt under section 2 or at common law. A juror tracking down such material would commit a contempt as discussed in Chapter 4.

3.74 This proposal has many other advantages: it avoids any doubt or argument about whether a person was aware or ought to have been aware that proceedings had become active and it avoids arguments about the steps that might reasonably be expected of a person to monitor or identify such material. It also ensures that the burden is proportionate. The offending material will be specified (for example, by its URL address) in the court order so there is a limited burden in identifying it.

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

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

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

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

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

Do consultees agree?

3.76 We think that the proposal is relatively uncontroversial. However, we can foresee that in some cases it may be necessary for the order to be made against persons other than the publisher. For example, it may be that the author of a blog cannot be identified or is resident abroad and not subject to the jurisdiction of the English and Welsh courts. In such a case, we think that the courts ought also to have the power to make an order in relation to anyone who has sufficient control over the accessibility of the specific publication, at the time of the order. There are numerous other instances in which the courts have been given statutory powers to order intermediaries who have not been directly responsible for the creation of offending publications, to prevent infringements.[82]

3.77 We consider that "control" in this context can be left to be interpreted by the courts on a case-by-case basis. The question will be whether, in respect of material that is available to the public or a section of the public, the person has the capability to prevent that material from being available.[83] There may be numerous people who have sufficient control, but not all will necessarily be subject to the jurisdiction of the English courts. For example, intermediaries behind a blog (for example, the domain name registrar and hosting provider) could be based abroad.

3.78 It is also important to emphasise that those with control will not necessarily be "publishers" within section 2 above. For example, an internet access provider or domain name registrar might well have some "control" over the accessibility of

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

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

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

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

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

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

Do consultees agree?

On what basis is the power to be ordered?

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

> (1) that the court is sure that the alleged acts are going to be carried out, if not restrained;
>
> (2) that the court is sure that if the alleged acts are carried out, then they would amount to a contempt of court. For the present case the

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

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

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

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

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

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

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

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

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

What penalty will follow?

3.84 The Crown Court has inherent power to punish a person who disobeys an order made by the court.[89] The maximum penalty is an unlimited fine and/or two years' imprisonment.[90] **Do consultees consider that the current maximum penalty is appropriate? Do consultees consider that the court should have the power to impose community penalties?**

3.85 If consultees agree with our proposal about creating a new contempt by publication which is triggered by the failure to comply with a court order, it is necessary to consider what the procedure for dealing with such contempt would be. Contempts in breach of section 2(2) or section 4(2) of the 1981 Act are usually dealt with by the Divisional Court under Part 81 of the Civil Procedure Rules (or, exceptionally, the court on its own motion).[91] We ask consultees in Chapter 2 whether they think intentional contempt at common law and contempt in relation to section 2(2) should be tried as if on indictment by a jury. In the

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

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

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

[90] See notes to Criminal Procedure Rules, r 62.9.

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

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

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

PLACE OF PUBLICATION

3.87 The criminal law of England and Wales is territorial,[93] although there are specific statutory exceptions to this. The problem of cross-frontier offences is one of antiquity, far pre-dating the advent of the internet.

3.88 Traditionally, the courts have adopted a "terminatory" approach to criminal jurisdiction.[94] Under this approach an offence with transnational elements is committed in England and Wales if the last constitutive act took place here, (that is, the crime was completed within this jurisdiction).[95] However, more recently, a "substantial measure" test has been adopted, which is complementary to the "terminatory" approach.[96] Under this approach, an offence will occur in England and Wales if a substantial measure of the crime is committed within the jurisdiction and there is no reason of comity why it should not be tried here.

3.89 The complexity in applying these principles of jurisdiction to crimes committed via the internet cannot be understated. At its simplest, criminal content could be created in one country, saved on servers in another country, with accessibility in numerous other countries.

3.90 There do not appear to be any reported cases of section 2 with a cross-frontier element. It is certainly possible to conceive of circumstances in which they might arise. For example, a US tourist might be murdered in England and Wales in such newsworthy circumstances as to be prominently featured on US news websites. These could be accessed in England and Wales and might give rise to a substantial risk of serious prejudice or impediment at trial. It is unclear whether liability for contempt might arise in such circumstances on the basis of the accessibility of the publication in England and Wales.

[92] See Ch 2 at para 2.76.

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

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

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

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

3.91 Neither the 1981 Act nor any of the decisions interpreting it explain in what circumstances a publication will have occurred within the jurisdiction. The term "publication", however, is used in the statutory definitions of other crimes which have posed similar cross-frontier problems. For example, in some of the crimes in Part III of the Public Order Act 1986, and the crime of obscene publication under section 2(1) of the Obscene Publications Act 1959. Unfortunately, the courts have not taken a consistent approach to the jurisdictional question in those offences. In some instances it has been held that publication was within England and Wales because the offending material was downloaded here. In some instances it has been held that publication was within England and Wales because the offending material was accessible here. In *Perrin*,[97] for example, "the publication relied on [was] the making available of preview material to any viewer who may choose to access it … ".[98] This was despite the fact that there was "no evidence as to where the data files were created and posted, and there was no evidence as to the location of the server".[99] On this interpretation, a publication would occur within England and Wales if it was accessible within this jurisdiction, irrespective of where the material was uploaded or hosted. That would give an extremely wide scope to the section 2 contempt.[100]

3.92 In more recent cases it has been held that it was sufficient that a substantial measure of the publishing activity occurred in England and Wales. In the context of "publication" under the Public Order Act 1986, the Court of Appeal in *Sheppard*[101] endorsed a "substantial measure" approach. In that case it was held that an offence under section 19 of the Public Order Act 1986 (publishing threatening, abusive or insulting material intended or likely to stir up racial hatred), was committed in England and Wales where the material had been prepared in this country, but uploaded to a server in California. Applying the "substantial measure" test, it was clear that almost everything in the case related to this country; it is where the appellants operated, where the material was generated, edited, uploaded and controlled, and the material was aimed primarily at the British public. The only foreign element was the hosting of the website on a server abroad.[102]

3.93 There is no developed jurisprudence from the English courts on what constitutes a "substantial measure". In *Sheppard*, the court declined to explore the theories as to when/where material is published on the web, because jurisdiction in the case was governed by the "substantial measures" principle.

3.94 On this interpretation, the publication could be caught by section 2 if the publication had been written here or uploaded here but it is unlikely that it would be sufficient that it was merely made accessible to individuals in England or Wales.

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

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

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

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

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

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

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

(1) should it be necessary that the publication was produced within England and Wales; or

(2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or

(3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad?