The Law Commission

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CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS

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In memory of Gianni Sonvico

who worked as a research assistant on this project during 2013

THE LAW COMMISSION

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THE LAW COMMISSION

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CONTENTS

	Paragraph	*Page*
CHAPTER 1: INTRODUCTION		**1**
The rationale for the law on contempt of court	1.1	1
Background to this project	1.5	2
The consultation	1.9	3
This report	1.13	4
Acknowledgments	1.24	6
CHAPTER 2: MODERN MEDIA		**7**
Introduction	2.1	7
Contempt by publication: a brief introduction	2.2	7
“Publication”	2.16	10
“Addressed to the public at large of any section of the public”	2.30	14
The time of publication	2.46	17
Our aims for reforming this area of the law	2.121	36
A revised model	2.130	39
The place of publication	2.206	59
CHAPTER 3: JURORS SEEKING EXTRANEOUS INFORMATION		**62**
Introduction	3.1	62
Current law and procedure	3.2	62

	Paragraph	Page
Problems with the current law and procedure	3.12	65
Prevalence	3.26	69
The proposals in the Consultation Paper	3.34	70
The response of consultees	3.42	73
Discussion	3.57	76
Recommendations	3.78	80
Extending a new offence to cover *Davey*-type cases	3.94	83
The form of any new offence	3.99	84
CHAPTER 4: JUROR DISCLOSURE AND SECTION 8 OF THE CONTEMPT OF COURT ACT 1981		**88**
Introduction	4.1	88
Current law and procedure	4.2	88
Problems with section 8	4.11	90
Justification for section 8	4.13	91
Reform in relation to miscarriages of justice	4.15	92
Reform for the purposes of academic research	4.31	97
Reform of the procedure	4.61	105
CHAPTER 5: OTHER MEASURES TO PREVENT JUROR MISCONDUCT		**109**
Introduction	5.1	109
Summary of proposals in the CP	5.4	109
Measures prior to jury service	5.12	111
Measures prior to empanelling the jury	5.17	112
Measures after empanelling the jury	5.36	116

	Paragraph	Page
CHAPTER 6: SUMMARY OF RECOMMENDATIONS		**125**
Modern media	6.1	125
Jurors seeking extraneous information	6.15	126
Juror disclosure and section 8 of the Contempt of Court Act 1981	6.19	127
Other measures to prevent juror misconduct	6.24	128
APPENDIX A: LIST OF LIST OF THOSE WHO COMMENTED ON CONSULTATION PAPER NO 209		**130**

THE LAW COMMISSION

CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS

To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

THE RATIONALE FOR THE LAW ON CONTEMPT OF COURT

1.1 The law governing contempt of court is vast and diverse. This project considers certain key aspects of the law focusing largely on contempts related to publications. Until the Contempt of Court Act 1981 ("the 1981 Act"), the law was developed almost exclusively through the common law.[1] As a result, the law regarding contempt is piecemeal. Taken together, all the different forms of contempt make up a specialist area of law developed by the courts to protect their own procedures. Consequently, the procedures for dealing with contempt are neither truly criminal nor truly civil.

1.2 The underlying rationale for the law on contempt was set out in the report of the Phillimore Committee:

> The law relating to contempt of court has developed over the centuries as a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.[2]

1.3 The law of contempt is designed to ensure that all citizens have unhindered access to effective, unbiased courts whose authority is respected, and that public confidence in the legal system is maintained. Litigants – and the public – must have confidence that the court's decision will be based only on the evidence which was seen and tested by all parties. The law of contempt of court also aims to ensure that no-one can undermine the functions of the court, either by depriving the court of the ability fairly to decide the case or by hindering the enforcement of the court's judgment.[3] Public confidence in the due administration of justice should be maintained as a result.

1 *Halsbury's Laws of England,* vol 22 (5th ed 2012) para 3.

2 Report of the Committee on Contempt of Court (1974) Cmnd 5794, para 1. See also *Borrie and Lowe: The Law of Contempt* (4th ed 2010), para 1.1.

3 *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 2-8 to 2-9; *A-G v Times Newspapers Ltd* [1974] AC 273, 307 to 309.

1.4 The aim of this project was therefore to respond to pressing, practical problems with certain areas of the law of contempt, with a view to recommending reforms that could maintain public confidence in the due administration of justice, whilst also making the law clear, fair, modern and practicable.

BACKGROUND TO THIS PROJECT

1.5 This project on contempt of court was referred to us by the Criminal Procedure Rule Committee during our consultation for our Eleventh Programme of Law Reform, and was subsequently included in that Programme in 2011.[4] After the publication of the Eleventh Programme, the Attorney General emphasised the urgent need to review the law in this area, and at the end of January 2012 asked the Commission to prioritise work on this project.

1.6 One aspect of the project examined the little-known archaic contempt of scandalising the court. It became clear during the project that the maintenance of this form of contempt was to be the subject of Parliamentary debate, following a proposal to abolish it. We therefore brought forward our consultation on this form of contempt, in order to meet the demands of the Parliamentary timetable and contribute to public debate on it in a timely way. The prospect of abolishing the offence was raised in Parliament in July 2012 and we published our consultation paper on that question in August.[5] We published the responses to the consultation paper in November and our final report recommending abolition in December 2012.[6] Our recommendation was implemented section 33 of the Crime and Courts Act 2013, which came into force in June 2013.[7]

1.7 In our Contempt of Court Consultation Paper ("CP") we dealt with the other aspects of the law of contempt within the scope of this project. Chapter 2 of the CP considered the law on contempt by publication both under the Contempt of Court Act 1981 and at common law. Chapter 3 examined the impact of new technology on the law regulating contempt by publication under the Contempt of Court Act 1981, especially given the rise of social media and so-called citizen journalism. Chapter 4 was concerned with the problems the law faces in dealing with jurors who seek information related to the proceedings beyond the evidence presented in court and jurors who disclose information related to their deliberations. Finally, Chapter 5 considered contempts in the face of the court committed in the Crown Court or in the magistrates' courts when exercising criminal jurisdiction.

[4] Eleventh Programme of Law Reform (2011) Law Com No 330.

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

[6] Contempt of Court: Scandalising the Court (2012) Law Commission Report No 335.

[7] Crime and Courts Act 2013, s 61(6).

1.8 To supplement the CP, we published online appendices analysing: the background to the Contempt of Court Act 1981, the importance of the right to freedom of expression and to a fair trial under the European Convention on Human Rights, comparative law and law reform, results of surveys we had conducted into the prevalence of certain forms of contempt, and the various types of contempt that exist (presented as a catalogue of specific contempts). We also published the impact assessment setting out the economic costs and benefits of our proposals.[8]

THE CONSULTATION

1.9 The consultation closed on 28 February 2013, having received seventy written responses from a variety of consultees including criminal prosecution and defence lawyers, media lawyers, the judiciary, other arms' length bodies, trade unions, non-governmental organisations, academics, the police and interested members of the public. The list of consultees who responded to the consultation is set out in Appendix A. We have also published the full responses on our website, along with our analysis of those responses.[9]

1.10 As part of the consultation exercise, we held a symposium at the Judicial Institute of University College London in January 2013 with expert speakers from academia, the judiciary, police, media, parliament and legal practice. Each of the chapters of the consultation paper was debated by the speakers and an audience of over 100 journalists, solicitors, barristers, academics, judges, government officials, and representatives of non-governmental organisations. We have treated the speeches of panel members at the symposium and our notes of the discussion that was held in relation to each chapter as part of the responses to the consultation.

1.11 We also held a seminar with members of the media and of the judiciary at the Royal Courts of Justice to discuss the modern media chapter of the CP. This event was held under Chatham House rule. We have also cited some of the views expressed at that event, on an anonymous basis.

1.12 We have also held numerous other discussions with bodies interested in the project. In particular, we have had discussions with: the Attorney General's Office; the Crown Prosecution Service; the Department of Culture Media and Sport; the Home Office; the Ministry of Justice; HM Courts and Tribunals Service; District Judges (Magistrates' Court), Crown Court Judges and Recorders; High Court Judges; the Senior Judiciary; the Judicial College; the Legal Aid Agency; the Metropolitan Police e-crime unit; the Serious Organised Crime Agency; the Internet Service Providers Association; the Information Commissioner's Office; Facebook; Google and Twitter.

[8] See http://lawcommission.justice.gov.uk/consultations/contempt.htm.

[9] The appendices, responses and summary of responses can be found at: http://lawcommission.justice.gov.uk/areas/contempt.htm. We have, in this report, summarised the overall picture of the responses we received, but they are analysed in detail in the documents on our website.

THIS REPORT

1.13 This report incorporates our conclusions from our analysis of the responses we received to the consultation paper and our recommendations in respect of two of the chapters from that paper: Chapter 3 which dealt with the modern media aspects of contempt by publication under section 2(2) of the Contempt of Court Act 1981, and Chapter 4 which dealt with contempt by jurors.

1.14 We have expedited our report on these areas of the project because they represent the two sides of the same most pressing issue, namely, how to maintain public confidence that jury trials are, and continue to be, conducted on the evidence in the case and not by consideration of extraneous material, particularly material available on the internet.

1.15 In the CP, the provisional proposals on these issues sought to tackle the problem from two different angles. The common aim is to protect the jury during the trial from seriously prejudicial material, particularly that available on the internet. The provisional proposals from Chapter 4 of the CP dealing with contempt by jurors sought to achieve this by making clearer to jurors what they are prohibited from doing whilst on jury service, and proposed enforcing that prohibition with a criminal sanction. The proposals from Chapter 3 of the CP sought to protect jurors by restricting, in extreme cases, the accessibility of certain forms of seriously prejudicial material available via the internet, thereby reducing the risk that jurors will discover such material.

1.16 This report is structured as follows. Chapter 2 of this report deals with the position in relation to contempt and the modern media, summarising the current law, examining the response to the consultation proposals and making recommendations for reform of the law. Chapters 3 and 4 of this report deal with the law in relation to juror contempts. We explain the current law concerning jurors who undertake research into the case that they are trying and the disclosure of jury deliberations in breach of section 8 of the 1981 Act. We then provide our analysis of the responses to the consultation proposals and our recommendations for reform. Chapter 5 of this report explains the current practice of using preventative measures taken to try to assist jurors in understanding their responsibilities and the relevant prohibitions, and then explains our recommendations for reform of these measures. Chapter 6 is a summary of our recommendations.

1.17 It is anticipated that a separate report will be produced covering the topics of contempt by publication (chapter 2 of the CP) and contempt in the face of the court (chapter 5 of the CP). Our intention is to publish these reports in 2014.

A SUMMARY OF OUR RECOMMENDATIONS

Contempt by publication and the impact of the modern media

1.18 In respect of contempt by publication and the impact of the modern media, we recommend that the definition of a publication "addressed to the public at large or any section of the public" under section 2(1) of the 1981 Act should not be amended. Although the definition is vague, particularly in relation to publications over social media (for instance those which are available to only a limited number of "friends" or "followers"), we do not consider that a statutory or other definition would be practicable. We instead recommend that the law should be left to develop on a case-by-case basis, allowing for future changes to online means of communication.

1.19 The cases of *HM Advocate v Beggs (No 2)*[10] and *Harwood*[11] both hold that the "time of publication" of material held online refers to the entire period during which the material is accessible. We recommend that section 2(3) of the 1981 Act be amended to put this interpretation on a statutory footing. However, we also recommend creating a new statutory exemption to contempt under section 2 of the 1981 Act, covering communications addressed to the public (or any section of it) and first published before proceedings become active. This exemption would apply unless a publisher is put on notice by the Attorney General a) that relevant proceedings have become active and b) of the location of their relevant publication. If, following such notice, the publisher did not remove the material, the trial judge would, following a hearing, have the same power to order temporary removal as under the current law.[12]

1.20 Although on balance consultees favoured a statutory definition of "place of publication" to ensure a more consistent approach, the challenge presented by the cross-border nature of the internet is not limited to contempt. We conclude that the issue of criminal jurisdiction merits more thorough treatment than can be achieved in a project specifically focused on contempt. We therefore recommend that the Law Commission should examine the definition of "place of publication" for the purposes of contempt as part of a wider future project examining aspects of criminal jurisdiction in the age of social media.

Juror contempt

1.21 In respect of contempt committed by jurors, we confirm our provisional proposal and recommend the introduction of a new statutory offence of sworn jurors in a case deliberately searching for extraneous information related to the case. We recommend that this offence should be triable on indictment, with a jury, in the usual manner. The maximum penalty for the offence should be 2 years' imprisonment and/or an unlimited fine, with the usual sentencing powers available following trial on indictment (including community penalties and disposals).

[10] 2002 SLT 139.

[11] [2012] EW Misc 27 (CC) at [37], available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/Misc/2012/27.html&query=harwood&method=boolean.

[12] Senior Courts Act 1981, s 45(4).

1.22 We also recommend a range of other measures designed to discourage and prevent jurors from undertaking research and from disclosing their deliberations (save in certain specified circumstances). Our recommendations feed into ongoing research about the best methods of informing people about their obligations as jurors and are designed to strengthen existing preventative measures with a view to creating greater consistency and certainty for jurors. The recommendations include greater education in schools about the role and importance of jury service; improving the information provided to jurors about their obligations during jury service; changes to the wording of the juror oath to include an agreement to base the verdict only on the evidence heard in court; requiring jurors to sign a written declaration; informing jurors about asking questions during the trial; a statutory power for judges to remove internet-enabled devices from jurors where necessary and effective systems for jurors to report concerns.

1.23 Finally, in respect of the prohibition on disclosing jury deliberations, we recommend the introduction of a specific, statutory, defence to a breach of section 8 of the Contempt of Court Act 1981, where, after the conclusion of the trial, a juror, in genuine belief that they are exposing a miscarriage of justice, discloses the content of jury deliberations to a court official, the police or the Criminal Cases Review Commission. We also recommend the introduction of an exception to the section 8 prohibition on jury research. This would allow for authorised academic research into jury deliberations, with a range of rigorous safeguards in place in order to protect the integrity of the jury's decision and the anonymity of jurors and parties to the trials.

ACKNOWLEDGEMENTS

1.24 In producing this report, we have been fortunate in having assistance from many individuals and organisations. We are particularly grateful for the help we have received from Alex Bailin QC, Professor Eric Barendt, Godwin Busuttil, Jonathan Caplan QC, Professor Penny Darbyshire, Louis Mably, Christina Michalos, Micheál O'Floinn, Professor Chris Reed, Professor ATH Smith, His Honour Judge Thornton QC, Professor Cheryl Thomas, Mr Justice Tugendhat, Professor Ian Walden, staff at the Judicial College, Professor Michael Zander QC, Professor Alisdair Gillespie and Professor Vanessa Munro.

CHAPTER 2
MODERN MEDIA

INTRODUCTION

2.1 In this Chapter we examine the current law and our provisional proposals made in the CP regarding the application to modern media of the Contempt of Court Act 1981 (“the 1981 Act”) provisions governing contempt by publication. We begin with a brief introduction to the principles governing statutory contempt by publication,[1] before examining the meaning of “publication addressed to the public at large or any section of the public” in the 1981 Act. We then address the difficult problem of the time of the publication, which presents particular challenges given the way in which new technology has changed the media landscape. Finally, we consider in what circumstances a publication on the world wide web (hereafter “the web”) should be regarded as within the jurisdiction of the courts of England and Wales. This issue has been rendered more complex by the impact of the internet as a phenomenon that is not restricted by boundaries in terms of geography or legal jurisdiction.

CONTEMPT BY PUBLICATION: A BRIEF INTRODUCTION

2.2 We analysed the substantive law of contempt by publication in Chapter 2 of the CP, and the impact of the new media on that law in Chapter 3.[2] This report deals with the issues raised by Chapter 3, but these can only be understood in the context of the law of contempt by publication as a whole, and in particular, strict liability contempt under the 1981 Act. We therefore begin with a brief introduction explaining that aspect of the law.

2.3 The rationale for contempt by publication arises from the need to protect the right to a fair trial. This right is enshrined in article 6 of the European Convention on Human Rights (“ECHR”), which provides that:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[1] Contempt by publication can also be committed at common law, although this form of contempt requires intention. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.56. We do not examine this form of contempt in this report, focusing instead on the strict liability incarnation.

[2] See para 2.24 below for a definition of “new media”.

2.4 Article 6 requires that the tribunal trying a case be independent and impartial. It covers the "right to be tried according to the evidence properly placed before a court, and on that evidence alone"[3] and not on material which is reported in the media or elsewhere. Prejudicial media coverage before or during the trial creates a risk that any tribunal trying a case will, if aware of that coverage, be influenced by it. In addition, the independence and impartiality of the tribunal is required not just as a matter of fact, but also as a matter of appearance. If there is a risk that the tribunal will see prejudicial media coverage (regardless of whether they have in fact seen it), this could give rise to the perception that the tribunal has or will become biased.

2.5 Whilst the law of contempt by publication is intended to prevent any legal tribunal from becoming partial, the focus of the law has increasingly been on preventing bias amongst the jury.[4] The jury, as a lay tribunal, has been deemed more susceptible to prejudicial media coverage than professional judges.[5]

2.6 On the other hand, it is also necessary to protect the right to freedom of expression under article 10 of the ECHR, especially because reporting on legal proceedings serves an important public interest.

2.7 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 … .

2.8 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.

2.9 It is clear that media coverage of legal proceedings falls within the right to freedom of expression. It is therefore only permissible for the law of contempt to restrict such coverage where necessary for "maintaining the authority and

[3] Words taken from 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 October 2013). See also see Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.4 and following.

[4] Contempt also applies to non-jury proceedings, both criminal and civil. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.9 and following.

[5] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.25 and following.

impartiality of the judiciary", which includes the jury,[6] or for "the protection of the rights of others", in this case the defendant's right to a fair trial. Protecting the right to a fair trial, whilst also ensuring that the right to freedom of expression is not restricted any more than is necessary or proportionate, is at the heart of the law on contempt by publication.[7]

2.10 The law governing contempt by publication is found in the 1981 Act. This introduces the "strict liability rule". Section 1 of the 1981 Act provides that this "strict liability rule" is:

> 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.

2.11 Section 2 of the Act goes on to explain 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.

2.12 Therefore, contempt by publication is committed where a publication creates a "substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" regardless of whether the publisher or distributor of the publication[8] intended it to have that effect or was aware that it might do.

2.13 However, this strict liability contempt can be committed only where the "proceedings in question" are "active" at the time of publication, as defined by the 1981 Act.[9] In general, most criminal proceedings become active from the time an arrest warrant is issued or at the point of arrest and cease to be active when the defendant is acquitted or sentenced. There are separate provisions for civil[10] and appellate proceedings.[11]

2.14 Although liability is strict regarding the publisher's awareness of the likely prejudice of the publication, in respect of proceedings being "active" there is a defence in section 3 if the publisher "does not know and has no reason to suspect that relevant proceedings are active". There is also a defence for a distributor if "at the time of distribution (having taken all reasonable care)" the distributor "does not know that [the publication] … contains … such matter [to

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

7 For further detailed analysis of the impact of the ECHR on the law of contempt, see Appendix B to the Consultation Paper, available on our website at http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court_appendix-b.pdf.

8 See para 2.16 and following below for an extensive discussion of the act of publication and the status of various entities in relation to publication.

9 Section 2(3), s 2(4) and Schedule 1.

10 Schedule 1, paras 12 and 13; section 20; *Peacock v London Weekend Television* (1986) 150 Justice of the Peace 71.

11 Schedule 1, para 15. See also Schedule 1, para 16.

which the strict liability rule applies] and has no reason to suspect that it is likely to do so."[12]

2.15 The question of what amounts to "publication" for the purposes of the 1981 Act is therefore an important one. It is to this question that we now turn.

"PUBLICATION"

2.16 In the CP, we highlighted that the word "publication" has two meanings.[13] First, publication can 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) in turn states that the relevant "conduct" is that of "publication".

2.17 However, difficulties arise because the 1981 Act does not define "the act of publication" (the conduct).[14] This could create problems in determining 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 conduct) in order to attract liability.[15]

2.18 The courts have recognised that in some instances "internet intermediaries" might be responsible for material if they are made aware of its contents. In brief, "internet intermediaries" is a term used to describe those services which facilitate the use of the web.[16] Such intermediaries include[17] the following:

(1) providers of internet access services, enabling users to transmit and receive content over the internet ("internet access providers");

(2) providers of hosting services, which provide space on servers to individuals and organisations so as to make content available via the internet ("hosts");

(3) platform operators which enable users to post material on websites (these intermediaries may or may not host the material themselves);

(4) domain name registrars and registries which manage and administer domain names[18] and

[12] Contempt of Court Act 1981, s 3(2).

[13] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.5 and following.

[14] Compare section 1(3) of the Obscene Publications Act 1959.

[15] This is particularly problematic because the 1981 Act focuses on whether there is a publication, rather than who is a publisher: see Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.30 and following.

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

[17] This is by no means an exhaustive list.

[18] A domain name, in very simple terms, identifies and is used to access websites. For example, lawcommission.justice.gov.uk is the Law Commission's domain name.

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

2.19 The liability of a particular intermediary for a publication will turn on which of these functions it is performing, what knowledge of the content it has, and whether it has had an opportunity to remove the material. In relation to access providers, liability can only arise if there is knowing involvement in the publication of the relevant words.[19] In *Davison v Habeeb,*[20] it was accepted in the context of defamation that in some circumstances if a web host was provided with sufficiently precise and well substantiated detail of the offending material, and that was not challenged, the web host could be held responsible for the material it was hosting. In a recent defamation case decided since the publication of the CP, *Tamiz v Google,*[21] the Court of Appeal held that a provider of a blogging platform could be "a publisher of the material"[22] on its platform once on notice of its contents.[23] There is considerable uncertainty about the liability of search engines for publications. In *Metropolitan International Schools Ltd (t/a SkillsTrain and/or Train2Game) v Designtechnica Corpn (t/a Digital Trends)*,[24] again in defamation, it was recognised that when a search was carried out by a user via the Google search engine there was no human input from Google and as such the search engine owner could not be characterised as a publisher at common law.

2.20 Although the above authorities on liability of intermediaries were decided in the context of defamation, there is reason to believe the same principles would be applied in the law of contempt. In the Crown Court case of *R v Harwood*[25] Mr Justice (now Lord Justice) Fulford took guidance from both the *Tamiz* and *Designtechnica* decisions in deciding to issue an injunction against the Mail Online website in respect of material which otherwise created a substantial risk of serious prejudice or impediment to the criminal trial over which he was presiding.

2.21 The second sense in which "publication" is used is to refer to publication in the physical sense, that is, the form in which the publication 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". In *Secretary of*

[19] *Bunt v Tilley* [2006] EWHC 407 (QB). Eady J stated: "[P]ersons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers". See also para 23 of *Tamiz v Google* where Richards LJ's approves this non-binding remark.

[20] [2011] EWHC 3031 (QB), [2012] 3 CMLR 104. See also *Tamiz v Google* [2013] EWCA Civ 68, *Godfrey v Demon Internet Ltd* [2001] QB 201.

[21] *Tamiz v Google Inc* [2013] EWCA Civ 68; [2013] 1 WLR 2151.

[22] *Tamiz v Google Inc* [2013] EWCA Civ 68; [2013] 1 WLR 2151 at [34].

[23] If the function Google was performing in this instance amounted to publishing, a defence under regulation 19 of the 2002 Regulations may be available. See para 2.58 below.

[24] [2009] EWHC 1765 (QB), [2010] 3 All ER 548, [2011] 1 WLR 1743. The position remains uncertain in other jurisdictions. For example, see *Rana v Google Australia* [2013] FCA 60. In New Zealand there are some judicial comments suggesting that a search engine may be a publisher of the short extract of a page which the search engine shows in search results: *A v Google New Zealand* [2012] NZHC 2352 at [70] to [75].

[25] [2012] EW Misc 27 (CC) at [26]. This case is further discussed below at para 2.76.

State for Defence v Guardian Newspapers Ltd,[26] Lord Diplock held that the word "includes" means that the list of forms of publication is exhaustive, despite the fact that the ordinary meaning of the word "includes" might suggest otherwise.[27]

2.22 The first of these terms, "speech", is largely self-explanatory. Likewise, as we explained in the CP, "writing" plainly covers a handwritten or typed message or a newspaper article. "Writing" is also defined in the Interpretation Act 1978 to include:

> typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.[28]

In the CP, we explained that we thought it likely that "writing" would be given a wide definition for the purposes of contempt covering, for example, material appearing on the web which is hosted on a web server, because what appears on the computer screen is "in writing" and because electronically stored data which is transmitted is written material stored in another form.[29]

2.23 The term "programme included in a programme service" is defined through the Broadcasting Act 1990 and the Communications Act 2003. Whilst these Acts provide quite complicated definitions,[30] in simple terms they encompass television, teletext, radio and some internet services, for example the BBC's iPlayer.[31]

2.24 Finally, the last element of the definition, "other communication in whatever form" is clearly a very wide definition indeed. In the CP, we suggested that the term seemed wide enough to cover comprehensively or near comprehensively the new media. By new media, we mean new, electronic means of mass communication, particularly on the web.[32] For example, we argued in the CP that a Facebook post, a tweet, a Flickr photograph, a video on YouTube, a Delicious tag[33], a Digg[34] or words on a website were all likely to be publications because they amount to "communications in whatever form". In the first such contempt by

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

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

[28] Interpretation Act 1978, Sch 1.

[29] By way of analogy, see *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [29] by Scott Baker LJ.

[30] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.13 and following.

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

[32] See "new media" in the Oxford English Dictionary.

[33] Delicious is "a social bookmarking service that enables users to tag, save, share and discover web content" through its website: see https://previous.delicious.com/terms (last visited 13 November 2013).

[34] 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 October 2013).

publication case in England, which concerned a photograph on a website, it was not disputed that this was a publication for the purposes of the 1981 Act.[35]

2.25 The issue of whether a hypertext link[36] constituted a publication of the underlying material was considered, but not resolved, by Mr Justice Sharp in *Tamiz v Guardian News.*[37] The Supreme Court of Canada held by a majority in *Crookes v Newton*[38] that hyperlinking did not, in and of itself, constitute publication of the underlying material for the purposes of the law of libel.

2.26 In light of our assessment that the definition of publication under section 2(1) of the 1981 Act seemed broad enough to cover the new media as well as the old, we asked consultees whether they agreed with this assessment. If they did not agree, we asked them why.

2.27 There was near unanimous agreement with our conclusion in the CP that the definition of publication was likely to be wide enough to encompass the new media. Twenty seven responses to the CP agreed with our interpretation of section 2(1), as did Nick Taylor and Professor Ian Cram in their commentary on the CP.[39] In addition, the Criminal Bar Association agreed with our interpretation, but commented that "the illustrative examples currently included in section 2(1) (speech, writing, programme included in a programme service), *could* be added to with words such as "online communication of any kind"."

2.28 Only two respondents disagreed with our interpretation of section 2(1). One commented that the section "should be much more clearly defined to cover electronic and internet publications".

2.29 In light of our analysis and conclusions on the current law and the views of consultees, we do not consider that there is need to amend the provisions of section 2(1). In particular, we consider that the term "communication in whatever form" is wide enough to cover the content of the new media now and probably in the future too. **In consequence, we recommend the maintenance of the current statutory definition of "publication" under section 2(1) of the 1981 Act.**

35 *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.

36 A hyperlink is an electronic link from one webpage to another webpage or file which may be downloadable. For example, on our webpage http://lawcommission.justice.gov.uk there is a hyperlink on the box at the top of webpage "A-Z of projects". By clicking on it, users are sent to another webpage http://lawcommission.justice.gov.uk/a-to-z-projects.htm which lists our projects alphabetically.

37 [2013] EWHC 2339 (QB) at [48]. See also *Azad Ali v Associated Newspapers Ltd* [2010] EWHC 100 (QB) at [22] and [28] and *Islam Expo Ltd v The Spectator (1828) Ltd* [2010] EWHC 2011 (QB) at [6] and [15]. The court did not consider it necessary to determine the issue in either case.

38 [2011] 3 RCS 269.

39 N Taylor and I Cram, 'The Law Commission's Contempt Proposals – Getting the balance right?' [2013] *Criminal Law Review* 465 at 479. The Justices' Clerks' Society and the CPS, whilst agreeing with us, raised concerns (beyond the scope of this project) about the fact that the Children and Young Persons Act 1933 (which provides for a prohibition on identifying juveniles involved in criminal proceedings under s 39 and s 49) only covers traditional media and not web publications.

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

2.30 In addition to the test for publication under section 2(1) which we have discussed above, strict liability contempt also requires that the communication be "addressed to the public at large or any section of" it. This clearly covers publications by national and local newspapers and broadcasters as well as, in certain cases discussed below, internet intermediaries who are responsible for the communication. However, as we explained in the CP, there is no express rule that can determine definitively whether a communication is addressed to the public or a section of it.[40] The matter is decided on a case-by-case basis. The likely relevant factors include the size of the group which is said to comprise the "section of the public", the nature and function of the group, the means of control over access to the group or the communication and the context in which the communication was made.[41] It is sufficient that "some of the public" have access to the communication; it is not necessary for the group to be more precisely defined as a group.

2.31 The contrast is with private communications,[42] and the concept implies an intention to communicate to more than a single individual.[43] We considered in the CP that posting material on a publicly accessible website is likely to fall within this definition: the post is a communication and it is available to the public (regardless of whether anyone actually accesses it).[44] This conclusion was reached by analogy with the case of *Sheppard*[45] which involved a prosecution under section 19 of the Public Order Act 1986 for publishing to the public or a section of it material which was likely or intended to stir up racial hatred. The Court of Appeal held in that case that it was sufficient that "the material was generally accessible to all, or available to, or was placed before, or offered to the public"[46] despite the fact that there was only evidence that one police officer had downloaded it. We thought that the courts would take a similar approach for the purposes of contempt. The Court's reference to "accessible", and the finding of the Court, would indicate that something is published to a section of the public when it is uploaded or made available, rather than when actually accessed or downloaded. In further support of this suggestion is the case of *AG v Associated Newspapers* in which the court stated that "it is true that publication occurred the moment that the photograph was originally posted".[47]

[40] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.23 and following.

[41] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-54; *Borrie and Lowe: The Law of Contempt* (4th ed 2010) para 4.9.

[42] Which might still be caught by the common law of intentional contempt. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.56.

[43] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-38. We discuss the implications of this for social media communications at para 2.43 and following below.

[44] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.26 and following.

[45] [2010] EWCA Crim 65, [2010] 1 WLR 2779.

[46] [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [34].

[47] *Attorney General v Associated Newspapers Ltd* [2011] EWHC 418 (Admin) at [27].

2.32 Evidence that actual access to the material was, or was likely to be, minimal would of course be relevant to the application of the 'substantial risk of serious prejudice' test. The lower the prospective circulation of the material, the less likely the court would be to conclude that this high threshold was passed.

2.33 Assessing whether a person's use of new media constitutes a communication to the public or a section of it will vary significantly both between the various media available and depending on how the particular service is used. Email, for example, would generally seem analogous to private correspondence.[48] Social networking sites, such as Facebook and Twitter, can involve communications to the world at large or to a limited number of "friends" or "followers" by the use of privacy settings.[49] In such cases, it appears that whether a communication was to the public or a section of it would need to be decided on a case-by-case basis. There have been no cases where this issue has fallen to be considered for the purposes of strict liability contempt by publication.

2.34 In light of the absence in the reported case law of any challenge raised in respect of this issue, we considered in the CP that the law in this area should be left to develop on a case-by-case basis. We asked consultees whether they thought that the lack of a statutory definition of "a section of the public" was creating problems in practice. If they did, we asked them to provide examples.

2.35 Seventeen responses to the CP agreed with our provisional conclusion that the lack of definition of the concept of "addressed to the public at large or any section of the public" was not creating problems in practice. Many respondents commented that the law could be left to develop case-by-case.

2.36 Ten respondents argued that the lack of a statutory definition was problematic. Concerns were raised about the vagueness of the concept "section of the public" and the uncertainty of relying on case law for a definition. Of these 10 respondents, many had concerns in relation to the impact of social media. Particular concerns were raised by a number of consultees about the fact that:

> "Section" gives no indication of how large that audience must be, and therefore leads to real uncertainty as to whether there is a risk of contempt or not. New media in particular has a huge degree of variance in the size of audiences. Furthermore, there it is unclear as to what would be considered "the public", particularly when privacy settings are utilised to some degree, for example on social networking pages.[50]

[48] This could, however, be complicated by the number of recipients of the email. This is especially so given increasing use of enormous mailing lists by, for example, campaign groups and advertisers.

[49] In addition, there may the be the issue of a communication being "shared" or "retweeted" outside the limited number to whom it was initially communicated. See, for example, *A-G v Harkins* and *A-G v Liddle* [2013] EWHC 1455 (Admin), [2013] All ER (D) 215 (Apr) which deals with reporting restrictions, but is analogous. We consider that this may be dealt with either by prosecution of the initial publisher or those who re-publish depending on the facts of the case.

[50] Response of Wiggin LLP.

2.37 However, even those consultees who raised concerns about the adequacy of the concept "addressed to the public at large or any section of the public", were not agreed on whether this is currently creating problems in practice in relation to communication by way of social media. Those consultees who thought it problematic in practice did not agree on whether a new definition or other guidance is needed or whether, because of the technical complexity of the new media, the law should still be left to develop on a case-by-case basis.

2.38 Other consultees, including various members of the media, thought the lack of statutory definition problematic in relation to online material communicated before proceedings became active. A good example of this view is that of the Society of Editors which questioned:

> whether any article can still be deemed to be "addressed to the public at large or any section of the public" once a story is no longer on the live section of the website and discovery is only achieved after extensive searching for it in an online archive.

2.39 The BBC went further, arguing that such online material "should not constitute publication at all".

2.40 The argument that material is not published to the public or a section of the public once it ceases to be on website front pages, or is hyperlinked and is only likely to be discoverable by the use of a search engine is not supported by any of the existing contempt case law, and indeed, the interpretation in *Harwood*[51] and *Beggs*[52] would seem to preclude this.

2.41 As we have explained above,[53] in the CP, we drew an analogy between cases of contempt and publications stirring up racial hatred under the Public Order Act 1986. Section 19 of that Act includes the concept of publication to a "section of the public". In the case of *Sheppard*,[54] where there was dispute as to whether the court could even deal with the matter, given that the material in question was held on a web server abroad (although it had been uploaded in the UK), it was held that:

> the judge put it correctly when he said that what the Crown had to show was that there was publication to the public or a section of the public in that the material was generally accessible to all or available to or was placed before or offered to the public and that that could be proved by the evidence of one or more witnesses.… The material in the present case was available to the public despite the fact that the evidence went no further than establishing that one police constable downloaded it.… The point that there cannot be publication without a publishee is in our judgment fundamentally misconceived.… the offences of displaying, distributing or publishing racially inflammatory

[51] *R v Harwood* [2012] EW Misc 27 (CC). Available at http://www.bailii.org/ew/cases/Misc/2012/27.html.

[52] *HM Advocate v (No 2)* 2002 SLT 139.

[53] See para 2.31 above.

[54] [2010] EWCA Crim 65.

written material do not require proof that anybody actually read or heard the material.[55]

2.42 Although *Sheppard* is clearly not a contempt case, in the absence of other authority it seems to us unlikely that a court would reach a different conclusion for the purposes of contempt. In consequence, we consider that the fact that the material is still accessible to members of the public online – regardless of whether they have to search for it or whether there is a link to it on the front page of a website – will be sufficient to establish that it is published to the public or a section of it.

2.43 In relation to the issue of social media, the consultees who raised concerns about the extent to which communications on social media are to a "section of the public" have clearly identified an ambiguity in the current law. There have not, to our knowledge, been any cases under section 2 of the 1981 Act involving the use of social media. It is therefore unclear what the legal position would be where the communication was not available to the public at large but only to a limited number of "friends" or "followers". Likewise, there has not been a contempt case involving the use of email.

2.44 However, it seems unlikely that this ambiguity could be resolved by a statutory or other definition. We doubt that statutory provisions could adequately define when a communication crossed the threshold of a "section of the public". How would it be possible to provide in clear statutory language some formula to account for whether, for example, a tweet to 1000 followers is a communication to "a section of the public"? There is a myriad of different forms of new media, a variety of privacy settings which can be applied to them, and differences in the number of users with access to the material even if privacy settings are used. We consider it highly unlikely that a workable explanation of "section of the public" could be developed which would appropriately account for this, without employing significant complexity and the need for regular updating as the technology develops.

2.45 In consequence, although there is some vagueness about the definition as it currently stands, we think it only realistic to allow the law to develop on a case-by-case basis. **We therefore recommend retaining section 2(1) of the 1981 Act as it stands without defining whether a communication is "addressed to the public at large or any section of the public".**

THE TIME OF THE PUBLICATION

Current law

2.46 As we explained above,[56] 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*".[57] This

[55] *Sheppard* [2010] EWCA Crim 65 at [34] to [35].

[56] See para 2.13 above.

[57] We examine the meaning of active proceedings in Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.9 and following (emphasis added).

requirement is in addition to the fact that communication must be "addressed to the public at large or a section of it".

2.47 The section is subject to two possible interpretations:

(1) A narrow interpretation: publication is a single act which occurs at the time of first communication to a section of the public. Liability for a publication can only arise if there are active proceedings at the time when the material is communicated, irrespective of whether proceedings become active at some later time and irrespective of whether the publisher is aware of that change of circumstance.

(2) An extended interpretation: publication is a continuing act that begins when the communication is first made available to a section of the public. 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, subject to the defence in section 3(1)[58].

The narrower interpretation – Liability for publication during active proceedings

2.48 It is clear that section 2 of the 1981 Act, however else it is construed, must apply to all publications that occur when proceedings are active.

Eg 1. In January 2013 a major news agency publishes material in print or online that is highly prejudicial about D, knowing that D is under arrest.

2.49 That would constitute a contempt under section 2, whether in print or online copy or both. Proceedings might be instituted against the publisher by the Attorney General, usually in the Divisional Court. The news agency would have no defence under section 3(1) unless they could prove that having taken reasonable care they did not know or have reason to suspect proceedings against D were active. The Crown Court before which D is to be tried may make an order for removal of that publication from the news agency website for the duration of the trial using the power in section 45(4) of the Senior Courts Act 1981. The injunctive power arises because the publication constitutes a contempt under section 2.

2.50 We also considered the position of the publication which appeared only online.

Eg 2. In November 2013 a blogger posts material that is highly prejudicial about D knowing that D is under arrest.

58 There is a defence in section 3 if the publisher "at the time of publication" "does not know and has no reason to suspect that relevant proceedings are active". We assume that under the present law "at the time of publication" will be interpreted as though publication was ongoing as a continuing act.

2.51 The blogger, as the person directly responsible for the content of the communication, would be in contempt under section 2 in the way described in the first example.

THE INTERNET INTERMEDIARY AS A PUBLISHER OF MATERIAL DURING ACTIVE PROCEEDINGS

2.52 In some cases it will be impossible to commit the primary publisher – the blogger – for contempt.

> Eg 3. In November 2013 a blogger posts material that is highly prejudicial about D, knowing that D is under arrest. The blogger is unidentifiable. The blogging platform is contacted by the defence team representing D (or by the CPS or the Court, or anyone else) with information of the fact that proceedings are active and identifying material on the blog which created a substantial risk of serious prejudice.

2.53 Under the present law, in certain circumstances, an internet intermediary that was not knowingly involved in the creation of the words that constitute the contempt could nevertheless be responsible within section 2 of the 1981 Act for a publication that was found to contain material that posed a substantial risk of serious prejudice.

2.54 One way in which the intermediary might be liable is, by analogy with the cases on defamation,[59] being treated as a publisher. Following this approach, in example 3, the blogging platform provider could be liable for the publication in specific narrow circumstances where the platform had actual knowledge of the material. Once on notice of the fact that the blog exists, that its contents contain material posing a substantial risk of serious prejudice and having had an opportunity to disable access to the blog, the platform host would be treated as a publisher for the purposes of liability under section 2.

2.55 Liability of the platform provider would turn on whether the defence or CPS (or anyone else) had notified it with sufficient detail of the blog and its contents. Once treated as a publisher in this way, the platform provider would be liable for contempt under section 2 and could be subject to an injunction ordering temporary removal of the material under section 45(4) of the Senior Courts Act 1981.

2.56 It is worth noting that the scope of liability is much narrower than a primary publisher's liability under section 2 of the 1981 Act read alongside the defence under section 3(1). In that case liability arises under section 2 unless the publisher can prove that having taken reasonable care, it did not know or have reason to suspect that the proceedings were active. In contrast, the platform provider would only ever be treated as a publisher once on notice of the matters described above and when provided with an opportunity to disable access to the

[59] *Tamiz v Google Inc* [2013] EWCA Civ 68; [2013] 1 WLR 2151.

material. Liability for contempt under section 2[60] would then be subject not to the defence in section 3(1)[61] but to the limits on liability established by the Electronic Commerce Directive ("the Directive").[62]

2.57 We explained the scope of the Directive in detail in the CP[63] but, in brief, the Directive, implemented by the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"),[64] restricts liability in respect of certain activities conducted by certain internet intermediaries.

2.58 In our example, considering the platform provider's liability through the lens of the 2002 Regulations, the platform provider would only be liable if it had "actual knowledge of the unlawful activity or information"[65] and did not act "expeditiously to remove or disable access" to it.[66] In determining whether the platform provider has "actual knowledge" for these purposes, the court will have regard to all the circumstances including whether it had been notified via an appropriate email account and given sufficient information to allow it to disable the offending blog.[67] The burden under the 2002 Regulations, in "criminal proceedings"[68] is on the Crown to disprove the defences once sufficient evidence is raised. So, where the platform provider argued that it had not been notified or that the notification was insufficiently specific as to which material was to be disabled or that the platform

[60] Note that although article 14(3) would permit an injunction to be granted irrespective of whether actual notice had been provided, the provision of notice is what renders the provider a publisher and therefore what brings the provider within section 2, and it is only when section 2 applies that a court would have the power to issue the injunction under section 45(4) of the Senior Courts Act 1981.

[61] Which would have been defeated by the intermediary being put on actual notice.

[62] Directive on Electronic Commerce 2000/31/EC, Official Journal L 178 of 17.07.2000 p 1. See the Contempt of Court (2012) Law Commission Consultation Paper No 209 at para 3.31 and following.

[63] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.43 and following.

[64] SI 2002 No 2013.

[65] Regulation 19(a)(i).

[66] Regulation 19(a)(i).

[67] Regulation 22 of the 2002 Regulations makes provision for what amounts to "actual knowledge" for these purposes. Under regulation 22, in determining whether there is "actual knowledge":
a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to—

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) [that requires an internet intermediary to make available an email address to "any relevant enforcement authority"].

(b) the extent to which any notice includes—

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question.

[68] We assume that this would include proceedings for contempt against the platform host as the maximum sentence would be 2 years' imprisonment and/or an unlimited fine.

had not had adequate time to disable access, it would be for the Crown to disprove that claim.

2.59 To take the example one stage further, it is worth considering what the position would be of an internet intermediary responsible for caching[69] material. Taking the facts of example 3, two situations are worth considering.

2.60 First, if the blogger or the platform host of the blog had disabled access to the publication on being put on notice, but the offending publication remained in the cache of a service provider, that provider could not be liable under section 2 of the 1981 Act for the publication (nor therefore the subject of an injunction to disable access) unless (i) it had actual notice of the fact that the publication had been disabled by the blog or host and (ii) it had not acted expeditiously to remove the offending material from the cache on having that notice.[70] That notice to the provider responsible for the cache could come from any source including the defence, CPS, the blogger or platform host. This is an unlikely scenario. The likelihood that a cached publication would pose a substantial risk of serious prejudice when the publication had been disabled at source would be very remote indeed.

2.61 The second situation that needs to be considered is where, on the facts of the scenario posed in example 3, it had not been possible to cause the blogger or host to remove the offending publication. This might arise if both the blogger and host are outside the jurisdiction and not subject to the Contempt of Court Act 1981 (nor therefore an injunction under section 45(4) of the Senior Courts Act 1981) or because, although subject to the jurisdiction, they have refused to comply with an injunction ordering temporary removal. In such a case, the intermediary responsible for the cache of the offending publication could not be liable under section 2[71] (and hence could not be subject to an order for temporary removal under section 45(4) of the Senior Courts Act 1981) unless (i) the intermediary responsible for the cache had actual notice (which could derive from any source) that an "administrative authority" (which could include the CPS or court but need not involve the Attorney General) had ordered the person responsible for the source material – the blogger or host – to remove or disable access and (ii) the cache had not acted expeditiously to remove or disable access when on notice of that fact. This is again an extremely unlikely scenario in the context of contempt.

2.62 In summary, therefore, following the approach taken in very recent cases on defamation, it is clear that *in some circumstances* internet intermediaries might

69 Caching is defined in regulation 18 of the 2002 Regulations as "automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request".

70 See regulation 18(b)(v) of the 2002 Regulations.

71 The relevant regulation is far from clear. Regulation 18 of the 2002 Regulations provides that an intermediary shall be criminally liable as a result of that transmission which the intermediary has not modified etc unless the intermediary "acts expeditiously to remove or to disable access to the information he has stored upon obtaining 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 a court or an administrative authority has ordered such removal or disablement."

be liable under section 2 and/or ordered to disable access for publications over which they have responsibility. This would be entirely consistent with the Directive and the 2002 Regulations.

2.63 Since the liability of the intermediary under section 2 can arise only in these limited circumstances as outlined, there is no obligation to monitor, therefore there is no conflict with article 15(1) of the Directive which establishes that:

> Member States shall not impose a general obligation on providers, when providing the services [as hosts conduits or caches] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2.64 We are not, we reiterate, suggesting that all internet intermediaries will be liable as publishers in this way. Their potential liability under section 2 could only arise if (i) they had sufficient notice for the courts to treat them as publishers, (ii) they had failed to disable access expeditiously and (iii) there was no defence available under the 2002 Regulations. These regulations provide different levels of defence depending on the service the intermediary was providing. In the example above, the internet intermediary was providing a hosting function, and liability for such services is permissible within the 2002 Regulations. Certain other services provided by internet intermediaries would never give rise to liability even if notice and time to disable access were provided. For example, those acting as mere conduits through which the blog was transmitted could not be liable: regulation 17.

2.65 Although under the Directive and the 2002 Regulations the power to issue an injunction is theoretically available in respect of all internet intermediaries,[72] that would not be possible in practice in the context of contempt. The only basis on which an injunction can be granted under section 45(4) of the Senior Courts Act 1981 is if the person responsible for a publication is liable under section 2 of the 1981 Act. Certain services provided by internet intermediaries would not be caught by section 2 since the internet intermediary would not be treated as a publisher or distributor and therefore, because they are not caught by section 2, no injunctive power would be available.

2.66 The liability of internet intermediaries is an area of law that will no doubt continue to develop[73], and there is no obvious reason why the approach in contempt of court should take a different course. Indeed, in terms of compliance with the 2002 Regulations and the Directive, that would be impossible.

[72] For example, article 12(3) of the Directive reads "this article shall not affect the possibility for a court or administrative authority, in accordance with Member States legal systems, or requiring the service provider to terminate or prevent an infringement."

[73] A case in point is the introduction before Parliament during the writing of this report of the draft Defamation (Operators of Websites) Regulations 2013. These set out the actions to be taken by website operators in response to a notice of complaint relating to allegedly defamatory material.

THE INTERNET INTERMEDIARY AS A DISTRIBUTOR OF MATERIAL DURING ACTIVE PROCEEDINGS

2.67 An alternative way in which liability might be imposed on an internet intermediary under the present law is by treating the internet intermediary as a distributor. Distributors will be liable under section 2 of the 1981 Act for material which they distribute during active proceedings unless they raise the defence under section 3(2). This provides that they are liable for a publication which poses a substantial risk of serious prejudice unless they do not, having exercised reasonable care, have reason to know or suspect that the publication contains the offending content.

2.68 In the context of the internet intermediary this will usually prove to be a valuable defence. Taking our example above, platform providers will be unaware of the contents of the blogs being hosted on its site. That defence would be defeated if the platform provider was contacted by the defence team (or the CPS or court or anyone else for that matter) with information that the blog (the publication) related to active proceedings *and* that its contents posed a substantial risk of serious prejudice or impediment.

2.69 Again, the liability of the internet intermediary would also depend on the Directive and the 2002 Regulations. Under those regulations, the platform provider would only be liable if it had "actual knowledge of the unlawful activity or information"[74] and did not act "expeditiously to remove or disable access" to it.[75] In determining whether the platform provider has "actual knowledge" for these purposes, the court will have regard to all the circumstances including whether it had been notified via an appropriate email account and given sufficient information to allow it to disable the offending blog.[76] The burden under the 2002 Regulations in "criminal proceedings"[77] is on the Crown to disprove the defences once sufficient evidence is raised.

2.70 As above in relation to publishers, we are not suggesting that all internet intermediaries will be liable as distributors in this way. Their potential liability under section 2 of the 1981 Act could only arise if:

(1) the courts were willing to treat them as distributors;

(2) they had reason to suspect or know of the content of the publication, having taken reasonable care;

(3) they had "actual knowledge of the unlawful activity or information";

(4) they had failed to disable access expeditiously and

(5) there was no defence available under the 2002 Regulations.

[74] Regulation 19(a)(i).

[75] Regulation 19(a)(ii).

[76] See regulation 22.

[77] We assume that this would include proceedings for contempt against the platform host as the maximum sentence would be 2 years' imprisonment and/or an unlimited fine.

2.71 As in relation to publications, although under the 2002 Regulations the power to issue an injunction is theoretically available in respect of all internet intermediaries,[78] that would not be possible in practice in the context of contempt. The only basis on which an injunction can be granted under section 45(4) of the Senior Courts Act 1981 is if the distributor is liable under section 2 of the 1981 Act. Certain services provided by internet intermediaries would not be caught by section 2 since the internet intermediary would not be treated as a distributor unless on notice and therefore, because they are not caught by section 2, no injunctive power would be available.

The extended interpretation: Liability for publications first appearing before proceedings became active

2.72 As we explained in the CP, the expression "at the time of the publication" in section 2(3) could be interpreted to extend beyond the narrow interpretation whereby:

> publication is a continuing act that begins when the communication is first made available to a section of the public. Liability under section 2 might, therefore, also arise if proceedings become active during the period of continuing publication, although they were not active when publication commenced, subject to the defence in section 3(1)[79]

2.73 We noted in the CP that the interpretation of "time of publication" has taken on a greater significance with the widespread use of the internet. Publication on the web means that there is a greater likelihood that material which is first published before the proceedings in question became active, but which remains available once proceedings have become active, is immediately accessible to the public. Such publications can be easily found by the use of search engines, months or years after first publication.

2.74 Where material that was published online before proceedings became active poses a substantial risk of serious prejudice or impediment, this extended interpretation of the law in paragraph 2.72 above could mean that the publisher is in contempt, subject to the defence in section 3(1), as soon as proceedings subsequently become active. This interpretation was supported in the Scottish case of *HM Advocate v Beggs (No 2)* where the court held that the expression "at the time of publication":

[78] For example article 12(3) "this article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, or requiring the service provider to terminate or prevent an infringement."

[79] There is a defence in section 3 if the publisher "at the time of publication" "does not know and has no reason to suspect that relevant proceedings are active". We assume that under the present law "at the time of publication" will be interpreted as though publication was ongoing as a continuing act.

was capable of referring to a period of time during which the material was accessible on the website, commencing with the moment when it first appeared and ending when it was withdrawn.[80]

2.75 This interpretation was adopted in England by Mr Justice Fulford (now Lord Justice Fulford) at first instance in the Crown Court in the case of *Harwood.*[81]

2.76 We discussed in detail in the CP[82] the arguments deployed in *Beggs* in support of the interpretation of publication as a continuing act. We doubted that some of these arguments stood up to scrutiny on the present wording of the 1981 Act. Nonetheless, we also noted that the broad interpretation adopted in *Beggs* has the practical advantage that the existing law on contempt by publication is, on this basis, capable of accommodating the impact of online media, which did not exist when the 1981 Act was passed. Whereas historically, "today's newspapers became tomorrow's chip paper", the development of online media means that all news reported – both current and historic – is equally available to anyone with internet access. The distinction between what is published before the proceedings in question become active, and what occurs after, is therefore harder to maintain and, indeed, in internet terms is almost illusory. As Mr Justice Fulford emphasised in *Harwood*, anyone looking on the web for contemporary reports of particular, active, proceedings will use search terms that are likely to produce results which are a mixture of contemporary (during active proceedings) and historic (pre-active proceedings) information.[83]

> Eg 4. In December 2012 a major news agency publishes in print and online material that is highly prejudicial about D. When it is first made available to a section of the public, in December, proceedings are not active. In January 2013 D is arrested. That material is still available on the publisher's website. The only print versions that are available to a section of the public are those stored in major libraries, the news agency's head office and at Colindale.[84]

2.77 Since the print versions are unlikely to come to the attention of the public they will not be treated as posing a substantial risk of serious prejudice. The online version is, however, as readily accessible as when it first appeared. That publication is, from the moment proceedings become active (on arrest/warrant for arrest) caught by the strict liability contempt rule under section 2. The news agency may rely on the defence in section 3(1) if it can prove that, having taken

80 2002 SLT 139 at [22]. See also *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-28.

81 Fulford J in *Harwood* [2012] EW Misc 27 (CC) at [37]. Available at http://www.bailii.org/ew/cases/Misc/2012/27.html.

82 See Contempt of Court (2012) Law Commission Consultation Paper No 209 at para 3.55 and following.

83 *Harwood* [2012] EW Misc 27 (CC) at [37]. Available at http://www.bailii.org/ew/cases/Misc/2012/27.html.

84 If this was a print only publication the problem would not arise since it will not pose a substantial risk of serious prejudice given that it is in print and the only versions likely to be available by the time of trial would be stored in the national newspaper archive at Colindale.

reasonable care, it did not know or have reason to suspect that D had been arrested since the publication first appeared. In the case of many news agencies that will be an impossible defence to run since the news agency will also be publishing information about the arrest and forthcoming trial.

2.78 The Attorney General may bring proceedings for contempt in the Divisional Court against the news agency in this example. Under section 45(4) of the Senior Courts Act 1981 the Crown Court before which D is to stand trial court may, subject to the criteria discussed below, order the removal of the information from the website for the duration of the trial or relevant period if there are linked trials.[85]

2.79 In the CP, we thought that the interpretation of "time of publication" adopted in *Beggs* and *Harwood* as applied in example 3, could give rise to concerns that publishers are required to monitor continuously the material on their websites and the events which trigger active proceedings (arrests of suspects, for example), in order to ensure that proceedings have not become active since the original (first) date of publication.

2.80 For some publishers, this could be an expensive and time-consuming endeavour and may not be a proportionate restriction on their right to freedom of expression under article 10 of the ECHR.

2.81 The approach is the same for publications which appear only online.

> Eg 5. In November 2013 a blogger posts material that is highly prejudicial about D. D is at that time not under arrest. In December 2013 D is arrested. The blog remains available on the platform. In March 2014 D is now facing trial.

2.82 The blogger in this example would, following *Beggs* and *Harwood*, be treated in the same way as the news agency in example 3. The blogger would be in contempt under section 2 (subject to a defence in section 3(1)). The blogger could also be made the subject of an injunction under section 45(4) of the Senior Courts Act 1981.

2.83 This may give rise to problems for primary publishers who publish online. Article 15(1) of the Directive establishes that

> Member States shall not impose a general obligation on providers, when providing the services [as hosts conduits or caches] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2.84 In consequence, we were concerned in the CP that any monitoring requirements could conflict with the Directive (and implementing 2002 Regulations).

85 *Harwood* [2012] EW Misc 27 (CC) at [37].

INTERNET INTERMEDIARIES: LIABILITY FOR PUBLICATIONS BEFORE PROCEEDINGS ACTIVE

2.85 Under the present law, an internet intermediary might, subject to a number of factors, be liable otherwise than as a primary publisher for material first appearing before proceedings were active.

> Eg 6. In November 2013 a blogger who is unidentifiable posts material that is highly prejudicial about D. D is at that time not under arrest. In December 2013 D is arrested. The blog remains available on the platform. In March 2014 D is now facing trial. The defence representatives become aware of that material and contact the platform provider seeking its removal.

2.86 The platform provider on which the blog is posted could be liable as a publisher or distributor of the blog as described in the previous section (see paragraphs 2.52 to 2.71, above) if:

(1) the communication was to a section of the public (above paragraph 2.30 and following);

(2) the court was prepared to treat the platform host as responsible (as publisher or distributor) because the host

(a) was on actual notice of the fact that proceedings were now active,

(b) that the content amounted to a contempt,

(c) they had failed to disable access expeditiously and

(3) there was no defence available under the Directive or 2002 Regulations.

2.87 In practical terms, that would mean that the platform provider would have no liability until notified of the content of the blog. If the adequate level of information was provided to the host of the blog, liability could arise as in example 4 above.

2.88 If the host is a publisher and the defences are defeated, the Attorney General may bring proceedings for contempt in the Divisional Court against the platform host. Under section 45(4) of the Senior Courts Act 1981 the Crown Court before which D is to stand trial court may, subject to the criteria discussed at paragraph 2.95, order the removal of the information from the website for the duration of the trial or relevant period if there are linked trials.[86]

Our conclusions on the present law in the CP

2.89 We concluded in the CP that we could not be confident that the *Beggs* interpretation of the 1981 Act – as that statute is currently worded – would be followed by an appellate court in England and Wales as a result of difficulties and potential weaknesses with the reasoning in that case. We argued that the law needed reforming to address two issues: firstly, the courts need an effective

[86] *Harwood* [2012] EW Misc 27 (CC) at [37].

mechanism for those exceptional cases in which material has been published online before proceedings were active but where it poses a substantial risk of serious prejudice to a trial. Courts need to have appropriate powers to minimise the risk that such material published before proceedings became active will prejudice jurors.

2.90 Secondly, at the same time, publishers and others need to have confidence that they know what their obligations are in relation to such material and that they can meet those obligations without disproportionate expenditure of time, effort and money. We recognise that this is of importance not only for representatives of the media but also for the public, since ignoring this consideration could lead to an undesirable chilling effect on the press and freedom of expression more widely.

Our proposals from the CP

2.91 As stated above[87] the interpretation of section 2 of the 1981 Act favoured in *Beggs* and *Harwood* was that it applies to publications commencing before proceedings were active. In the CP we asked consultees whether they considered that this interpretation of section 2 is correct. We suggested that it might not be correct, and in any event proposed amending section 2(3) to confirm that "time of the publication" is to be interpreted as meaning "time of first publication" (in effect, to reverse the decision in *Beggs*). This would relieve the burden on publishers continuously to monitor their historic publications and currently active proceedings in order to prevent them from falling innocently into contempt. We concluded that, if publication is a continuing act, then the current section 2 seemed to be a disproportionate restriction.

2.92 However, we were concerned that such an amendment would leave a gap in the law because, if no contempt could be committed in relation to material published before proceedings became active, this might not adequately protect the right to a fair trial under article 6 of the ECHR. In essence, because jurors might easily and innocently be able to access material first published before proceedings became active, there would need to be some restriction on that material in order to prevent them from becoming partial. A juror might find such material by, for example, searching for the name and address of the Crown Court in which they would be sitting. Such a search would clearly not be prohibited, but a search engine may produce results which include news reporting about recent and historic cases which have occurred at that Crown Court centre. Some of these reports could contain material which gives rise to a substantial risk of serious prejudice.

2.93 We were therefore concerned that there was a need to empower the courts to reduce the risk of serious prejudice or impediment in extreme cases – in order to prevent the jury from becoming, or being seen to be, partial – in circumstances where alternative measures would not suffice to address the risk. We consider in more detail below the alternative measures which could be adopted.[88] In brief, juries can be questioned before the trial begins and the risk of actual bias can be guarded against in that way in most cases. However, the courts still need the

[87] At paras 2.74 to 2.76.

[88] See para 2.184 below.

ability to i) address cases where actual bias cannot be eliminated and ii) address the perception of bias even where the actual bias can be addressed.

2.94 Therefore, we provisionally proposed in the CP that, if consultees agreed that section 2(3) of the 1981 Act should be amended, the courts be provided with a power to make an order when proceedings are active to remove temporarily an identified publication that was first published before proceedings became active. The power would only be available where the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Such an order would be capable of being made against any person who is a publisher within the meaning of the 1981 Act and a failure to comply with such an order expeditiously without reasonable excuse would be a contempt of court.

2.95 We considered that a court, in issuing an order, would have to have regard to the test of substantial risk of serious prejudice or impediment under section 2. In *Attorney General v MGN Ltd*,[89] Lord Justice Schiemann set out ten key principles for the courts to consider in applying this test.[90] We explain them here insofar as they would be relevant to making an order:

> Principle (1) Each case must be decided on its own facts.
>
> Principle (2) The court will look at each publication separately … .
>
> 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.
>
> Principle (4) That risk must be substantial.
>
> 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.
>
> Principle (6) The court will not … [make an order] unless it is *sure* that the publication has created this substantial risk of that serious effect on the course of justice.[91]
>
> 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

[89] [1997] Entertainment and Media Law Reports 284; [1997] 1 All ER 456.

[90] [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].

[91] This means that the criminal burden and standard of proof applies. See *Ex p HTV Cymru (Wales) Ltd* [2002] Entertainment and Media Law Reports 11 at [25].

> 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.

Principle (8) 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.[92]

> 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: … the novelty of the content of the article in the context of likely readers of that publication.
>
> 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: … (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.[93]

2.96 We envisaged that the need to make such orders would arise very rarely in practice. In effect, the power we proposed would have put on a statutory footing the power to make an order such as that made in *Harwood*, which was made using section 45(4) of the Senior Courts Act 1981. Whereas under the present law primary publishers have a continuing obligation to monitor all of the material published on their websites before proceedings became active, under our provisional proposal they would only have had the obligation to comply with court orders specifying the temporary removal of certain, clearly identified, material.[94]

CP proposals regarding internet intermediaries

2.97 In addition, we explained in the CP that there could be cases where it would be necessary for the order to be made against persons other than the primary publisher. For example, it may be that the author of a blog cannot be identified or is resident abroad and not subject to this jurisdiction. In such a case, we provisionally proposed that the courts ought to have the separate 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.

[92] *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097.

[93] We considered in more detail how these principles are applied in practice in the Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.30 and following.

[94] In practice this would mean identifying the URL (the specific web address of the web page, for example, http://lawcommission.justice.gov.uk/areas/contempt.htm).

2.98 We considered in the CP that those with control would not necessarily be "publishers" for the purposes of section 2.[95] We considered that "control" in this context could be left to be interpreted by the courts on a case-by-case basis, but would cover some internet intermediaries such as those undertaking caching and hosting.[96] In deciding whether someone had sufficient control, the question would be whether, in respect of material that is available to the public or a section of the public, the person had the capability to prevent that material from being so available.

2.99 We also proposed that the application for a temporary removal order made either against a publisher or against someone with "sufficient control" should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General.[97] We also asked consultees about the appropriate penalties and, in particular, whether the current maximum penalty for contempt of an unlimited fine and/or two years' imprisonment[98] would be appropriate. In addition, we asked whether community penalties should be available to the sentencing court.

2.100 Finally we asked consultees whether, in cases where one of our proposed orders was breached, the contempt should be tried in the Divisional Court under Part 81 of the Civil Procedure Rules (as contempt by publication under section 2 is currently tried[99]) or whether it should be tried in the Crown Court by judge and jury (on indictment) or "as if on indictment" (with a judge but no jury) as we provisionally proposed some other contempts might be tried.[100]

The views of consultees on *Beggs* and a temporary removal power

2.101 We questioned in the CP whether *Beggs* had been correctly decided on the wording in the current section 2(3) and/or whether publication under section 2 should be treated as a continuing act to which liability would attach if proceedings became active after the material was first published. The majority of responses to the CP indicated that they considered *Beggs* to have been wrongly decided and/or that section 2(3) should be amended so that publication would not be a continuing act. The members of the media who responded to the CP were generally of this view, in particular for practical reasons related to the difficulty of monitoring the contents of their websites and to ensure protection of their article 10 ECHR rights.

2.102 Other stakeholders, such as the CPS, The Council of HM Circuit Judges, District Judges (Magistrates' Courts), the Law Society and the Criminal Bar Association

[95] There is no case law on whether an internet intermediary can be a publisher for the purposes of contempt, but the matter has been considered in the context of defamation law. We have discussed this at para 2.52 and following above.

[96] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.77.

[97] The permission of the Attorney General is needed to being proceedings for contempt by publication under section 2 of the 1981 Act. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.58.

[98] Contempt of Court Act 1981, s 14.

[99] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.59.

[100] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.64.

shared the media's view that either *Beggs* had been wrongly decided or that, regardless, section 2(3) should be amended. Five other consultees responded that section 2 had been incorrectly construed in *Beggs* and 10 consultees argued that section 2(3) should be amended (regardless of whether *Beggs* had correctly construed the section or not).

2.103 However, this view was not universally held. Ten responses to the CP argued that section 2 had been correctly construed in *Beggs* as applying to publications which had first been published before proceedings became active. Anthony Arlidge QC, for instance, noted that "publication is a continuing act and can apply when the initial publication occurred before proceedings are active".

2.104 We have sought here to separate the analysis of responses about the proposed temporary removal power in relation to publishers and in relation to "controllers". However, it is important to bear in mind during what follows that many consultees did not separately address the issue of the new proposed power applying to publishers and that applying to controllers, responding instead in relation to the principle of the proposals.

2.105 In relation to publishers, few consultees from the media were in favour of the proposal for a temporary removal power, with many coming out strongly against it. Those who responded to the CP from organisations other than those connected with the media had a more divided view.

2.106 Some consultees (in particular, members of the media) took the view that section 45(4) of the Senior Courts Act 1981 already provides such a temporary removal power, so no new power would be necessary (even if *Beggs* were reversed so that matters published before proceedings became active would not be in contempt). The difficulty with that approach is that there needs to be a basis for a court to grant an injunction. At present the power under section 45(4) to grant an injunction arises only because the publication, under the *Beggs* interpretation, is in contempt of court. If *Beggs* were reversed by statute, as under our provisional proposal, the publication would no longer be a contempt, and the power to grant an injunction could no longer derive from the Senior Courts Act. It would therefore require the creation of a new statutory power in accordance with our provisional proposal.

2.107 Of those who were against the proposed power, concerns were raised that the proposal was:

(1) "unnecessary" as the appropriate focus should be on controlling the behaviour of the jury not the media, with "greater emphasis … on judicial directions to the jury forbidding the research of material outside of the courtroom;"[101]

(2) "unworkable" or impractical for publishers to act on (in particular because it was argued that removal of the webpages would be time-consuming, as

[101] Quotation from the Society of Editors.

would reinstatement at the end of the trial, and there could be problems with cached pages);[102]

(3) "ineffective given the reach of global media"[103] and therefore likely to undermine public confidence in the domestic media. The concern was raised that if certain material published by the domestic media were made unavailable for the public to access, the public would start to look to foreign media (which might be less restricted by English law) for their news instead;[104]

(4) likely to mean that temporary removal orders would become routine rather than limited to rare cases and/or would be made in cases where it was not necessary (in the ECHR sense) or proportionate (for example, because further steps could be taken to insulate the jury instead);

(5) likely to lead to "lengthy applications and complex investigations which could cause delay to the trial"[105] and satellite litigation which is costly and time-consuming;[106]

(6) likely to be costly for the media in respect of their needing to be represented at applications for such orders and to have cost implications for the parties to the criminal proceedings;[107]

(7) applicable in the Crown Court where many advocates "are likely to be unfamiliar with the law on freedom of expression... [and] unable properly to represent the rights of the public" because of potential "conflict with the interests of the defence and the prosecution";[108]

(8) ignoring the important social, historical and research value of historic online material and preventing members of the public who are not jurors from accessing it;[109]

[102] Our understanding, having met with communications specialists, is that there is always the facility to temporarily remove access to a publication (whether on a webpage or cached) and that it is not technically difficult to do so. The time-consuming aspect relates to the ease with which the webpage can be identified, and we make recommendations to rectify this at para 2.162 and following below.

[103] Quotation from the Society of Editors.

[104] The suggestion that because a few individual web pages are temporarily unavailable would impact on likely readership habits for publications seems rather strained.

[105] Quotation from the Council of Circuit Judges.

[106] Our recommendation, at para 2.162 and following below, reduces likelihood of any court hearing being necessary.

[107] Our recommendation, at para 2.162 and following below, reduces likelihood of any court hearing being necessary.

[108] Quotation from the Senior Judiciary. With respect, this seems to overlook the numerous instances in which freedom of expression challenges arise in the context of mainstream criminal law prosecutions, notably in public order offences. As we explain at para 2.187 below, in any event the media would have the right to be represented and make submissions at the making of any such order.

[109] We have addressed this concern with our final recommendation, see para 2.186 below.

(9) likely to run into difficulties in the case of individuals who are determined to flout court orders, and the ensuing dispute could give rise to even more publicity;[110]

(10) incompatible with article 10 of the ECHR.[111]

We consider the way in which these concerns can be addressed at paragraph 2.130 and following below.

2.108 Various media organisations and their legal representatives[112] argued that, if under our provisional proposal, the specific statutory power for judges to make such orders were to be created (replacing the existing broader power to do so under the Senior Courts Act 1981) an appropriate procedure would need to be devised. This would need to ensure that the media were put on notice about any application for a court order for temporary removal; that the media were informed of precisely what material the order would relate to; to allow the media to make representations and, if necessary, to appeal any order; to provide for specific identification of the material to be removed (in particular, by URL); and to ensure that the media were given sufficient time to comply with any order made.

2.109 Media stakeholders emphasised:

(1) the benefit of the courts being the body responsible for making an independent decision (as opposed to say, a request from the police) about whether to order the temporary removal of a publication;[113]

(2) that publishers already frequently take material down from their websites even when the risk is that they have committed a civil wrong, for example, when threatened with an action for libel.

2.110 As we have explained, analysing the responses of consultees who took particular positions on this issue is somewhat complicated because not all responses were clear about whether they were for or against the use of temporary removal powers in principle or whether they were for or against them only in relation to publishers or only in relation to controllers.

2.111 However, broadly speaking, approximately 15 responses were against the introduction of the power in relation to publishers, with 13 responses in favour. Two responses were also received that were more neutral, both of which argued that the power would need to be limited and subject to strict constraints to prevent unnecessary use.

[110] The risk that an individual who is subject to an order may not abide by it is one which exists in relation to any form of court order. The courts have mechanisms – including the use of the contempt jurisdiction – for addressing such difficulties.

[111] However, see para 2.113 below for the opposite view from a consultee.

[112] Including the BBC, Independent Print Limited as well as legal representatives of the media from the Media Lawyers' Association.

[113] ITN, the BBC, the Sun and the Times all noted that they frequently receive requests for removal, in particular from the police, and the uncertainty surrounding non-judicial requests given there is no strict obligation to comply with such requests.

2.112 In addition, the members of the Senior Judiciary who responded felt that the proposals would "benefit from further elaboration and then discussion." Since the publication of the CP, we have had further discussions with members of the judiciary, the police, media lawyers and internet service providers, and subsequently refined our proposals.

2.113 Notably, the Equalities and Human Rights Commission explained that they did not consider that the proposal would conflict with the State's obligations under the ECHR. They responded that:

> The law provides a means to challenge restrictions on freedom of expression especially those where particular individuals or organisations (including publishers) are given notice to remove or disable access to particular pieces of information.
>
> The [Equalities and Human Rights] Commission considers that the new proposal to allow courts to make such orders are ECHR compliant as long as the duration of the order does not last beyond the period justifiably required to interfere with freedom of expression, and as long as it is strictly restricted to that information which it is essential to remove in order to safeguard article 6 rights. The legislation should contain clear and workable criteria to enable the courts to reach conclusions that are compliant with competing ECHR rights when determining whether to use such powers in any given case.

View of consultees on internet intermediaries

2.114 As we explained above,[114] in the CP we made a provisional proposal to allow the courts to impose a temporary removal order against those with "sufficient control" over material which gave rise to a substantial risk of serious prejudice. We had anticipated that those with "sufficient control" would include some internet intermediaries.[115] The order would only be made where for some reason it was not possible or practical to proceed against a publisher.

2.115 Approximately 17 responses were against the creation of this power, with 12 in favour. Another response was in favour but sceptical and emphasised the importance of placing limits on the power.

2.116 Some academic commentators also raised concerns. Nick Taylor and Ian Cram argued that "the proposal ignores the practical problem that arises when those deemed to have 'sufficient control' are physically located outside the jurisdiction" and that if those outside the jurisdiction ignore UK court orders this would lead to the courts' authority being undermined.[116]

2.117 The response of the Internet Service Providers Association (ISPA) considered the practicalities of the use of such power in relation to internet intermediaries.

[114] See para 2.99 above.

[115] See para 2.98 above.

[116] N Taylor and I Cram, 'The Law Commission's Contempt Proposals – Getting the balance right?' [2013] *Criminal Law Review* 465 at 481.

ISPA explained that we needed to clarify which intermediary would be the most appropriate subject of the order. It was argued that the courts would need guidance "to ensure that the multitude and divergent nature of online intermediaries is taken into account when decisions about the proportionality and necessity of a court order are made."

2.118 ISPA also responded that:

> blocking injunctions are only very rarely applied to mere conduits. This reflects that blocking by access providers can be a crude, technically complex and potentially costly exercise. Moreover, given that a virtually unlimited number of access providers can be involved in allowing the public to access content online, it seems to be highly unlikely that making an order against an access provider can provide for an effective solution to prevent jurors and others from accessing publications that pose a substantial risk of serious prejudice.

2.119 It was suggested that, if the proposals were adopted, orders should only be:

> made against the person who has the highest degree of "sufficient control" over the accessibility of the material and who incurs the least amount of costs in complying with a court order. Based on our members' experience, we believe that a court, making an order, must take into account the proximity of a provider to the publication, the control of a provider over accessibility and the proportionality of asking the provider to remove or disable access (balanced against the rights of defendant etc.). The blocking of access to content should always be considered as a last resort and, as a point of principle, access providers should only be asked to block content if it has been impossible to address the accessibility of a publication via more proportionate means.

2.120 The main concerns of consultees were therefore to ensure that orders were made proportionately and to avoid the risk of orders being made indiscriminately.

OUR AIMS FOR REFORMING THIS AREA OF THE LAW

2.121 It is important to bear in mind when considering our recommendations for reform of this area of law the objectives behind the proposals in the Consultation Paper. In devising our proposals, we were aware of the need to protect the right to a fair trial by ensuring that the jury is insulated from prejudicial material, whilst also protecting the media and others' right to freedom of expression and the public's right to be informed. We had not set out to suggest that it would be either possible or desirable to cleanse the web of all prejudicial material relating to every trial. Our aim was to try to mitigate, insofar as realistically possible, the risk of serious prejudice arising in this way and to allow the courts to make such orders only in cases where it was truly necessary.

2.122 We sought to reduce the risk that jurors, who might innocently search for matters related to the trial, would come across prejudicial material. We also sought to tackle the risk that, despite a new criminal offence being created for jurors

searching for information[117] and that offence being made known to every juror,[118] some sworn jurors would still seek out prejudicial material. The criminal prohibition placed on this type of behaviour will, we hope, deter this conduct, but in some extreme cases (for example, where the material is highly prejudicial and easy to find) temporary removal of material may be necessary. The overall aim had been to ensure that the defendant, the prosecution and the public could have confidence that jurors would not easily or inadvertently come across information which had been published before proceedings became active, which had not been written with the constraints of the Contempt of Court Act 1981 in mind, and which posed a substantial risk of serious prejudice.

A proportionate response to prejudice on the web

2.123 One of the risks which a court would be concerned to avoid is that of a juror quite innocently becoming aware of prejudicial material without that juror breaching any court order or committing the new offence we propose.[119] An example of this might be where a juror who has received a summons, but has yet to attend court to perform jury service, and undertakes an online search for some legitimate reason e.g. seeking information about the Crown Court centre[120]. That juror would not be prohibited from undertaking such a search but the search might produce results which include material published before proceedings became active and which is seriously prejudicial to the case which they will be trying (for example, a news report of a previous trial for which the defendant faces a retrial which covers material that will not be admitted in evidence at the re-trial).

2.124 In addition, there is the risk that, despite a new criminal offence being created and made known to every juror,[121] some sworn jurors will fail to comply. The criminal prohibition placed on the juror concerned will, we hope, deter this conduct, but in some cases temporary removal of material may be necessary. An extreme example is the case of Maninder Pal Singh Kohli who faced charges in England of rape and murder but fled to India. When in India awaiting extradition he confessed to the crimes in a TV interview. At his trial in England, Mr Kohli claimed that his confession was unreliable as it was obtained by oppression in India. The trial judge excluded the confession and it was not presented as evidence to the jury. However, a curious juror searching for information about the trial would have immediately discovered this most prejudicial material in the form of the YouTube video of his confession.[122]

2.125 The risk of jurors undertaking searches and finding such prejudicial material is likely to be low in most cases, which means the power to order temporary removal will be rarely used. However, if the law of contempt failed to legislate for such scenarios, there would be a risk that jurors could in some cases come

[117] See Chapter 3 below.

[118] See Chapter 5 below.

[119] See Chapter 3 below.

[120] See para 2.162(4) and following below.

[121] See Chapter 5 below.

[122] The video is still available: http://www.youtube.com/watch?v=rF9m_H5UkEA (last visited 1 October 2013).

across seriously prejudicial material which could bias the tribunal. Furthermore, juries must not only be impartial in fact but also must be seen to be so. This means that the law needs to prevent the risk of such partiality from occurring. It is therefore important that the law of contempt provides the power to deal with this material in those rare cases where the need arises.

Avoiding the burden of continuous monitoring

2.126 In addition, we were alert to the fact that any burden placed on publishers would need to be compatible with their article 10 rights and not impose unreasonable or disproportionate demands on their time, money and right to freedom of expression. Likewise, the public's right to be informed would need to be respected.

2.127 For this reason, we were particularly concerned about the burden of continuous monitoring of online publications which falls on publishers under the current law. This burden arises by virtue of the fact that:

(1) publication is deemed a continuing act under the current law and therefore it does not matter whether material was first published before or after proceedings became active;

(2) section 2 of the 1981 Act is effective once proceedings are active;

(3) liability for contempt under section 2 is strict, so an intention to create a substantial risk of serious prejudice is not necessary and

(4) the defence under section 3 is limited to situations where the publisher had "no knowledge or reason to suspect" that relevant proceedings are active.

The defence under section 3 may not provide adequate protection since a large media organisation may well know or have reason to suspect that proceedings are active.[123] What it may be unaware of is that, some years before, it published material on a matter which would create a substantial risk of serious prejudice to the new proceedings, though that material now resides amongst many thousands of other pages on its website which were not created in recent memory. Without continuous monitoring of its online publications, it may – given its size, the number of its staff, and the scale of its online publications – not uncover its publications from before proceedings became active. The publisher may also not make the connection between the new proceedings becoming active and its previous publications.

2.128 Accordingly, as we highlighted in the CP, there is a risk that the current law criminalises publishers:

(1) for undertaking conduct which was lawful when first undertaken (the act of publication, since if proceedings were not active at the time of first publication, this conduct would not at that time be caught by the 1981 Act);

[123] Thereby defeating any defence under s 3(1) of the 1981 Act.

(2) which gives rise to a consequence for which no intention is required (whether a substantial risk of serious prejudice is created);

(3) which occurs due to changing circumstances (new proceedings becoming active) over which the publisher had no control and

(4) where the mental element required as to circumstances is merely a reason to suspect.

2.129 That seems a somewhat unsound basis on which to attach criminal liability. It was in light of these considerations that we made our proposals in the CP in relation to amending section 2(3) of the 1981 Act. These were to clarify that "time of publication" means time of *first* publication (in effect, to reverse the decision in *Beggs*) whilst also ensuring protection for the defendant's right to an impartial tribunal by providing the court with the power, exceptionally, to make an order for temporary removal of material for the duration of a trial.

A REVISED MODEL

2.130 In light of the responses of consultees, we contemplated whether there were alternative options to our original proposals on this issue. We considered that one option could be to amend the 1981 Act to confirm the present law that section 2 applies to all publications, irrespective of whether proceedings were active at the time of first publication. However, to alleviate the burden imposed by the current law on those responsible for publications, we consider that publications first appearing before proceedings were active should be exempt from section 2 contempt unless put on formal notice by the Attorney General that the publication posed a substantial risk of serious prejudice or impediment.

2.131 **We therefore recommend clarifying section 2(3) of the 1981 Act to put on a statutory footing the present interpretation: that publication is a continuing act.[124] For the avoidance of doubt, it may also be necessary to define the meaning of "first publication" in the legislation, i.e. the time when the communication first became accessible to the public at large or any section of it.**

(1) First publication occurs when proceedings already active

2.132 Under this recommendation, the current law would largely be maintained. Section 2 of the 1981 Act would apply in its present form to cases where proceedings were active at the time of first publication.

(a) Publications during active proceedings

2.133 So, a publication which created a substantial risk of serious prejudice to active proceedings would be in contempt, provided that the proceedings were active at the time of first publication.

[124] The Law Commission is only able to recommend amendments to the law in England and Wales although *Beggs* 2002 SLT 139 is a Scottish case. However, there may be merit in reforming the law as a whole in order to provide consistency across the jurisdictions.

Eg 7. In January 2014 a major news agency publishes material in print or online that is highly prejudicial about D, being aware that D is under arrest.

2.134 In this example, proceedings might be instituted against the publisher by the Attorney General, usually in the Divisional Court. The Crown Court before which D is to be tried may make an order for removal of that publication from the news agency website for the duration of the trial using the power in section 45(4) of the Senior Courts Act 1981.

2.135 Publishers could, as they currently can, use the defence under section 3(1) of the 1981 Act if having taken all reasonable care, they had no knowledge and no reason to suspect that proceedings were active at the time of publication. To provide greater clarity in the scheme **we recommend that section 3(1) of the 1981 Act be amended to make clear that it applies only in relation to communications that were first made available to a section of the public when proceedings were already active.** This will make clear that there is no obligation to monitor continuously publications that first appeared before proceedings were active.

2.136 The exception to liability under section 4(1) of the 1981 Act – that the publication was a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith – would also apply. Likewise, the exception to liability under section 5 – that the publication was made as or as part of a discussion in good faith of public affairs or other matters of general public interest where the risk of impediment or prejudice to the particular legal proceedings was merely incidental to the discussion – would apply too.

2.137 In effect, this would maintain the form of contempt envisaged when the Contempt of Court Act was passed. It is unlikely that, in 1981, the concept of continuing publication was in legislators' minds, given that the day's newspapers were discarded the next day, or at most were relegated to the national newspaper archive at Colindale or a library. The aim of the 1981 Act at that time was to prevent prejudicial publication after a person's arrest on a particular day, so that publications on days after the arrest would be caught by section 2. It seems unlikely that it was anticipated that the 1981 Act would apply retrospectively to publications which had first occurred on days before the arrest had even happened.

(b) Online only publications first published during active proceedings

2.138 We consider that the recommendations made above can apply to the circumstances in which the publication appears only on the web.

Eg 8. In January 2014 a blogger posts material that is highly prejudicial about D knowing that D is under arrest.

2.139 The blogger, as the person directly responsible for the content of the communication, would be in contempt under section 2 in the way described in the last example.

(c) Publication during active proceedings: liability of internet intermediaries otherwise than as primary publishers

2.140 Although not the primary publisher, the internet intermediary could be responsible within section 2 for a publication that was found to contain material that posed a substantial risk of serious prejudice and could be ordered to remove that temporarily by an order under section 45(4) of the Senior Courts Act 1981.

2.141 We set out above at paragraphs 2.52 to 2.71 the circumstances in which certain internet intermediaries could be liable as publishers or distributors.

Eg 9. In January 2014 a blogger posts material that is highly prejudicial about D knowing that D is under arrest. The blogger is unidentifiable.

2.142 In this particular example, the liability of the platform provider would be as described above at paragraph 2.52 and following. There would only be liability, as under the present law, if:

(1) the communication was to a section of the public (above paragraph 2.30 and following;

(2) the court was prepared to treat the platform host as responsible as a publisher or distributor because the host:

(a) was on actual notice of the fact that proceedings were active,

(b) that the content amounted to a contempt,

(c) they had failed to disable access expeditiously and

(3) there was no defence available under the Directive or 2002 Regulations.[125]

2.143 The Directive and 2002 Regulations would mean that only certain activities performed by internet intermediaries could render them liable under section 2 of the 1981 Act. If an intermediary can be liable at all,[126] it will only be so where the intermediary has the form of knowledge or awareness prescribed by the 2002 Regulations in relation to the offending material.

2.144 There would be no conflict with article 15 of the Directive which prohibits imposing a general monitoring obligation.

2.145 For the sake of clarity, **we recommend that section 3(2) of the 1981 Act should also be amended to make clear that it applies only where the publication first appeared when proceedings were active**.

[125] The effect of these would be to provide defences to the section 2 contempt and any injunction under section 45(4) Senior Courts Act 1981 until the platform provider had had time to render the material inaccessible.

(2) First publication before active proceedings: a new contempt "defence"

2.146 As we have noted previously,[127] the web has had a profound impact on the concept of "time of publication". Today's news is, and will remain indefinitely, readily and easily available to the public as a whole in seconds through the use of any internet search engine.

2.147 In consequence, under our recommendation, publications which were first made available to a section of the public before active proceedings but which subsequently created a substantial risk of serious prejudice once proceedings had become active would still be caught by the 1981 Act. However, the law would provide an exemption for those responsible for such publications, whether as publishers or distributors. That new exemption would be available unless the person responsible for the publication (as a publisher or distributor) was put on formal notice by the Attorney General of a) the existence and location of their earlier publication; b) the fact that relevant proceedings had became active since that publication and c) the offending content of the publication. Only when put on notice would the provisions of section 2 apply.[128]

2.148 Having been put on notice – the detail of that process is explained below[129] – the person responsible for the publication would then have the option of temporarily removing the material voluntarily, if it accepted that the publication created a substantial risk of serious prejudice or impediment. If the person responsible for the publication that had been put on notice disagreed or did not wish to comply voluntarily, it would be possible for the parties to the criminal proceedings prejudiced/impeded by such a publication to apply to the court for an injunction to prevent the contempt in the usual manner. That would be an *inter partes* hearing involving the publisher or distributor accordingly. Any court order granted would amount to an order to disable access temporarily to the publication for the duration of the trial.

2.149 Where the recipient of the notice voluntarily makes the material inaccessible, it may be that the recipient will not be monitoring the trial, and thus be unaware when the proceedings are no longer active. Organisations interested in the trial, such as news organisations, would know when material could safely be reinstated, but this would not necessarily the case for (for example) a blogger or a blog host. There is thus the risk that the material might (a) be reinstated too early, or (b) never reinstated at all. The latter would have the practical effect of diminishing free speech. **We therefore recommend that the Attorney General should send a second notice once proceedings are no longer active**.

[126] We noted above that certain services provided by internet intermediaries will mean that they cannot be liable for contempt if their only responsibility for the publication lies in the provision of that service. For example, providing conduit services by which publications are transmitted.

[127] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.52.

[128] We are aware that the term "exemption" has acquired a particular meaning in some theoretical criminal law scholarship. By using the term here we are not adopting any particular theoretical meaning. We mean simply that it provides a complete defence to liability under section 2 of the Contempt of Court Act 1981.

[129] See para 2.162 below.

2.150 The 1981 Act would apply in the following way:

(1) The Act would be amended to make clear that publication is a continuing act (see our recommendation at paragraph 2.131 above). The strict liability rule would apply to a publication if the proceedings in question were not active at the time of first publication, but became active during the period of publication. In essence, it would not be necessary that proceedings were active when the communication first became available to the public or a section of it. The strict liability rule would equally apply (subject to the new exemption described below) where proceedings subsequently became active and the publication was still available to the public or a section of it.

(2) The strict liability rule would be maintained in its current form, that is "the rule of law whereby [a publisher's or distributor's] conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of" whether the publisher or distributor intended or was aware of the risk of interference with justice in the proceedings.

(3) The strict liability rule would apply only in relation to publications, and for this purpose "publication" would (as now) include any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public. That would include publications online and in new media:[130] this would include, for example, material accessible on the web.

(4) The strict liability rule (as now) would apply only to a publication which created a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced.

(5) Schedule 1 of the 1981 Act would continue to apply in determining whether proceedings had become active. In general, active proceedings would still be triggered by arrest or the issue of a warrant for arrest.

(6) However, there would be an exemption so that a person responsible for a publication could only be subject to the strict liability rule in section 2[131] of the Contempt of Court Act 1981 in relation to a publication that first appeared before proceedings were active if they had been put on formal notice by the Attorney General: a) that relevant proceedings were active; b) of the location of their relevant publication and c) that in the Attorney General's opinion, the content of the publication posed a substantial risk of serious prejudice. We discuss the requirements for formal notice below when we describe the procedure by which it would be given. In essence it would prevent anyone from having to bear the burden of any continuous monitoring obligation and allow them quickly and easily to identify material alleged to be in contempt.

[130] See para 2.29 above.

[131] There would be no exemption from intentional contempt liability at common law.

(7) The new exemption would offer far broader protection to the publisher than the defence in section 3(1). For publications during active proceedings the section 3(1) defence would be defeated by the publisher being aware, or having reason to suspect proceedings were active whether notified *by any party* in any form. In contrast, the new exemption would apply unless formal notice from the Attorney General was received by the person responsible for the publication irrespective of whether the person had acquired from other sources knowledge or reason to suspect that the proceedings were active. For that reason we recommend (above) the redrafting of section 3(1) to make clear it applies as a defence only in a case where the communication was first made available to a section of the public when proceedings were active.

(8) We acknowledge that this provides a very wide defence. Even if the person responsible has been told expressly of the existence of active proceedings they need not take any action in relation to a publication first published before active proceedings except on the receipt of formal notice from the Attorney General. That would not, of course, allow for anyone to republish *in some other form* once the proceedings were active. That would be a separate contempt caught by section 2 because the proceedings were active when that publication first appeared.

(9) We explain below what would happen if the person responsible was put on formal notice and did not act to disable access to the publication. One remedy for this situation would be for the court to use its existing power to grant an injunction to prevent the contempt by publication.[132] We discuss this in more detail at paragraph 2.171 below and following.

(10) As under the current law, a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest would not be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings was merely incidental to the discussion (again, this would be an exception to liability, not a defence, so the burden would continue to rest with the party bringing the contempt proceedings).

(11) In the case of a publication that first appeared before proceedings were active (provided the exemption was lifted by the receipt of formal notice, as above), it would be not be a bar to proceedings for contempt that the publication was a fair and accurate report of earlier legal proceedings held in public, published contemporaneously and in good faith. Section 4(1) would therefore afford a defence. This is because it may well be that it is the reports of historic proceedings which themselves give rise to the substantial risk of serious prejudice in the proceedings which have become newly active. So, for example, during earlier proceedings, a publisher may have produced an online news article describing the evidence which a jury was considering. At the time of first publication, these earlier proceedings were active and there was clearly no contempt

[132] We noted at para 2.106 above the suggestion by several consultees from the media that the present law provided adequate powers to do this.

as the publication was a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith. If, some time later,[133] that same defendant was being prosecuted in a different trial, that published report of the previous conviction could give rise to a substantial risk of serious prejudice. Such a publication would fall within the revised section 2. It would be inappropriate for the report to be subject to a defence that it was a fair and accurate report of legal proceedings because it is the very content of the report itself – the fact of the previous conviction – which could give rise to a substantial risk of serious prejudice to the new proceedings.[134] It would be protected by the exemption and liability would arise only if formal notice had been issued to the publisher by the Attorney General.

2.151 We make no recommendation in relation to section 5 of the 1981 Act. This is because we anticipate that section 5 would be available to the person responsible for a publication first communicated before proceedings are active (in the same way as when proceedings are in fact active). The public interest would be assessed at the time when the publication is alleged to pose a substantial risk of serious prejudice.

2.152 **We recommend that where the communication was first published before proceedings became active, the person responsible for such a publication should be exempt from liability under section 2 of the 1981 Act unless put on formal notice by the Attorney General of a) the existence and location of the publication which first appeared before proceedings were active; b) the fact that relevant proceedings have become active since that publication and c) the offending contents of the publication.** (As stated above, at paragraphs 2.135 and 2.145, we recommend that sections 3(1) and 3(2) of the Contempt of Court Act 1981 would not apply in cases involving a communication first published before proceedings became active.)

2.153 **We recommend that section 4(1) of the 1981 Act be amended to make clear that where a publication that first appeared before the present proceedings were active poses a substantial risk of serious prejudice to present proceedings, and the person responsible for the publication has been put on formal notice (as above), the fact that the publication constituted a fair and accurate report of earlier proceedings does not exclude liability for contempt under section 2 in relation to the present proceedings.**

2.154 The scheme will apply also in relation to any distribution of publications that were first made before proceedings are active.

2.155 The exemption would be more protective of the distributor than the defence in section 3(2). Unless formal notice from the Attorney General was received, the distributor would not be within the section 2 contempt irrespective of whether the

[133] In cases where it was known that the defendant faced a second set of proceedings, the judge could make an order under s 4(2) of the 1981 Act, but this would not be possible where the second prosecution was not anticipated at the end of the first proceedings.

[134] It may also be questionable whether the report could be regarded as published "contemporaneously" for the purposes of the second proceedings. See *Arlidge, Eady and Smith on Contempt* (4th ed 2011) at paras 4-285 to 4-293.

intermediary had acquired, from other sources, knowledge or reason to suspect that the publication first published before proceedings contained material posing a substantial risk of serious prejudice. (This is why we recommend, at paragraph 2.145 above, that section 3(2) of the 1981 Act should also be amended to make clear that it applies only where the publication first appeared when proceedings were active.)

Publications first published before proceedings active: Liability of internet intermediaries otherwise than as primary publishers

2.156 We recommend that the scheme as set out above will apply in cases in which an internet intermediary is responsible for a publication which first appears before proceedings were active. The internet intermediary would only be brought within the scope of section 2 as a publisher or distributor if put on formal notice by the Attorney General of: a) the existence and location of the earlier publication; (b) that the publication contained material that posed a substantial risk of serious prejudice and c) the offending content.

2.157 We envisage that the Attorney General would, in deciding whether to issue a formal notification to an intermediary responsible as a distributor, have regard to whether it was possible for the primary publisher to be notified directly instead. Indeed, we would expect the Attorney to target the primary publisher in the first instance, with the intermediary only notified in cases where it was impractical and impossible to notify the publisher.

Eg 10. A blog posting is discovered which had been created by an identifiable person within the jurisdiction of England and Wales. It is hosted by a platform provider with a UK presence. It was first posted on the website before D had been arrested. D is now facing trial and the post contains highly prejudicial allegations that do not form part of the case against D and will not be adduced at his trial.

2.158 We would expect the Attorney formally to notify the author of the blog as the publisher, rather than notifying the intermediary which hosts the blog, unless there was some compelling reason why this was not possible.

Eg 11. A blog posting which contains material that is highly prejudicial is discovered which had been created by an unidentifiable person. It is hosted by a platform provider with a UK presence. It was first posted on the website before D had been arrested. D is now facing trial and the post contains highly prejudicial allegations that do not form part of the case against D and will not be adduced at his trial.

2.159 The primary publisher is not readily identifiable or has no presence in the jurisdiction which would allow enforcement of the contempt. Formal notice against the intermediary may in an extreme case be necessary. In cases where the primary publisher cannot not be identified, or the publisher is based wholly outside the jurisdiction and so a court would be unwilling to make an unenforceable order, it should be possible for the courts to require that access to material be temporarily disabled through the internet intermediary. This action would only be taken where necessary to prevent a substantial risk of serious prejudice which would undermine the right to a fair trial. Again, given the

thresholds established in relation to such orders, which we explained above,[135] we consider that it would be exceptionally rare for a distributor to be required to disable access to a publication.

2.160 The process by which the Attorney General would issue a formal notice is that described above. This would prevent internet intermediaries from carrying the burden of continuous monitoring of material because liability could only arise through adequate notification.

2.161 The new exemption from liability would be more protective of the internet intermediary than the defence in section 3(2) of the 1981 Act applicable in relation to active proceedings contempts. Unless formal notice from the Attorney General was received, the intermediary would not be within the section 2 contempt irrespective of whether the intermediary had acquired, from other sources, knowledge or reason to suspect that the publication first published before proceedings contained material posing a substantial risk of serious prejudice.

The notification procedure

2.162 Under this recommendation, in any case where the publication first appeared before proceedings were active, the person responsible for publication would need to be put on formal notice by the Attorney General of the precise material that gives rise to a substantial risk of serious prejudice or impediment now that proceedings have become active. The process by which that formal notice would be given could, we recommend, be prescribed in a Criminal Procedure Rule with the following key elements:

(1) The defence or prosecution representatives in the relevant criminal proceedings[136] could identify that material which, in their opinion, gives rise to a substantial risk of serious prejudice or impediment. We understand from discussions with stakeholders that in high profile cases this searching for material is already being done by both the prosecution and the defence in anticipation of any application that the proceedings are an abuse of process on the grounds of prejudicial media coverage.

(2) The defence or prosecution would set out in writing where that material appears, for example, by providing the name of the publisher (in so far as possible), the headline and the URL. This would ensure that the relevant material can be easily located by the person responsible for the publication.

(3) The defence or prosecution would set out in writing why, in their opinion, the material gives rise to a substantial risk of serious prejudice or impediment. This is the standard section 2 test. The test relates not just to the content of the material, but also to the other factors identified (which we discuss in more detail below) such as how easily available it would be to jurors undertaking internet searches in good faith. Consideration would

[135] At para 2.95 and following above.

[136] See para 2.189 below on who should be able to apply for an order.

also need to be given as to whether jury selection might obviate the danger because jurors would be asked whether they had seen material relating to the trial. It sets a high threshold and we do not anticipate that many publications that were made before proceedings were active will satisfy this test. That factor will be obvious to practitioners and will ensure that only meritorious applications are made to the Attorney General.

(4) The defence or prosecution would also set out in writing why the material would be unlikely to be admitted in evidence at trial and thereby revealed to the jury (for example, reports of a previous conviction which is unlikely to be admitted under the bad character provisions of the Criminal Justice Act 2003).

(5) Finally, the defence or prosecution would provide the date of the trial (and other relevant hearings) and the expected duration of the trial. Information about any other relevant matters could also be included.

2.163 The requirement that the formal notice be issued by the Attorney General ensures that only meritorious notices are sent to those responsible for publications. The recipient would have to take time and resources to decide whether to disable material which, it is contended, would give rise to a substantial risk of serious prejudice or impediment or whether to contest an application at a court hearing. Those responsible for publications already assess whether they fall foul of the section 2 test when they are deciding whether to publish material when proceedings are already active. Applying this procedure and test in relation to material first published before proceedings become active has the benefit of ensuring that the considerations for publishers are the same.

2.164 In a case where it was the defence which followed this procedure, their written application would be supplied to the Attorney General's Office, the prosecution and the court. In a case where it was the prosecution which followed this procedure, their written application would be supplied to the Attorney General's Office, the defendant(s) and the court. Provided that the Attorney General was satisfied that the above requirements had been met (in particular, the high threshold of the section 2 test was satisfied and the publication adequately identified), the application would be sent to those responsible for the publication. That would constitute formal notice so that the defence for material first published before proceedings were active would be unavailable. We identified these requirements for notification in order to try to ensure that there is a filtering system, whereby only notices which meet the criteria identified above will be sent.

2.165 A new Criminal Procedure Rule or Statutory Instrument should contain provisions as to the stage of the criminal proceedings at which these various steps are to be carried out.[137] These provisions would be with a view to ensuring that the whole process, including in rare cases the application for an injunction and any appeal

[137] We note that there are currently (as of November 2013) draft regulations before Parliament which deal with actions to be taken by website operators in response to a notice of complaint relating to allegedly defamatory material. They include a schedule explicitly setting out the steps for websites to take. See the draft Defamation (Operators of Websites) Regulations 2013.

arising out of such an application, are concluded in advance of the trial. This would be to protect against a prospective juror innocently coming across prejudicial material before commencing their juror service (for instance by entering the name of the Crown Court where they are due to commence juror service into a search engine).

2.166 **We recommend that the procedure for formal notice and for an order and subsequent *inter partes* hearing be formalised through a new Criminal Procedure Rule or statutory instrument.**[138]

On receipt of formal notice

2.167 If the person responsible for the publication has been put on formal notice by the Attorney General, it will be for that person to decide what action to take in relation to the publication. He or she would have two options as follows.

(a) Voluntary compliance

2.168 They could decide temporarily to disable access to the publication so that it is no longer available to the public at large or a section of the public for the duration of the trial. In that respect the position would be similar to the present law of contempt under section 2 where the publisher/editor has to make the decision about whether to publish. The difference is in deciding whether it should be temporarily removed for the trial instead of whether it should first appear at all before the end of the trial. We envisage (and our discussions with stakeholders lead us to believe) that, in many cases, those who are put on formal notice that proceedings have become active and that they have previously published material which may give rise to a substantial risk of serious prejudice would act to disable access to that publication. Indeed, most mainstream publishers already take similar steps, for example, to ensure that there are no hypertext links connecting reports of proceedings currently before the court with material published before proceedings became active and which may be prejudicial.

2.169 As stated above (paragraph 2.149) we recommend that the Attorney General should send a second notice once proceedings are no longer active to avoid the risk that those responsible for a publication reinstate it too soon, or out of caution do not reinstate it at all because they are unaware whether the proceedings have concluded.

2.170 From our discussions with consultees since the publication of the CP, we understand that internet intermediaries will usually comply with orders of the UK courts. Indeed, most of the mainstream internet intermediaries operating in the UK have terms of service requiring compliance with local laws, and therefore will be able to act if users (who are publishers for the purposes of the law on contempt) do not comply with their terms of service. We also understand from ISPA that their members would be likely to comply with any formal notice received through official channels from the Attorney General in order to ensure

[138] We consider the procedure for the *inter partes* hearing and any subsequent order at para 2.186 above.

that material distributed by them is in compliance with local law.[139] We consider that a protocol may need to be established in order to facilitate smooth channels of communication between the Attorney General's Office, the internet intermediaries and their representative bodies.

(b) Court order of last resort: an injunction

2.171 However, in some cases, those responsible for publications may decide not to disable access to the publication. This may be because they genuinely consider that the publication will not give rise to a substantial risk of serious prejudice. For example, this may be because the material is very difficult to find on a search engine. Or they may be unwilling to disable access to the material for some other reason.

2.172 Whatever the reason, if they did not act to disable access to the relevant publication once put on notice, the prosecution or the defence (or the Attorney General) could make an application to the court trying the proceedings to which the publication relates. The application would be for an injunction ordering the temporary removal of the publication, using the existing power in section 45(4) of the Senior Courts Act 1981. Since the publication would be caught by the strict liability provisions of the 1981 Act, there would be no need for any new statutory power to be created.

2.173 We envisage that court orders against internet intermediaries in such circumstances would be exceptionally rare. They would only be likely where: the primary publisher was unidentifiable or had no presence within the jurisdiction against which contempt could be enforced; the intermediary, having been served with formal notice, chose not to comply voluntarily; and the Crown Court was satisfied to the criminal standard both that the relevant publication posed a substantial risk of serious prejudice and that the publication could be readily found by potential jurors.

2.174 The only basis on which an injunction can be granted under section 45(4) of the Senior Courts Act 1981 is if the distributor is liable under section 2 of the Contempt of Court Act 1981. Certain services provided by internet intermediaries would *not* be caught by section 2 even if the internet intermediary was on formal notice. In some instances, although on formal notice, the 2002 Regulations would still preclude liability under section 2. If there is no liability under section 2, there is no scope to issue an injunction. This would only arise in relation to internet intermediaries who were alleged to be responsible for a publication solely on the basis of their acting as mere conduits through which the material is transmitted.

2.175 Those responsible as platform providers or hosts (and others) would be caught by section 2 of the 1981 and would be subject to an injunction under section 45(4) of the Senior Courts Act 1981 provided they were on formal notice by the Attorney General in the way described above.

[139] We do not anticipate that the Attorney General would exercise his power to commit to the Divisional Court for contempt before first having sought injunctive relief (or after such relief having been sought by one of the parties, see para 2.193 and following below).

2.176 The court would have regard to all the factors as discussed at paragraph 2.179, below – whether the publication creates a substantial risk of serious prejudice, whether alternative measures would address that risk, and the compliance of any order with the ECHR.

2.177 We do not expect that in these cases injunctions would be needed in anything other than extreme circumstances, but there will be situations in which, exceptionally, such a power is essential. As with the present law, in considering whether to make an order under section 45(4), the court would need to consider whether measures short of an injunction would suffice to address the substantial risk of serious prejudice and whether the making of the injunction would be a proportionate restriction on the right to freedom of expression under article 10 of the ECHR. We consider that restrictions on when such an injunction could be made will help to ensure that this response to the problem of prejudicial media coverage is proportionate. Four particular limitations are worth emphasising and we now explain them in detail.

(1) PUBLICATION POSES A SUBSTANTIAL RISK OF SERIOUS PREJUDICE AND CAN BE READILY FOUND

2.178 Such an injunction would only be granted where the publication posed a substantial risk of serious prejudice and where it could be readily found. Whilst we would expect that only those publications which met this test would be subject to formal notice, the court would also have to be satisfied that these requirements were met before restraining the publication.

2.179 As we have noted above, Tugendhat J[140] has set out the test to be considered by the court when deciding whether to issue an injunction to prevent a contempt under section 2 (building on the principles identified by Lord Justice Schiemann in *Attorney General v MGN Ltd*[141]). In brief, the test (insofar as relevant) is as follows:

> (a) each case must be decided on its own facts;
>
> (b) the court would look at each publication separately...;
>
> (c) the publication in question must create some risk that the course of justice in the proceedings in question would be impeded or prejudiced by that publication;
>
> (d) that risk must be substantial;
>
> (e) the substantial risk must be that the course of justice in the proceedings in question would not only be impeded or prejudiced but seriously so;
>
> (f) the court would not convict [for] [or restrain a] contempt unless sure that the publication had created that substantial risk of a serious effect on the course of justice;

[140] In *Attorney General v Random House Ltd* [2010] Entertainment and Media Law Reports 9.

[141] [1997] Entertainment and Media Law Reports 284.

(g) in assessing whether the publication did create such a risk of a serious effect on the course of justice, the court would consider the following matters in particular, the likelihood of the publication coming to the attention of a potential juror, the likely impact of the publication on an ordinary reader at the time of publication, and (crucially) the residual impact of the publication on a notional juror at the time of trial;

The court would also need to consider the effectiveness of alternative measures, such as the use of jury questionnaires before each individual jury is empanelled.[142]

(h) in assessing the likelihood of the publication coming to the attention of a potential juror… ;

(i) in assessing the likely impact of the publication on an ordinary reader at the time of publication the court would consider in particular the prominence of the article in the publication and the novelty of the content of the article in the context of likely readers of that publication;

(j) in assessing the residual impact of the publication on a notional juror at the time of trial the court would consider in particular the length of time between publication and the likely date of trial, the focusing effect of listening over a prolonged period to evidence in a case, and the likely effect of the judge's directions to a jury.

2.180 The court also held that:

The standard of proof which had to be satisfied before an injunction could be granted to restrain a contempt of court was the criminal standard. …

In deciding whether an injunction should be granted, it was relevant to consider the test for making an order under [section] 4(2) of the 1981 Act,[143] and in that context the court should consider whether the risk of impediment could be overcome by less restrictive means than the granting of an injunction. No such measures were available. …

The court had also to consider whether the granting of an injunction would be proportionate as well as necessary, and to strike a fair balance between the interests of the respondent and the public interest in the fairness of the criminal trial.

[142] See para 2.184 below, where we explain this further.

[143] Section 4(2) allows the court to impose restrictions on reporting proceedings. It states that:

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.

2.181 This final matter includes considering the publisher's article 10 right to freedom of expression and the public interest in the proceedings in question and in ensuring a fair trial.[144]

2.182 Furthermore, any court, in applying the principles identified above, would need to assess how likely it is that any juror or witness would come across the publication. The court would examine how easy it would be to find the publication, for example, by using certain terms in search engines, and would be conscious of the clear directions that the jury would be under not to undertake such searches as it would be a criminal offence. The court would also need to consider alternative measures which might mitigate the risk.

(2) ONLY WHEN ALTERNATIVE MEASURES WILL NOT SUFFICE

2.183 Where a substantial risk of serious prejudice or impediment does exist, and the test above is satisfied, the court would also need to consider whether it could be mitigated by other steps. If no reasonable alternative steps could mitigate the substantial risk of serious prejudice, the court would grant the injunction. The courts, after all, have a duty to take measures to protect the defendant's right to a fair trial.

2.184 There are various alternative measures which the court would need to consider before granting such an injunction. The measures available would of course depend on the nature of the prejudicial material and the case in question. However, one obvious alternative measure which could be used in many cases would be to question jurors on selection about what publicity they are already aware of in relation to the case or any related case. Indeed, we understand that currently it is not uncommon for judges, with the agreement of the parties, to issue questionnaires about prejudicial media coverage to potential jurors in high profile cases. This will be a consideration for the court being asked to grant the injunction and in many cases it may be that the selection process could prevent actual and/or perceived bias. However, there may be cases where such selection could cure only the former in which case an injunction for temporary removal might be necessary to prevent perceived bias, where the prejudicial material is easily or readily discoverable.

2.185 This requirement and the test of substantial risk of serious prejudice will help to ensure that applications are only made in exceptional cases, because of the high threshold which must be established if the applicant is to succeed in obtaining an injunction. This thereby reduces the burden on the parties to the case, the media, and the courts.

(3) ONLY FOR A LIMITED DURATION

2.186 If a publication posed a substantial risk of serious prejudice or impediment, and alternative measures were insufficient to address the risk, any such injunction could only be made for a limited duration, covering the period until there no longer exists that substantial risk. In some cases, this period will end when the trial (or any related trial) is concluded and all the verdicts in the case(s) have been delivered. At such point, the order would cease to apply and material which

[144] See para 2.202 and following below.

had been temporarily disabled could again be made available. In other cases, the period will in fact end earlier. For example, where the information contained within the publication was unexpectedly adduced as evidence in the case, the substantial risk of serious prejudice would cease once the evidence had been adduced and therefore the order could be discharged. Again, material which had been temporarily disabled could be made available. There would never be a need for material to be removed from the web on a permanent basis. This therefore preserves the important historical and social value of online publications for the public at large in the long term.

(4) ONLY AFTER AN *INTER PARTES* HEARING

2.187 If an application were made for an injunction temporarily to remove the publication, it would be necessary to provide notice of the application to both the other parties in the criminal proceedings (namely the prosecution or defendants, depending on who was making the application) and the person who may be subject to the injunction. Again, the person responsible for the publication should be informed of precisely what material the injunction would relate to, in the same manner as the formal notice from the Attorney General, including the name of the publisher, the headline (if any) and the URL of the specific publication. The person must be given adequate notice of the application in order for legal advice to be taken if necessary. At the hearing where the application is made to the court, the publisher must be permitted to make representations. If the judge, having considered the matters we laid out above, decides to grant the injunction, then the court must again specifically identify in the terms of the order the material to be disabled (including the relevant URL). They must also be given reasonable time to comply with the injunction. We consider that enshrining this procedure in the Criminal Procedure Rules will ensure that the proper process is followed.

2.188 In addition, there should be a right of appeal for those subject to the order. We consider that the easiest mechanism for achieving this would be to extend the existing power in section 159 of the Criminal Justice Act 1988 to those cases where the Crown Court restrains a statutory contempt using its power under section 45(4) of the Senior Courts Act 1981.[145]

[145] Section 159 states:

> (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against—
>
> (a) an order under section 4 or 11 of the Contempt of Court Act 1981 made in relation to a trial on indictment;
>
> (aa) an order made by the Crown Court under section 58(7) or (8) of the Criminal Procedure and Investigations Act 1996 in a case where the Court has convicted a person on a trial on indictment;
>
> (b) any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and
>
> (c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;
>
> and the decision of the Court of Appeal shall be final.

2.189 **We recommend that a route to appeal against an order for temporary removal of a publication made under section 45(4) of the Senior Courts Act 1981 be established by the extension of section 159 of the Criminal Justice Act 1988.**

Who may apply for an injunction?

2.190 In the CP, we had proposed a new statutory temporary removal order. We asked consultees whether the consent of the Attorney General should be needed to make an application for this proposed new order. Views on the matter were divided. Fourteen consultees agreed that it should be possible for either the prosecution or defendant(s) to make such an application without first seeking the permission of the Attorney General. In addition, it was suggested by the Criminal Bar Association that it should also "be open to the Attorney General to make such an application and that the Court should also be able to act on its own motion."

2.191 Eleven consultees responded that the Attorney General's permission should be sought before the application. This was a particular concern of the media consultees who considered that without such consent they would end up defending applications without merit.

2.192 As we have explained, in light of the responses of consultees, we have revised our thinking so that our recommendation is now for a new exemption under the existing law rather than for a statutory removal order. We consider that the concerns raised by the media in respect of the need to ensure a filter for unmeritorious applications have been met by our recommendations for the procedure by which publishers or distributors are put on formal notice. In particular, providing that the formal notice procedure be undertaken by the Attorney General will ensure that there is proper consideration of the relevant law and of the articles 10 and 6 rights that are engaged. In consequence, we do not consider it necessary to vest exclusive powers to make such an application in the Attorney General. **We therefore recommend that the prosecution, the defence or the Attorney General should be able to apply for an injunction. The permission of the Attorney General should not be a prerequisite.**

Breach of the order

2.193 If the court granted an injunction requiring that access to a publication be temporarily disabled and the person responsible for the publication chose not to comply with this injunction, this would amount to a contempt of court in two ways. First, it would be a common law contempt by virtue of the breach of the order. Second, it would be a statutory contempt under the 1981 Act because the publisher would not be able to avail themselves of the formal notice defence which we have recommended. Although this contempt would technically arise as soon as the Attorney General issued a notice, as set out above,[146] we do not anticipate that the Attorney General would commit a contemnor to the Divisional

(2) Subject to Rules of Court, the jurisdiction of the Court of Appeal under this section shall be exercised by the criminal division of the Court, and references to the Court of Appeal in this section shall be construed as references to that division.

[146] See para 2.156 and following, above.

Court for contempt in these circumstances until and unless an injunction had been granted and subsequently ignored.

2.194 It would then be open to the party who made the application for the order to apply to commit the publisher for common law contempt of the Crown Court for having breached the order.[147] In addition, the Attorney General would be able to bring proceedings for common law contempt of the Crown Court[148] and for the statutory contempt in the Divisional Court.[149] In practice, we understand that currently judges of the Crown Court will usually refer cases of alleged contempt by the media to the Attorney General for consideration of whether to bring proceedings in the Divisional Court. It is very unusual for contempt proceedings against the media to be heard in the Crown Court.[150] We consider that any application by the Attorney General to the Divisional Court should take primacy over the application by one of the parties to the Crown Court proceedings. This preserves the position of the Attorney as superintendent of prosecutions and also the Attorney's role in safeguarding the public interest.[151] Therefore, **we recommend that, if the Attorney General applies to commit for statutory contempt in the Divisional Court, there should be no opportunity to bring proceedings for common law contempt in the Crown Court in relation to the same publication.**

2.195 Where the application to commit was made by one of the parties in the Crown Court, this would be done in the usual manner applicable to breach of any other injunction in the Crown Court. This form of committal is governed by Part 62 of the Criminal Procedure Rules. Section 3 of that Part deals with "contempt of court by failure to comply with court order etc." Rule 62.9 applies in the Crown Court where there is alleged to have been "any other conduct with which that court can deal as a civil contempt of court". Rule 62.9 explains how the application should be made and served on the respondent, what details the application must contain and the procedure at the hearing. There are also provisions covering the service and use of witness statements, for hearsay and for cross-examination of witnesses.[152] Any publisher or distributor found by the Crown Court to be in contempt of court could appeal against that finding to the Court of Appeal by virtue of section 13(2)(bb) of the Administration of Justice Act 1960.

2.196 Where the application was made by the Attorney General to the Divisional Court, the publisher or distributor would fall to be committed under Part 81 of the Civil Procedure Rules. Part 81 also explains how the application should be made and

[147] The Crown Court could also proceed on its own motion.

[148] On the powers of the law officers as guardians of the contempt jurisdiction, see the recent family cases *In the Matter of an application by Her Majesty's Solicitor General for the committal to prison of Jennifer Marie Jones for alleged contempt of court* [2013] EWHC 2579 (Fam) at [11]-[17] and *Bedfordshire Police Constabulary v RU and FHS* [2013] EWHC 2350 (Fam).

[149] Contempt of Court Act 1981, s 7.

[150] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 13-34: the best practice is to hear such cases in the Divisional Court.

[151] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 2-184 and following.

[152] Rule 62.11 and following.

served on the respondent, what details the application must contain, and the procedure at the hearing. Any appeal lies to the Supreme Court.[153]

2.197 The penalty for either form of contempt would be an unlimited fine and/or a maximum of two years' imprisonment, under section 14 of the 1981 Act. In the CP, we asked consultees for their views about the penalty to be applied to breach of the statutory orders which we had provisionally proposed.

2.198 Four consultees felt that the current maximum was too high, including the National Union of Journalists which responded:

> Current maximum sentence of up to 2 years imprisonment and/or an unlimited fine as well as the possibility of being ordered to pay costs, even where the serious misconduct has not constituted a contempt of court, is excessive in respect of an individual journalist. In respect of individual journalists [and companies], the sentence should reflect the seriousness of the offending conduct and the means to pay. It is not necessarily so that an individual journalist will be supported in a case by the employer, and it may well also affect freelances who would not have the support of an employer to call on anyway.

2.199 However, the majority of respondents (15) indicated that the current maximum penalty was appropriate. We consider that it is important that the courts have appropriate powers for the most serious cases. In any event, the courts would need to consider whether a particular penalty would be proportionate within the terms of article 10 of the ECHR depending on the facts of the case. We note that it is over 60 years since the courts have sent a professional journalist to prison for contempt.[154] There is also merit in ensuring that maximum penalties are standardised across the different types of contempt. Therefore, it would be inappropriate to adopt a different maximum for cases of this type of contempt. In consequence, we consider that the 2 year *maximum* sentence of imprisonment and/or an unlimited fine should apply to these forms of contempt. We therefore make **no recommendation to deviate from the current maximum penalty as specified in section 14 of the 1981 Act.**

Compliance of the scheme with EU law

2.200 As we explained above[155], article 15 of the Directive provides that:

> Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14 [mere conduits, caches and hosts], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

[153] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.58 and following.

[154] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.107.

[155] See para 2.63 above.

2.201 We are confident that our recommendations avoid the risk of any conflict with this provision.[156]

Compliance with the ECHR

Ensuring ECHR compliance level 2

2.202 It is undoubtedly true that material published on the web has an important social value and engages article 10. As the European Court of Human Rights ("ECtHR") has explained:

> In light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of internet archives is a critical aspect of this role and the court therefore considers that such archives fall within the ambit of the protection afforded by article 10.[157]

2.203 However, the ECtHR has also held, in the context of so-called archive material on the web which was allegedly libellous, that:

> archives constitute an important source for education and historical research ... . However, the margin of appreciation[158] afforded to states in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned…[159]

[156] We note that the European Commission in January 2012 announced a "horizontal initiative on notice and action procedures" as part of its action plan on e-commerce: see the Commission Communication, "A coherent framework for building trust in the Digital Single Market for e-commerce and online services" p 15, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF (last visited 1 October 2013). See also the Commission Staff Working Document, "E-commerce Action Plan 2012-2015: State of play 2013", which at p 15 indicates that the Commission is working on an impact assessment for notice and action procedures, http://ec.europa.eu/internal_market/e-commerce/docs/communications/130423_report-ecommerce-action-plan_en.pdf (last visited 1 October 2013). We understand that this work is ongoing and that there is not any indicative timetable for future action on this issue.

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

[158] The "margin of appreciation" refers to the degree of latitude allowed to member states by the ECtHR in their observance of the Convention: see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2000) para 6.42. The doctrine reflects the fact that responsibility for enforcing the Convention is shared between national authorities and the ECtHR, and that the former will often be best placed to strike the appropriate balance between the competing interests of the community and the protection of the fundamental rights of the individual: see, eg, *Handyside v United Kingdom* (1976) 1 EHRR 737 at [47] to [49]. However, the degree of latitude accorded to member states on this basis will depend on the particular issues in a given case: see, for example, *Hatton v United Kingdom* (2003) 37 EHRR 611.

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

2.204 The recent decision in *Delfi*[160] would imply that the approach taken in the current law on defamation[161] is consistent with article 10. Our recommendations reflect that approach in so far as liability is imposed on internet intermediaries. It is therefore suggested that given our proposals are in compliance with the Directive and the 2002 Regulations,[162] they are also consistent with the UK's article 10 obligations under the ECHR.

Implementation

2.205 If our recommendations are enacted through amendment of the 1981 Act, any obligations imposed by virtue of the new law are the same as or less onerous than the obligations under the present law. We therefore do not believe that any particular difficulties of implementation or need for transitional provisions arises.

THE PLACE OF PUBLICATION

2.206 The issue of place of publication was also addressed in the CP.[163] The criminal law of England and Wales is territorial,[164] although there are specific statutory exceptions to this. At common law, the courts have traditionally adopted a "terminatory" approach to criminal jurisdiction.[165] This means that an offence with transnational elements is deemed to have been committed in England and Wales if the last act necessary to constitute the offence took place here (that is, the crime was completed within this jurisdiction).[166] However, more recently, the courts have utilised a complementary "substantial part" test.[167] Under this test, an offence will be deemed to have occurred in England and Wales if a substantial part of the crime is committed within the jurisdiction and there is no reason of comity why it should not be tried here.

2.207 As we explained in the CP, the complexity of applying these principles of jurisdiction to crimes committed via the internet should not be underestimated. At its simplest, criminal content could be created in one country, saved on servers in a second country, with accessibility in both the first and second countries and numerous other third countries as well.

2.208 For the purposes of the law on contempt by publication, there is no case law explaining in what circumstances a publication will be deemed to have occurred

160 *Delfi AS v Estonia* App No 64569/09.

161 And future law under the Defamation Act 2013, s 5.

162 See para 2.63 and following, above.

163 See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.87 and following.

164 M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) pp 2-3.

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

166 See M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) p 115 and following. 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.

167 *Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418 at [57].

within the jurisdiction. The term "publication", however, is used in the statutory definitions of other criminal offences which have posed similar cross-frontier problems.[168] Unfortunately, the courts have not taken a consistent approach to the jurisdiction question in relation to those offences. In some instances it has been held that online publication was within England and Wales because the offending material was accessible here.[169] In the more recent case of *Sheppard,* which we discussed above,[170] it was held that it was sufficient that a substantial measure of the publishing activity occurred in England and Wales.[171] It is unclear which (if either) of these interpretations might apply to contempt.

2.209 In consequence, we asked consultees whether they considered that the absence of a definition of the place of publication was creating problems in practice and whether a statutory definition of the place of publication was necessary. If they thought that a statutory definition was necessary, we asked what form that definition should take. We gave three examples:

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

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

(3) whether it should 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.

2.210 In general, there was more support for a statutory definition than for maintaining the status quo, although the issue was closely balanced. Six consultees responded that either there was no need for a statutory definition, or that the lack of one was not creating problems in practice. Nine consultees responded that a statutory definition was needed or that there would be benefits in such a definition.

2.211 If a statutory definition were to be introduced, only two consultees were in favour of example 1 and only three consultees were in favour of example 2. Twelve consultees were supportive of example 3.[172] Various consultees explained that the issue is a complex one with "no easy answers"[173] but that example 3 was the definition best directed at the mischief which section 2(2) of the 1981 Act seeks to address, namely, the likelihood of the jury being exposed to material which gives rise to a substantial risk of serious prejudice.

[168] 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.

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

[170] See para 2.31 above.

[171] *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [33].

[172] The figure here is 12 even though only 9 consultees wanted a definition because some responded that, although they did not favour a definition, if one were to be adopted, example 3 would be their preference.

[173] Quotation from Richard Shillito.

2.212 Some consultees responded with suggestions of their own, rather than favouring our examples (1) to (3), or with variants to the examples. In particular, it is notable that the Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts) took the view that:

> "accessible" is the key term to be used in any definition; accessible in England and Wales even if written, created, uploaded and hosted abroad. We do not consider "accessed" [as in example 3] is sufficient.

2.213 Various consultees, including criminal justice bodies and members of the media, commented that, regardless of the definition adopted, there were a variety of practical difficulties with adopting a definition which might include persons physically located outside of the jurisdiction.

2.214 We recognise that the issue of jurisdiction in respect of cases of contempt by publication is a problematic and complex matter, although there do not appear to have yet been any contempt cases where the court has been required to confront this issue. However, the challenge presented by the cross-border nature of the internet is not limited to contempt. It is becoming an increasingly important feature of the criminal law as a whole, affecting many other offences.

2.215 In consequence, we consider that the issue of criminal jurisdiction needs more thorough treatment than can be achieved in a project focused directly on contempt of court. First, there are other areas of the criminal law where the issue is probably more pressing than for contempt. Secondly, the concept of jurisdiction should be dealt with consistently across relevant areas of the criminal law. It would be highly undesirable to develop a definition of place of publication for contempt which did not also apply to public order offences, hate crime, obscenity offences and any number of other crimes which can be committed by virtue of a publication which appears on the web. Likewise, the issue of jurisdiction can also pose problems in cases involving trans-border conduct not related to publications, for example cases of internet fraud and money-laundering.

2.216 For these reasons, **we recommend that the issues of place of publication and jurisdiction should be considered in more detail in a separate Law Commission project on social media at a future date.**

CHAPTER 3
JURORS SEEKING EXTRANEOUS INFORMATION

INTRODUCTION

3.1 Chapter 4 of the CP considered the issues surrounding contempt of court committed by jurors in two different forms – jurors seeking extraneous information about the case that they are trying, and jurors disclosing information about the case that they are trying (in circumstances other than those currently permitted by law).[1] In this chapter we consider the current law and procedure and our proposals in respect of jurors seeking information about the case that they are trying beyond the evidence adduced in court. We also examine the measures which are currently in place to inform jurors about their obligations during jury service and which are designed to prevent them from committing such contempts. In Chapter 5 we address what steps should be taken to improve these procedures.

CURRENT LAW AND PROCEDURE

3.2 We begin by examining the current law in respect of jurors who seek extraneous information about the case they are trying. Jurors who do this, in breach of the directions of the judge, may be in contempt of court. In *Attorney General v Dallas* the Lord Chief Justice explained that undertaking such research was a contempt of court because:

> The defendant [Dallas] knew perfectly well, first, that the judge had directed her, and the other members of the jury, in unequivocal terms, that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it. This was because she had sought to arm and had armed herself with information of possible relevance to the trial which, although not adduced in evidence, might have played its part in her verdict. The moment when she disclosed any of that information to her fellow jurors she further prejudiced the administration of justice. In the result, the jury was rightly discharged from returning a verdict and a new trial was ordered. The unfortunate complainant had to give evidence of his ordeal on a second occasion. The time of the other members of the jury was wasted, and the public was put to additional unnecessary expense. The damage to the administration of justice is obvious.[2]

[1] There are of course other ways that a juror could commit a contempt: see Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.1.

[2] *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [38], by Lord Judge CJ.

3.3 Since we published the CP, further cases of contempt have been brought against jurors. In *Attorney General v Davey* and *Attorney General v Beard*,[3] the court was concerned with two different types of misconduct committed by jurors.

3.4 Beard's case concerned an allegation that he had undertaken research via the internet into the case that he was trying by typing the defendants' names into a search engine. The case against Davey was that, having been empanelled as a juror on a different trial involving an allegation of sexual activity with a child, he had posted an update on Facebook about the case. The update stated "Woooow I wasn't expecting to be in a jury Deciding a paedophile's fate, I've always wanted to Fuck up a paedophile & now I'm within the law!"[4]

3.5 In respect of both cases, the court explained the law as follows:

> First the Attorney General must prove to the criminal standard of proof that the respondent had committed an act or omission calculated to interfere with or prejudice the due administration of justice; conduct is calculated to interfere with or prejudice the due administration of justice if there is a real risk, as opposed to a remote possibility, that interference or prejudice would result…
>
> Second an intent to interfere with or prejudice the administration of justice must also be proved….
>
> More recently in *Attorney General v Dallas* [2012] 1 WLR 991, a case where a juror had conducted her own research on the internet, Lord Judge CJ set out at paragraph 38 four elements which would ordinarily establish the two elements of contempt in cases where there had been deliberate disobedience to a judge's direction or order.
>
> i) The juror knew that the judge had directed that the jury should not do a certain act.
>
> ii) The juror appreciated that that was an order.
>
> iii) The juror deliberately disobeyed the order.
>
> iv) By doing so the juror risked prejudicing the due administration of justice.[5]

3.6 Both Davey and Beard were found to be in contempt.

3 [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment).

4 *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [6]. Posting such material on Facebook would not fall within the scope of section 8 since there had been no disclosure of the jury deliberations (indeed, no deliberations had yet occurred).

5 *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [2] to [4].

3.7 The present procedure for dealing with jurors in contempt involves proceedings being brought by or with the consent of the Attorney General or by the court proceeding on its own motion.[6] The current procedure falls under the Civil Procedure Rules Part 81 and will normally be brought by the Attorney before the Divisional Court's summary jurisdiction. In consequence, the civil rules of evidence apply, although the defendant is entitled to the enhanced fair trial provisions of article 6(2) and 6(3).[7] It is unclear whether legal aid is available[8] and whether the protections of the Bail Act 1976 apply.[9] The only avenue of appeal is to the Supreme Court.[10]

3.8 In the CP we explained that a variety of measures exist to try to prevent jurors from committing acts of misconduct during their jury service.[11] Prior to commencing jury service, jurors receive a booklet entitled *Your Guide to Jury Service*, which is sent with their jury summons.[12] This contains warnings about not discussing the case with other people outside the jury and about alerting the judge to issues of concern. Similar warnings, and explanations about not undertaking research about the case, are given in the DVD which is shown on arrival at court on the first day of service,[13] in the speech given by jury managers following the DVD, and in directions from the judge in court once the jurors are empanelled. The Crown Court Bench Book and Companion Bench Book provide information about what judges should say to jurors about this at the start of the trial, and the supplement to the Bench Book provides a suggested form of words.[14]

3.9 In addition, jurors empanelled for trial take an oath, aloud, in front of their fellow jurors, the judge, advocates and defendant(s) where they swear or affirm to "faithfully try the defendant and give a true verdict according to the evidence".[15]

3.10 In court and during deliberations, steps are usually taken to restrict jurors' use of personal electronic devices capable of accessing the internet. However, different court centres appear to operate different systems in respect of jurors' internet-

[6] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 11-361.

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

[8] "Criminal proceedings" for which legal aid is available are defined under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This definition covers only contempts committed in the face of the court (s 14(g)), and although "other proceedings… may be prescribed", other types of contempts do not appear to have been so prescribed.

[9] It depends on whether contempt proceedings are "proceedings for an offence" under s 1(1) of the Act. If the Act does not apply, the common law of bail may do so, but the lack of legal clarity here could give rise to a breach of article 5. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.67.

[10] Administration of Justice Act 1960, s 13.

[11] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.77 and following.

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

[13] *Your Role as a Juror*, Ministry of Justice, http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu (last visited 1 October 2013).

[14] *Crown Court Bench Book – Directing the Jury* (2010) p 9; *Crown Court Bench Book – First Supplement* (2010) p10. See also *Crown Court Bench Book Companion* (2011) pp 1 to 2.

[15] Criminal Practice Directions, issued 7 October 2013, 39E.3.

enabled devices.[16] In some court centres, jurors are permitted to keep such items with them in the jury assembly area, but the devices must be switched off in court, and are removed when jurors are deliberating in the jury room. In other court centres, jurors' internet-enabled devices are removed from them for the whole time that they are at court, whilst in yet other court centres, jurors have been able to keep their internet-enabled devices at all times, including during deliberations.[17]

3.11 Despite the measures we have identified in this brief summary there is, as we explain below in more detail,[18] still concern that jurors may not understand what they are prohibited from doing, or may be unable or unwilling to abide by the restrictions imposed on them. In consequence, in the CP we proposed a variety of preventative measures designed to assist jurors to understand their obligations and to discourage juror misconduct. We discuss those proposals and our recommendations for reform in Chapter 5.

PROBLEMS WITH THE CURRENT LAW AND PROCEDURE

3.12 There are a number of difficulties with the current law and procedure for dealing with jurors who seek extraneous information about the case that they are trying, which we considered would be remedied by introducing a new statutory offence.

Consistency across courts

3.13 As we explained in the CP,[19] the principal reason for reform would be to provide clarity and consistency in the law. According to *Dallas*, the relevant conduct is treated as contempt because it is a breach of the order made by the judge at the start of the trial instructing jurors not to undertake research into the case that they are trying.[20] However, although currently there is guidance for judges on this (for example, in the Crown Court Bench Book and in the Companion to the Bench Book[21]), there is no specific form of words that judges must use. Accordingly, the scope of the criminal contempt that could be prosecuted depends on the exact wording that each judge adopts in warning the jurors at the start of the trial. In consequence, the scope of the contempt varies from court to court and from case to case.

3.14 This, for reasons of principle, seems an unsatisfactory state of affairs. Furthermore, this is unsatisfactory in practice because if an allegation of juror contempt is prosecuted, this situation requires the Divisional Court to enquire into

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

[17] As apparently occurred in *Barrett* [2007] EWCA Crim 1277 and *W* [2007] EWCA Crim 1781.

[18] See para 3.26 below and following.

[19] Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.38.

[20] Although the judgment in *Beard* and *Davey* arguably implies that it is both breach of the order and a common law contempt, that is, conduct specifically intended to interfere with the administration of justice. See *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [2] to [4].

[21] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.12 and following.

what the judge said to the alleged contemnor (the person said to have committed contempt) in every contempt trial. As we explained in the CP, the precise scope of a statutory offence has been laid out in jurisdictions abroad, particularly in Australia, and we are confident that something similar could be replicated here.[22]

3.15 In an attempt to address the issue of inconsistency, the recent judgment in *Beard* and *Davey* noted that:

> every attempt is made to try and warn jurors not to use the internet or social networking sites for any purpose in relation to the case. However, as is also clear, the language used is not consistent giving room for argument of the type advanced before us as to what a juror might understand was prohibited.
>
> Many judges have adopted the practice not only of warning the jury in terms similar to what the judges in these two cases did, but also handing the jury a notice setting out what they must and must not do and the penal consequences of any breach. They have done this so that no juror can subsequently claim that he or she did not understand what they should not do and what the consequences might be.…
>
> We propose to invite the Criminal Procedure Rule Committee in consultation with the Judicial College to review the terminology used in the material given to the jury and to consider whether to recommend that the practice to which we have referred … [handing out written notices] should be universally followed.[23]

3.16 Whilst this may go some way to providing consistency in the directions given to jurors across different courts, it does not address all of the concerns about the use of the contempt jurisdiction in this manner. We turn now to consider these additional concerns.

Clarity for jurors

3.17 A further problem with the present law is that the prohibition on searching for extraneous material is explained to jurors as forbidden because it is "a contempt of court". What is less clear, however, is whether it is explained what a contempt of court is and what the penalties for committing one are. We doubt whether, from the point of view of a layperson, it is obvious what "a contempt" is or what the implications of this are. We consider that the message would be clearer for jurors if they could be told that such conduct is a crime – a matter which is likely to have more resonance for those who may have limited understanding of legal terminology.

[22] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.36.

[23] *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [58] to [61].

3.18 To some extent, the provision of written notices to jurors – as recommended in *Davey and Beard*[24] – could serve to increase their understanding of what is and is not prohibited. However, additional concerns as to the approach of the courts to these cases of juror contempt have been raised (which we discuss below in detail).[25] In particular, these include questions about: (a) whether it would be better for the offence to be the creation of Parliament rather than of the courts; (b) whether the current procedure for trying this type of contempt protects the rights under article 5 and 6 of the European Convention on Human Rights ("ECHR") of the juror who is alleged to have committed the contempt; and (c) the impact that the current use of a judge's order has on efforts to build rapport with the jury.

The source of the offence

3.19 As noted above,[26] there is some doubt whether extraneous research by jurors is a contempt by its own nature, or only because it is a breach of the directions given by the judge at the beginning of the trial. This is a further source of confusion for jurors and others. Further, as a matter of constitutional principle it is generally preferable for an offence to be the creation of Parliament rather than of the courts, not least because of the role of Parliamentary scrutiny in introducing a new statutory offence. Still less should criminal liability be in effect the creation of each individual judge in the Crown Court. Undoubtedly, the courts must have the power to make orders which need to be tailored to the particular facts of the case before them. Sanctions must also be available to punish breaching such orders so that the authority of the courts is upheld. However, when the order to be introduced is a standard one, as proposed in *Beard and Davey*, applicable to all jurors in all cases in all courts across the country, this in effect creates a new criminal offence in all but name. It is not appropriate for the Divisional Court, or the Judicial College, to create new crimes any more than it is for individual trial judges.

3.20 We consider that providing consistency in the prohibitions on juror misconduct, with the subsequent sanction for breach, is best done by legislation rather than by standardised court orders. The creation of criminal offences by statute allows the terms of the offence to be debated in Parliament. It allows the legislature to set down with clarity the elements of the offence, and to debate publicly the mischief which the offence seeks to address. The Parliamentary process and the fact that the offence has been enshrined in statute adds to the legitimacy of any offence created and the sanction which committing the offence attracts.

Procedure

3.21 In addition, there are procedural benefits in prosecuting this conduct as an ordinary crime. As we explained in the CP,[27] the current use of the civil procedure in the Divisional Court to bring proceedings for this type of contempt may raise concerns about compatibility with articles 5 and 6 of the ECHR. Some

[24] See para 3.15 above.

[25] See para 3.19 and following below.

[26] At para 3.13 and fn 20.

[27] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.67 and following.

stakeholders have raised concerns that the current procedure does not allow the defendant to know the case against which they must defend themselves adequately, because there is no charge sheet or indictment.

3.22 There are also concerns about whether the disclosure procedure under civil law is appropriate to deal with what is, for article 6 purposes, a criminal penalty carrying a potential prison sentence. Additionally, there may be concerns that, where the trial judge needs to question a juror in order to decide whether to discharge the juror or jury, the juror should be entitled to exercise the privilege against self-incrimination, and/or take legal advice before answering the judge's questions.[28] Finally, it is not clear that the protections of the Bail Act 1976 apply to contempt proceedings before the Divisional Court, which may have implications for a defendant's right to liberty under article 5.

3.23 Aside from the concerns about ECHR compatibility, it is hard to see the justification for adopting a procedure for these forms of juror misconduct which is different from that used for other forms of similar criminal behaviour. In consequence, in the CP we considered that there may be merit in reforming the law in order to ensure that jurors accused of searching for extraneous information would be tried on indictment. The introduction of a statutory criminal offence would be the easiest way of achieving these procedural changes.

Judges' rapport with juries

3.24 A final problem with the current situation is that it puts judges in a difficult position at the start of a trial. As we have seen, the determination of whether a juror has committed a contempt of this kind depends on the precise form of words used by the judge in directing the jury. It is unusual to characterise a judicial direction to the jury such as this as a "court order". The consequence of doing so is that this places a significant burden on trial judges to set out in full the precise boundaries of legitimate juror conduct in their opening words to the jury.

3.25 Judges with whom we have met explain that their main focus on empanelling a jury is attempting to develop a rapport with the new jurors. Many judges are aware that the early moments when a jury is empanelled can be crucial to establishing the relationship between them and the court. In our discussions with judges, it has become apparent that attempting to establish that rapport does not sit easily with judges issuing "orders" about what jurors can and cannot do, and threatening to imprison them for breaching the order. The introduction of a statutory criminal offence would help judges avoid these conflicting tensions. Instead of having to issue an order to jurors, with sanctions of imprisonment, judges will be able to explain that it is Parliament that has made this conduct criminal. The process by which the information about the offence might be provided most effectively to jurors is dealt with at paragraph 5.17 and following below.

[28] Although the privilege against self-incrimination applies in both civil and criminal cases, the use of the criminal procedure at trial would allow a defendant to use s 78 of the Police and Criminal Evidence Act 1984 to exclude evidence obtained in breach of the privilege.

PREVALENCE

3.26 In the CP we discussed the problem of jurors seeking information from outside the courtroom about the case that they are trying in a broader context. We explained that jurors who engage in such conduct may act from a variety of motives.[29] We also argued that this problem may be greater today in light of the influence of the internet on modern life. In the pre-internet age, jurors who sought to undertake research would have to take a more active role, such as travelling to the crime scene with the risk of being observed doing so. Now, the information is easier to find and the risk of being caught is low as jurors can undertake most research from the comfort of their own PCs, laptops, tablets or smart phones at home or elsewhere.[30]

3.27 Evidence as to the prevalence of this problem is very limited but two valuable studies in England and Wales have examined this issue.[31]

3.28 In 2010 Professor Cheryl Thomas found that in "high-profile cases" 12% of jurors surveyed admitted that they had looked for information on the internet about the case they were trying while it was underway. In standard (non-high-profile) cases, 5% admitted doing so.[32] Professor Thomas explained in her report that "standard cases" were "those lasting less than two weeks with little media coverage" whilst "high profile cases" were "those lasting two weeks or more with substantial pre-trial and in-trial media coverage".[33]

3.29 Since we published our CP, Professor Thomas has undertaken further research looking at this issue. This found that 23% of jurors questioned were "confused about the rule on internet use";[34] 62% of jurors questioned had not heard of recent prosecutions of jurors for misconduct[35] and up to 7% of jurors admitted to having used the internet to look for information which may be prohibited.[36] For

[29] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.21 and following.

[30] See, for example, *R v Thakrar* [2008] EWCA Crim 2359, [2009] Criminal Law Review 357. In some cases however, jurors seek to share the information with other members of the jury.

[31] Other research has been undertaken overseas: see Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 4.24 to 4.26.

[32] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43. It was also found that 26% of jurors in high profile cases and 13% in non-high profile cases admitted that "they *saw* media reports of their case on the internet during the trial". This finding may suggest that some jurors were reluctant to admit having actively looked for such reports. However, it may also suggest that some jurors had read their regular newspapers on the internet and come across reports of their trial, without having actively undertaken searches for such information.

[33] *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 40 to 41.

[34] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 488.

[35] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 490. The prosecutions to which Professor Thomas refers include *Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991, *Frail* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 and *Pardon* [2012] EWHC 3402 (Admin).

[36] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 491.

example, 7% admitted to looking for information about the legal teams in their trial, whilst 6% admitted to looking for definitions of legal terms.[37]

3.30 In addition, the latest research revealed that despite attempts to bring to jurors' attention the fact of the prosecutions in *Dallas* and *Fraill*:

> Just over a third of serving jurors (38 per cent) were aware of recent prosecutions of jurors and just under two third of jurors (62 per cent) were not aware of the cases.[38]

3.31 These figures suggest that there are still grounds for concern about the conduct of some jurors and also about whether the message to jurors not to undertake research is being delivered with sufficient clarity. This is so despite attempts through the wording of the Crown Court Bench Book, the Companion Bench Book and the Judicial College training judges to warn jurors appropriately and refer them to the facts of *Dallas*.

3.32 As we explained in the CP, the Criminal Case Review Commission ("CCRC") also provided us with anonymous data about cases in which the Court of Appeal has directed the Commission to investigate potential juror misconduct. This data indicates that there has been an increase in the number of directions which concern such allegations. Between 1998 and 2005, the CCRC recorded four directions involving such allegations. Yet, from 2006 until mid-2012, the CCRC has been involved in at least 27 directions concerning such allegations. These included allegations about jurors' use of mobile phones in court; jurors' inappropriate access to certain information about the case and jurors' inappropriate contact with someone connected to the case.

3.33 Empirical studies with jurors have limitations because they often rely on self-reporting behaviour which the jurors have been repeatedly told is prohibited. Professor Thomas suggests that the results of her 2010 research are likely to show the "minimum numbers of jurors" who look for information about their case, given that others may not have admitted to such conduct if they realised that it was prohibited.[39] By the same token, the cases which result in juries being discharged or which reach the Court of Appeal, or are referred to the CCRC, are only those where the juror's behaviour has come to light. We simply do not know how many jurors engage in this behaviour and go undiscovered.[40]

THE PROPOSALS IN THE CONSULTATION PAPER

3.34 As we explained in the CP, jurors seeking information which goes beyond the evidence heard in court is problematic because it evidently has implications for a

[37] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 491.

[38] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 490.

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

[40] G Daly and I Edwards, "Jurors Online" (2009) 173 *Criminal Law and Justice Weekly* 261, 261.

defendant's right to a fair trial.[41] Article 6 of the ECHR requires a trial before an independent and impartial tribunal, which should neither be biased nor appear biased.[42] That requirement may be violated if a juror obtains material prejudicial to one of the parties in the case. Furthermore, article 6 includes an "implied" right to cross-examine witnesses,[43] and a requirement that the court "inform the parties of the evidence taken into account" in reaching its decision, therefore allowing the parties an opportunity to make submissions on the case.[44] In addition, the parties have a right to know the basis on which the jury reached its decision.[45] In the absence of the jury giving a reasoned verdict, the evidence before the court and the judge's summing up become the public record on which the jury must be assumed to have based its decision.[46] Any or all of these requirements may be violated where a juror – without the parties and the judge knowing – obtains material about the case beyond the evidence presented in court.

3.35 Whilst in principle jurors undertaking research into the case that they are trying is problematic because of the implications for a fair trial, there are also practical considerations. In a case where the jury has been empanelled and it is subsequently discovered that a juror has undertaken prohibited research, it is likely that the juror and quite possibly the whole jury will have to be discharged. This means that a new jury will have to be empanelled, which may lead to the proceedings being adjourned for retrial at a later date. That delay has obvious consequences for the defendant and the complainant who are awaiting the outcome of the proceedings (particularly so for a defendant who is remanded in custody pending trial). Such delay can also erode the quality of the evidence eventually heard, as witnesses' memories fade over time. There is also the financial cost to consider. Every day which has been lost to the aborted proceedings leads to substantial costs to the public purse for the court building, the court staff, the judge, and the lawyers in the proceedings.

3.36 The law of contempt by publication, as we have explained in the second chapter of this report, goes some way to prevent the risk of jurors being exposed to extraneous prejudicial material. However, there is a limit to how far restrictions on the media can legitimately address a problem such as this. There also needs to be clear restrictions on jurors' conduct. In the CP we therefore proposed a further

[41] Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.29 and following. See also J Brannan, "Crime and social networking sites" (2013) 1 *Juridical Review* 41, 49 to 50.

[42] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 11.146 and following. See also *Pouladian-Kari* [2013] EWCA Crim 158, [2013] Criminal Law Review 510.

[43] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 11.179.

[44] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 11.180.

[45] S Grey, "The World Wide Web: Life Blood for the Public or Poison for the Jury?" (2011) 3(2) *Journal of Media Law* 199, 199; N Haralambous, "Juries and Extraneous Material: A Question of Integrity" (2007) 71 *Journal of Criminal Law* 520, 524; A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) p 41, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Oct 2013).

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

legal response, namely the creation of a specific criminal offence of seeking information related to the case that the juror is trying.

3.37 This new offence would help to remedy the problems with the current law and procedure which we identified above. Nonetheless, we also highlighted in the CP that there may be concerns that creating such an offence would make jurors more reluctant to admit their misconduct and their fellow jurors more reluctant to report concerns, which would actively work against uncovering cases of miscarriages of justice. Some have also argued that the existence of an offence such as this in other jurisdictions, particularly in Australia, has not deterred jurors from undertaking their own research.[47] We address these criticisms below.[48]

3.38 With regard to the procedure for dealing with any new offence, we considered in the CP that there would be merit in reforming the law in order to ensure that jurors accused of searching for information would be tried on indictment. One of the advantages of trying such matters on indictment would be that the existing, well-established and familiar rules of evidence and procedure would apply as a matter of course. This would ensure protection of the alleged contemnor's human rights.

3.39 However, in the CP we also raised concerns that trial by jury may not be the most appropriate mechanism for dealing with misconduct by other jurors. Jurors may be unwilling to convict the defendant for an offence arising out of conduct he or she engaged in while serving on a jury. We considered an alternative proposal to deal with this concern, which would be to adopt a trial process incorporating the protections inherent to trial on indictment (including the criminal rules of evidence and procedure), but presided over by a judge alone in a trial "as if on indictment".[49]

3.40 In the CP, we asked consultees whether they considered that, if our proposed new offence were adopted, it should be triable only on indictment with a jury or whether it should be tried as if on indictment by a judge sitting alone. We also asked whether, if the latter, it should be a specific level of judge in all cases or whether the trial judge should be allocated by the presiding judge on a case-by-case basis. In relation to sentencing for any new offence, we asked consultees whether the current maximum sentence within section 14 of the Contempt of Court Act 1981 (an unlimited fine and/or two years' imprisonment) would be appropriate and, if not, what the sentencing powers should be. We also asked whether community penalties should be available for any new juror offence.

3.41 If consultees disagreed with the proposal to introduce a statutory offence of research by jurors, we asked whether the summary contempt jurisdiction used in *Dallas* (and *Beard and Davey*) should continue to be used, but with trial by judge alone (instead of before the two-judge Divisional Court). If so, we asked how this

[47] See Consultation Paper 4: Jury Directions (2008) New South Wales Law Reform Commission Consultation Paper, para 5.34. This can be found at: http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/cp04.pdf (last visited 25 November 2013).

[48] See para 3.61 below.

form of contempt could be defined with sufficient precision and how the procedure could be amended to ensure that the alleged contemnor's rights would be better protected in any committal for contempt.

THE RESPONSE OF CONSULTEES

3.42 We examine here the consultation responses to our proposals. Consultees agreed with our assessment that there was a real problem of juror misconduct of this type. The CCRC explained that in the investigations it has undertaken around 50% concerned "alleged inappropriate contact with, or prior knowledge of, a defendant, his/her family, witness etc" whilst another 20% accounted for "Internet/mobile telephone use". Yet, only one of these cases involving the internet (of those decided thus far) had resulted in the conviction being quashed with five of the cases involving inappropriate contact having the same outcome.

3.43 More consultees who responded to our question on the new offence were in favour of this proposal than were against it. Many representatives of the media were in favour of the offence, not least because they preferred it as an alternative to the temporary removal power we proposed.[50] Many also argued that the juror offence was desirable on the basis that policing the jury rather than the media provided a more effective response to the problem. If the 12 jurors in any case were bound by the prohibition on searching for extraneous material that would provide a more proportionate response to the danger of jurors being exposed to such material than placing further limits on media publication.

3.44 Nonetheless, some members of the media had concerns about how the offence might affect them and wanted reassurance that they would not be deemed complicit if the juror obtained the prohibited information from media publications.[51]

3.45 The Equalities and Human Rights Commission supported the proposal, arguing that it would "improve compliance with ECHR rights." The Association of Chief Police Officers, the London Criminal Courts Solicitors' Association, the Criminal Bar Association, the Law Society and twelve other consultees were also in favour of the introduction of a statutory offence.

3.46 One of those twelve responses came from the Senior Judiciary, whose views were presented by Lord Justice Treacy and Mr Justice Tugendhat. They argued that there was "a good case" for the introduction of a statutory offence:

> Firstly, it would be consistent with statutory or common law offences which criminalise other forms of misconduct by jurors. Secondly, it would recognise the acknowledged fact that improper accessing of

[49] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.70 and following.

[50] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.79. However, note that we are now recommending an alternate measure, see Chapter 2.

[51] See our suggested definition at para 3.99 below. On the basis of this suggestion, there is no risk that the media would be deemed complicit in any such misconduct by a juror.

information may be as harmful to the integrity of the trial as other forms of misconduct. Thirdly, it would avoid the potential uncertainty which could arise under the present system where judges' instructions to a jury may take different forms and which run the risk of being misconstrued by jurors as something less than a mandatory court order.

… we consider that additional clarity may help to prevent or reduce offending. Whilst we recognise the argument that fellow jurors might be more reluctant to report a breach of which they had become aware, we think this is outweighed by the benefits of clarity. Moreover, if no statutory offence relating to the seeking of information were to be enacted, so that the matter continued to be dealt with as a contempt of court, the inevitable move towards giving jurors fuller information about what is prohibited and the potential criminal penalties for breach are likely to have a similar effect in any event.

3.47 Another of the positive responses came from Professors Fenwick and Phillipson. They argued that Parliamentary scrutiny of the offence would enhance "the actual and perceived legitimacy of the power to punish jurors".

3.48 Of those against the introduction of a new specific offence, concerns were raised by the Law Reform Committee of the Bar Council that given the existing contempt jurisdiction this was an example of "a further proliferation of unnecessary criminal legislation".

3.49 It was also argued by some consultees that the new offence would not have a deterrent effect and that it would discourage disclosure by jurors of their own or others' misconduct.[52] In relation to this last point, the CCRC explained that, at present, jurors do not report misconduct by fellow jurors because they did not want "to get the other juror into trouble, so this is a risk whether or not there is an offence of contempt or a specific offence". In consequence, "on balance", the CCRC was in favour of our proposal, given the benefits of clarity and underlining the seriousness of the behaviour.

3.50 The Coroners' Society, the Council of Circuit Judges, the CPS and five other consultees were not in favour of the new offence. However, since these responses were received we have had informal discussions with the CPS to clarify the nature of their objections and seek to meet their concerns. They have subsequently recognised "that the benefits of having such juror conduct caught by a specific statutory offence (with all the safeguards that would offer) outweigh the earlier misgiving [they] had about the introduction of such an offence". We have also had similar discussions with the Council of Circuit Judges.

3.51 In response to our questions about the procedure and penalties for the new offence in the CP, 11 responses favoured trial on indictment with a jury, whilst seven were against this mode of trial. This included various members of the

[52] See also JR Spencer, "The Law Commission's consultation paper on contempt of court" [2013] *Criminal Law Review* 1, 2.

media, the London Criminal Courts Solicitors' Association and the Chancery Bar Association.

3.52 Views were split on whether trial "as if on indictment" by judge alone (and no jury) should be used for any new statutory offence. Thirteen responses were against the idea whilst eight were in favour.

3.53 Two responses explained that if the new offence were to be tried by judge alone, the trial judge should be allocated by the presiding judge for the Circuit on a case-by-case basis. Three consultees explained that there should be a specific or minimum level of judge responsible for the trial. Another consultee again explained that:

> There is no reason why such cases should not be tried by Circuit Judges, though the presiding judge should have the discretion to allocate the case to a more senior judge where appropriate.[53]

3.54 Whilst opinion was divided in respect of the procedure for trying the new offence, more consultees appeared to be in favour of trial on indictment with a jury than either trial in the Divisional Court (as with juror contempts currently) or the option of trial "as if on indictment" by judge alone.

3.55 In the CP, we raised the option of trial "as if on indictment" by judge alone because of possible concerns that, if trial by jury were adopted, jurors could be unwilling to convict other jurors of this offence. We acknowledge that such fear was speculative and have been reassured by the expert views of the CCRC, Criminal Bar Association, the CPS and some of the senior judges (including Lord Justice Treacy and Mr Justice Tugendhat), who did not share this concern. Indeed, Lord Justice Treacy and Mr Justice Tugendhat, in their response on behalf of those senior judges commented that,

> If a statutory offence of intentionally seeking information were enacted, it would be appropriately triable only on indictment. We see no reason to breach the general principle of trial by jury in this instance. The trial process itself should acquaint jurors with the extent of the prohibited conduct and the rationale for it and they should be trusted to try the matter just as they would any other serious case. We do not consider that there is any warrant for trial by judge sitting alone.

3.56 With respect to sentencing for the new offence of intentionally seeking information related to the case that the juror is trying, there was general agreement on consultation that the current maximum sentence under section 14 would be acceptable (up to two years' imprisonment and/or an unlimited fine) and that community penalties and disposals should be available to the sentencing court. Eighteen consultees favoured adopting the existing maximum sentence, whilst two found the current penalty "excessive". Seventeen responses supported the introduction of community penalties, whilst only one was against this.

[53] Quote from the response of the Chancery Bar Association.

DISCUSSION

3.57 In light of the views of consultees, we consider that the benefits of introducing a new offence outweigh any disadvantages. As we have explained, the current law and procedure is problematic because of the lack of clarity for jurors and the lack of consistency across courts. Any statutory offence would be consistent across courts and would clarify the law. The scope of the offence would not turn on the form of words that a judge happened to adopt when directing the jury in a given case. The legitimacy of criminalising the conduct would also be increased by subjecting the new offence to Parliamentary scrutiny.

3.58 There are also obvious investigative and procedural benefits for the alleged contemnor in having the usual criminal process apply, including applying the rights and powers under the Police and Criminal Evidence Act 1984, the Bail Act 1976, the usual criminal rules of evidence and procedure, criminal disclosure obligations on the prosecution and the application of the criminal legal aid regime. Appeals against convictions would be heard in the Court of Appeal (Criminal Division). The use of the normal process applicable for criminal offences would make the procedure for prosecuting such misconduct fairer, and less likely to be challenged on the basis of incompatibility with the ECHR.

3.59 Solutions short of the creation of a new statutory criminal offence – such as the standardisation of court orders as suggested in *Beard and Davey* – will only go some way to remedying the problems with the current law. We consider that it is only by introducing a new criminal offence that all of the problematic aspects of the current law and procedure can be addressed.

3.60 Whilst the majority of consultees were supportive of a new offence, some had concerns in relation to whether such an offence would have a deterrent effect, whether this would mean that offences were being duplicated, whether jurors would be willing to report misconduct by other jurors and whether jurors would be willing to convict other jurors of the new offence. We deal now with each of those concerns.

The deterrent effect

3.61 As we have seen, concern has been expressed by some consultees that a new statutory offence may not have a deterrent effect.[54] We noted above[55] that some have argued that the existence of an offence such as this in other jurisdictions, particularly in Australia, has not deterred jurors from engaging in prohibited research.[56]

[54] See para 3.49 and footnote 53 above.

[55] At para 3.37.

[56] See Consultation Paper 4: Jury Directions (2008) New South Wales Law Reform Commission Consultation Paper, para 5.34. See also J Hunter, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* (UNSW Jury Study, 2013) in which Hunter concludes that there should be a review of the juror research offence in New South Wales to determine whether the goals of criminalising juror misconduct can be better achieved by other means. It is of note, however, that in Hunter's study of 20 criminal juries in New South Wales fewer than half were directed by the trial judge as to the existence of the offence. Contrast our recommendations in Chapter 5.

3.62 Since the publication of the CP, we have undertaken further research into this issue. Australia has enacted juror research offences in Queensland, New South Wales and Victoria. New South Wales has brought no prosecutions under their legislation since it was enacted in 2004.[57] In Queensland, there have also been no prosecutions for the offence.[58] In Victoria, there has been only one prosecution of illegitimate juror research by the Office of Public Prosecutions.[59] It is also possible for the police to prosecute this offence in Victoria, but the Office of Public Prosecutions was only aware of one police prosecution of this offence. Non-enforcement will almost certainly have an impact on the ability of a criminal offence to deter.[60]

3.63 While there has been some research into the new offences, there does not appear to be any which conclusively points to their effectiveness. This would require a comparison to the rates of juror misconduct prior to the introduction of the offences. However, it is difficult to determine the prevalence of juror misconduct pre- and post- criminalisation in the same jurisdiction in light of the increasing use of the internet, which has dramatically changed the opportunities for jurors to undertake research. It is therefore very difficult to determine the deterrent effect of the legislation. It may be that many jurors who would otherwise have been tempted to seek extraneous material are now deterred by the knowledge that such behaviour has been criminalised and that the post-legislative instances reported relate to a small minority of rogue jurors.

3.64 In any event, it would clearly be a mistake to proceed on the basis of the assumption that the effectiveness of the offence is based on whether *all* jurors have been deterred from conducting research. An aspiration of criminal legislation may be that it will prevent people from engaging in the relevant activity. However, criminalising any form of activity cannot ensure that it will never occur again. In the absence of more extensive research into the area, it cannot be convincingly argued that post-legislative instances of illegal juror research demonstrate that such offences are inappropriate.

3.65 In consequence, we do not consider the views of some about the effectiveness of the offence overseas to be determinative of its potential deterrent effect here.

Duplication of offences

3.66 Some consultees also had concerns that the introduction of a new statutory offence was an unnecessary duplication given the existing contempt jurisdiction. We do not consider that the argument about the proliferation of offences is a strong one in this context. The new offence would not criminalise any activity beyond that which is covered by the existing law of contempt. Whilst undoubtedly

[57] We were told this by the NSW Office of the Director of Public Prosecutions.

[58] We were told this by the Attorney General for Queensland.

[59] This resulted in an "adjourned undertaking" of 12 months (without conviction), with $1200 to be paid into the Court Fund. This information was provided by the NSW Office of the Director of Public Prosecutions. See also, "Juror in Hot Water for Online Search", *Herald Sun* (Melbourne), 19 June 2011, http://www.heraldsun.com.au/news/victoria/juror-in-hot-water-for-online-search/story-fn7x8me2-1226077656291 (last visited 1 October 2013).

[60] See also *Juries and Social Media: A report prepared for the Victorian Department of Justice* published on 16 April 2013 by the Standing Council on Law and Justice at p 18.

this would mean that the law would be duplicated – the contempt jurisdiction would co-exist along with the new offence – we consider that the benefits of clarity and consistency, and the procedural benefits, justify this duplication.

3.67 It would be difficult, perhaps impossible, to introduce the new statutory offence and abolish the old contempt at common law. This is due to the width of the contempt jurisdiction and its application to not only criminal cases but also civil, family and other proceedings. It would be exceedingly difficult to use legislation to abolish that small area of contempt dealing with research by jurors into the case that they are trying, without inadvertently disrupting many other forms of contempt of court. A major problem with the current law is the difficulty in defining the scope of this contempt. It is therefore equally apparent that the same difficulty would exist in relation to defining the contempt that would be abolished.

3.68 This means that the new statutory offence will exist alongside the existing contempt jurisdiction, although we anticipate that it is the statutory offence rather than the contempt which should be prosecuted. The House of Lords in *Rimmington* explained in the context of the common law of public nuisance that:

> although it could not be said that conduct falling within the terms of a specific statutory offence could never be prosecuted as a common law crime, good practice and respect for the primacy of statute required that the offence should be prosecuted under the relevant statutory provision unless there was good reason for doing otherwise….[61]

3.69 In consequence, we consider that, unless there are good reasons for bringing proceedings for contempt instead of for the new statutory offence, the latter will be the preferable form of prosecution. Proceedings for contempt brought without good reason could be subject to challenge by the defendant as an abuse of the process of the court.

3.70 Since the new offence would criminalise only conduct which is already a contempt, no new pool of offenders would be created and therefore we do not anticipate that the offence will have any cost implications. Indeed, there should be cost savings for several reasons. First, as noted, the clarity and consistency the new offence could serve to deter such conduct. That would result in a smaller pool of jurors engaging in such conduct, which in turn would mean that fewer trials would be disrupted by jurors being discharged for wrongdoing, fewer prosecutions of jurors should occur and fewer appeals based on alleged jury misconduct should arise. Secondly, in those cases in which a juror does commit the new offence, the prosecution should be cheaper and simpler because proceedings in the Crown Court using the ordinary criminal procedure are likely to cost less than those in the Divisional Court.

Jurors reporting behaviour by other jurors

3.71 Some responses to our CP also raised concerns that jurors would be unwilling to report misbehaviour by other jurors if the conduct were criminalised, because of fear of the consequences for the misbehaving juror. However, it is notable that

[61] *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at 459 to 460.

the CCRC – which probably has more experience than any other body of dealing with juror misconduct – did not accept this view. The CCRC response explained that, at present, jurors do not report misconduct by fellow jurors because they do not want "to get the other juror into trouble, so this is a risk whether or not there is an offence of contempt or a specific offence".

3.72 We consider that there is force in the CCRC's argument that the creation of a new statutory offence is unlikely to render jurors (more) unwilling to report a fellow juror's misconduct. Whilst some jurors may currently have reservations about reporting misconduct, we doubt whether this risk will be increased by changing this conduct from a contempt to a criminal offence. In any event, we have proposed, in Chapter 5, additional measures to encourage jurors to report concerns that they have about their fellow jurors' behaviour during the trial process which should work to ease concerns about under-reporting.

Unwillingness of jurors to convict defendants of the new offence

3.73 Our proposal that the new offence is tried on indictment means that defendants charged with the new offence will be tried by a judge and jury in the Crown Court. In the CP we raised concerns that jurors may be unwilling to convict the defendant for an offence arising out of conduct he or she engaged in while serving on a jury. This concern has been echoed by at least one consultee in discussions since the CP was published. As stated above[62] we have been reassured in this regard by expert responses from the CCRC, Criminal Bar Association and the CPS, and the view of senior judges that the new offence would be appropriately triable only on indictment.

3.74 Furthermore, any difficulties which arise from jurors trying other jurors could already arise under the current law, for example in the context of the trial on indictment of a defendant charged with perverting the course of justice arising out of alleged misconduct when acting as a juror in a previous trial. In this context the law would trust a jury to adjudicate fairly and impartially on the conduct of another juror.

3.75 Similarly, we have considered whether practical difficulties might arise in gathering evidence from jurors. We conclude that any concerns in this regard are misplaced. Circumstances in which a trial judge has to question individual jurors during the course of a trial already arise, and are expressly provided for in the Protocol on Jury Irregularities in the Crown Court[63]. The possibility of a trial judge having to terminate such questioning of a juror, or issue them with a warning, to avoid infringing the juror's privilege against self-incrimination can also already arise (as in the above example of a juror facing a charge of perverting the course of justice). If judges become more familiar with the issues dealt with by the protocol as a result of the new juror offence, then that is to be welcomed.

3.76 Where there is a suspicion that the new juror offence has been committed, police officers could seek evidence in the usual way, including by interviewing other

[62] At para 3.55.

[63] The costs are not insignificant. For example, the costs for the trial of Dallas included costs to the AGO of £21, 051.47.

jurors with a view to their creating witness statements. We do not consider that either a police officer seeking a statement or a juror choosing to give one in these circumstances would commit a contempt under the current state of the law.[64] As is clear from our recommendations in Chapter 4, under our proposals for the reform of section 8 of the 1981 Act (creating new exceptions to the general prohibition on juror disclosure) it is certain that no contempt would be committed in such circumstances.

3.77 Whilst it would be true, as it is of any witness to criminal conduct, that jurors would be under no compulsion to give a witness statement against a fellow juror, there would be no special disincentive for them to do so arising from section 8 of the 1981 Act.

RECOMMENDATIONS

3.78 In light of our discussion above, **we recommend the creation of a new statutory criminal offence for a sworn juror in a case deliberately searching for extraneous information related to the case that he or she is trying.**

3.79 We consider in more detail below what such an offence might look like in practice.[65] The new offence proposed goes no further than the current scope of liability under the common law of contempt and, as at present, prosecutions could only be commenced with the consent of the Attorney General.

3.80 As we have seen,[66] the views of consultees were supportive of trying any new offence on indictment. It has been suggested to us that this type of offence – given the likely sanction involved – might be more suitably designated an either way offence, triable in either the magistrates' or the Crown courts. Although it is likely that, in many cases, the sentencing powers of the magistrates' court will be adequate (a maximum sentence of six months' imprisonment and/or a fine of up to £5,000),[67] we consider that there is merit is giving the Crown Court exclusive jurisdiction over the offence. This is because the offence is one which cannot be committed in relation to the magistrates' court because they lack juries. We think that it is important that juror conduct that offends against the process of the Crown Court is tried in that court.[68]

3.81 In consequence, **we recommend that the new criminal offence should be triable only on indictment, in the usual manner.**

3.82 This would mean that the ordinary criminal process would apply to a juror accused of the new offence. The investigative process (including police powers) would be governed by the Police and Criminal Evidence Act 1984, so the safeguards for suspects and defendants within that Act would also apply. If

[64] *Attorney General v Scotcher* [2005] UKHL 36; [2005] 1 WLR 1867,

[65] See para 3.99 below.

[66] See para 3.51 above.

[67] Although not all. Some juror misconduct has led to sentences in excess of that, for example *Frail* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 which resulted in a sentence of 8 months.

[68] And any other jurisdiction in which a jury sits – see para 3.99 below.

charged, the juror's first appearance would be in the magistrates' court whereupon the case would be sent to the Crown Court using the procedure established by section 51 of the Crime and Disorder Act 1988. Bail for the accused juror would be under the provisions of the Bail Act 1976. Once the case was sent to the Crown Court, the usual procedure involving a preliminary hearing and a plea and case management hearing would apply. The ordinary criminal disclosure regime under the Criminal Procedure and Investigations Act 1996 would apply, as would the usual rules of evidence (for example, the hearsay and bad character regimes of the Criminal Justice Act 2003). The trial would take place before a jury. In addition, the defendant would benefit from legal aid if they fell within the scope of the current criminal legal aid arrangements.

3.83 In light of consultees' general agreement with our proposals on sentencing, **we recommend that the new offence be punishable by a maximum sentence of two years' imprisonment and/or an unlimited fine.**

3.84 We regard the application of community penalties as a sentencing option for this proposed offence as uncontroversial, given the agreement amongst consultees. We consider that, by virtue of the offence being tried on indictment, all the usual sentencing provisions should apply to the offence as a matter of course. This means that, in addition to community penalties, it should be possible for the court to impose discharges, fines, suspended prison sentences, hospital orders, or any other order which would be available to a sentencing court following a trial on indictment.

3.85 We suspect that the introduction of community penalties may be particularly appropriate in cases where there is significant mitigation given that people who undertake jury service are generally likely to be of previous good character, or at least recent good character. A person is ineligible for jury service if he or she is on bail at the time of service or has ever been sentenced to a life sentence, an extended sentence, imprisonment for public protection, or imprisonment for a period of five years or more.[69] In addition, a person is disqualified from jury service for a period of ten years after he or she is sentenced to any period in prison of less than five years or to a community penalty.[70] Therefore, juror-contemnors will not have recently committed other serious criminal offences, which could militate against the imposition of a prison sentence.

3.86 In consequence, **we recommend that all of the usual sentencing provisions which flow from a trial on indictment, including community penalties, should apply to the proposed offence.**

3.87 In the CP we asked consultees whether, in the alternative to a new offence, the existing contempt jurisdiction used in *Dallas* (and *Davey and Beard*) – that is, trial before the Divisional Court – should be reformed. In answer, three responses favoured trial by judge alone (instead of the current two-judge Divisional Court) whilst three were against this idea.

3.88 The Chancery Bar Association was in favour, explaining that:

[69] Juries Act 1974, s 1 and Sch 1, Part 2.

[70] Juries Act 1974, s 1 and Sch 1, Part 2.

> The offence is sufficiently defined as a contempt by virtue of the orders made by the Judge at the start of the trial not to conduct research and that disobedience to such a direction is a contempt of court. The Court hearing the contempt application has sufficient powers to enable disputed questions of fact to be investigated, by hearing oral evidence where necessary.

3.89 The Council of Circuit Judges also favoured this procedure, if there is to be a new offence, explaining that such cases:

> should be tried by a High Court or Circuit Judge allocated by a Presiding Judge. We would expect that it should be defined to expressly prohibit deliberately obtaining or seeking to obtain information in connection with the trial or any witness or alleged victim or the defendant. A contemnor's rights could be better protected by ensuring the precision of the charge, and the grant of free legal representation.

3.90 Some consultees did not specify whether trial by judge alone (as opposed to a two-judge Divisional Court) should be used. The Bar Council explained their views as follows:

> The requirement is for a means of identifying those cases in which a contempt is dealt with by the court in which it arises, if this is possible and appropriate, and those in which it should proceed on indictment. Inevitably, it will be dealt with by a judge alone when the court deals with a contempt during or immediately after proceedings. Defining the contempt with precision is possible by identifying what jurors are not to do, explaining why they are not to do it, and the potential consequences if they ignore these directions [see Consultation Paper paragraphs 4.5 to 4.14]. The likely consequences of the contempt, particularly as to the nature of the penalty, would be one guide as to the manner of trial. However, Article 6 requirements must be satisfied whatever the nature of the alleged contempt and the extent to which this is possible in any given case may be material in identifying whether it is suitable for trial on indictment, rather than by the court in which, or in connection with which, the contempt arises.

3.91 The CPS took "the view that however the contempt is tried, the alleged contemnor has the protection of Article 6 ECHR, and this is sufficient to safeguard their rights."

3.92 The Criminal Bar Association favoured trial by jury for both types of contempt. However, they explained in response to this question that:

> We do not consider that there are any grounds to distinguish between the way section 8 contempt proceedings are tried and common law contempt proceedings are tried. The same level of protection should be afforded to the alleged contemnor in each case.
>
> The case of *Dallas* goes some way towards providing clarification as to the law. It may assist if the judicial direction to be given by Crown Court judges to the jury not to undertake their own research is

regularly reviewed by the Judicial Studies Board to ensure that there is conformity as to the content of the direction.

3.93 In light of our conclusions above, about the introduction of the new offence and the appropriate venue for trial, there is no need to propose reform of the existing contempt jurisdiction used in *Dallas* (and *Davey and Beard*). As we have explained, our presumption would be that the general power to commit for contempt would remain.[71] But, in cases where the misconduct falls within the terms of the new statutory offence, it should generally be prosecuted as the new offence using the normal criminal procedure, rather than as a contempt before the Divisional Court, on the analogy of the principle set out in *Rimmington*.[72]

EXTENDING A NEW OFFENCE TO COVER *DAVEY*-TYPE CASES

3.94 The introduction of this new offence would cover the situations raised by the *Dallas* and *Beard* cases, namely, jurors undertaking research to uncover extraneous information about the case that they were trying, beyond the evidence presented in court. However, cases such as *Davey* would be left untouched by this new offence. As we have explained, Davey was held to be in contempt of court after posting a message about the case that he was trying on Facebook. The message did not disclose the jury's deliberations (and therefore did not fall within section 8). But the court found that the message amounted to contempt at common law because Davey had intentionally interfered "with the administration of justice by disregarding his duties to act as a juror".[73]

3.95 The question which therefore arises is whether it is necessary to extend our recommended offence in relation to jurors seeking extraneous material to cover jurors who demonstrate an intention not to try the case solely on the evidence, in accordance with their oath.

3.96 This extension could cover, for instance, any situation in which a juror discloses evidence relating to the trial to anyone outside of their number, prior to the jury's retirement (after which point section 8 of the 1981 Act will apply). Such conduct is currently treated as a common law contempt, as it is a breach of the direct judicial order not to discuss the case with anyone outside of their number.

3.97 Although we did not consult on the extension of the offence in this manner, we consider that many of the benefits of our recommended new offence in respect of jurors who undertake extraneous research would also apply to any extended offence. Again, instructions to jurors not to communicate with others about the case that they are trying, particularly through the use of social media, are given by the judge at the start of the trial.[74] This raises the concerns we have detailed above in relation to the clarity and consistency of the directions given. Equally, the arguments which we raised about the importance of parliamentary scrutiny of

[71] See para 3.67 above.

[72] *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459. See para 3.68 above.

[73] *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [27].

[74] See, for example, the direction in *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) at [14].

new criminal offences apply in this context too. There also seems to be no reason why jurors who make such disclosures – or engage in similar conduct which demonstrates an intention not to comply with the oath – should not have the benefit of trial on indictment and the normal criminal procedure.

3.98 In consequence, it may be appropriate to extend our proposed offence to cover conduct which demonstrates an intention by jurors to repudiate their oath and not to try the case on the evidence.

THE FORM OF ANY NEW OFFENCE

3.99 We consider here the key elements of the new offence:

(1) The offence could be committed by "any act".

Whilst the focus of our CP and this report has largely been on the problem of jurors undertaking research involving the internet, there seems to be no reason why the legislation should be limited to this form of misconduct. Undoubtedly, other types of misconduct which do not entail internet searches also involve the mischief which the offence seeks to address, in particular the potential breach of the right to a fair trial. An example not involving the use of the internet might include telephoning an expert outside of the court proceedings in order to ask questions about scientific evidence. In such a case, there would be a risk that the jury would base its verdict on information not adduced in evidence and unchallenged by the parties.

(2) The offence could be committed by any person sworn as a juror.

We consider that the offence should apply to any person who has been sworn as a juror. Having had discussions with judges involved in coroners' proceedings and civil jury trials, there seems to be no reason in principle why the offence should not also apply to non-criminal jurors. Indeed, in many non-criminal proceedings the risks of extraneous research may be higher because of the type of case which is likely to involve a jury. For example, coroners' inquests into deaths in police custody are often the types of cases which will have attracted significant media reporting prior to the inquest. The requirements of article 6(1) – for an independent and impartial tribunal – apply equally to non-criminal proceedings.[75]

As with most crimes, other people could be convicted as "secondary parties" or "accessories" if they assisted or encouraged a juror to commit the offence. The normal rules of secondary liability would apply.[76] So, for example, where a sworn juror (P) called his friend (D), and asked D to conduct internet searches relating to the trial or visit the crime scene to photograph it and send the images, P would commit the offence, and D would be guilty as an accessory for doing acts of assistance or encouragement provided D knew that P was a serving juror. A

[75] In rare cases in which a jury hears a libel trial there is an argument that the use of the criminal sanction may be disproportionate.

[76] The rules are described in P J Richardson (ed), *Archbold:Criminal Pleading, Evidence and Practice* (2013), at 33.87 and following and also in Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2014), at A5.3 and following.

juror who, without soliciting it, received extraneous information from another would commit no offence.

It is also possible that in some circumstances non-jurors might commit offences under the Serious Crime Act 2007 in relation to the new statutory offence. For example, if D1 and D2 were on trial together and each blaming the other for the offence, D1 or an associate might seek to contact jurors with information about D2's previous convictions that have not been revealed at trial. That act is capable of assisting or encouraging a juror to commit the new offence. Subject to proof of D1's mental fault in providing the material, this could amount to an offence under sections 44 to 46 of the Serious Crime Act 2007.

The new offence would not criminalise those responsible for a publication which the juror sought to discover. Journalists would clearly fall outside of the scope of the offence (unless they were sworn jurors in legal proceedings, or otherwise committed acts of intentional assistance or encouragement as described).

(3) The offence should be limited to acts done with the intention of discovering information related to the proceedings that the juror is trying, other than evidence communicated to the juror in court or by the appropriate officer of the court.

The aim of the offence would clearly be to capture instances of extraneous research by the juror, rather than information legitimately obtained. This relates to the point which we discuss below, at (4).

(4) The offence should not criminalise conduct necessary for the lawful performance of the duties of a juror.

For the avoidance of doubt, the new offence provision may need a subsection making clear that nothing in it is intended to hinder the lawful performance of the duties of a juror. So, for example, a juror who phones a court clerk to ask what time the court is sitting should not fall within the terms of the offence. Likewise, jurors examining an exhibit in the jury room while deliberating should not fall within the ambit of the offence.[77]

[77] The position as to what jurors may lawfully do by way of experimentation, as part of their duties as jurors, is set out in *R v Maggs* (1990) 91 Cr App R 243. The jury was given a plan showing the configuration of a road and, after retirement, was provided with a tape measure on request. In dismissing the appeal against conviction, the Court of Appeal held that it would clearly be impermissible for the jury to take or be given equipment where it would be used to conduct unsupervised experiments. However:

> a magnifying glass or a ruler, or come to that a tape measure, do not normally raise even the possibility of any such experiments. Indeed they are the sort of objects which any member of the jury might easily have in his pocket when summoned to serve upon the jury, and there could be no possible objection to his using it in the jury room. (*Maggs* at 247; see also *Karakaya* [2005] EWCA Crim 346, (2005) 2 Cr App R 5 at [20].)

We consider that the law in this area would benefit from clarification by the Court of Appeal (Criminal Division).

(5) The mental element for undertaking the conduct should be intention.

This will ensure that it is deliberate misconduct by jurors which is captured, rather than behaviour which is merely reckless or negligent. In light of the fact that jury service is a civic duty, but one that is compulsory, we are wary of drafting the offence in too wide terms which might convey to jurors an unwelcome message and compromise their goodwill in participating in jury service.

(6) If necessary, "discovering information" could be defined. If so, we suggest that it be defined non-exhaustively, including clarifying that it covers undertaking searches using the internet.

(7) If necessary, "information related to the proceedings that the juror is trying" could be defined. Again, this could be non-exhaustive, but could clarify that it includes information about the charges, the parties, witnesses, legal representatives or the judge.

Both of these points will help to ensure that the scope of the offence is clear for jurors, for lawyers and judges dealing with such cases.

We have included legal representatives and the judge here for three reasons. Firstly, there is the risk that jurors who engage in searching for these matters will, in the course of doing so, uncover prejudicial material related to the case because a search for them is likely to discover material which also relates to the defendant or the witnesses. Secondly, there is a concern that searching for these matters will tempt the jurors to undertake more extensive research into other problematic areas. Finally, such searches are problematic in light of the use to which jurors may put the material which they find when searching for the legal representatives or the judge. For example, a juror who searches for the judge in any case may come across media criticism of the judge's approach to sentencing in other cases. Although the cases may not relate to the one currently being tried, it is clearly not for jurors to take into account in reaching their verdict that the judge has a reputation as a harsh sentencer, for example.

If the proposed offence were to be extended in the manner which we canvassed above,[78] that form of the offence could be defined as any conduct of a sworn juror demonstrating an intention not to try the case solely on the evidence. As we have explained, the aim of this provision would be to cover situations like that which arose in *Davey*, where no extraneous research into the case was undertaken, and the disclosure did not breach section 8, but where there was an intentional interference with the administration of justice by the failure of the juror to abide by their oath.

(8) The offence, whether including that extension or not, should be triable only on indictment.

[78] From para 3.89.

(9) The maximum penalty on conviction should be 2 years' imprisonment and/or an unlimited fine.

We have explained above[79] that the normal criminal procedure applicable to indictable only offences should apply.

(10) Proceedings for this offence should not be instituted except by or with the consent of the Attorney General.

We consider that, given the sensitivity of cases of this type, the consent of the Attorney General should be required to prosecute. Given the role of the jury as an independent and impartial tribunal in a criminal dispute between the state and an individual, there are obvious sensitivities about the State's subsequent role in investigating those jurors.[80] For this reason, we consider that such cases should require the Attorney General's consent to prosecute. Such consent is currently required to try jurors for contempt, and we see no reason why this should change where the conduct is also subject to a specific criminal offence.

(11) It may also be necessary to clarify that the introduction of the new offence does not prejudice proceedings for contempt of court at common law, under the Contempt of Court Act 1981, or under any other enactment.

This will maintain the existing contempt jurisdiction which may be used in exceptional cases, subject to what we have explained above at paragraph 3.69 above. One of the reasons for creating a statutory offence is to avoid the ambiguity of the present scope of this form of contempt at common law. It would therefore seem impossible to define that form of contempt with sufficient precision that it could be abolished.

3.100 In addition, we consider that the judge sentencing any juror for having committed this new offence should have the discretion to permanently disqualify that individual from jury service in the future. This would mean that, in the most serious cases, judges would be able to ensure that the juror could not engage in such prejudicial conduct again. In cases where the judge exercised the discretion not to disqualify the juror,[81] the juror would, in any event, automatically be subject to disqualification for a period of ten years if they received a community penalty or a prison sentence because of the provisions of the Juries Act 1974.[82]

[79] See para 3.38 above.

[80] See Criminal Practice Directions, issued 7 October 2013, 39M.13 on the procedure to be followed before the police may investigate offences involving jurors.

[81] For example because the case was less serious and/or the juror showed genuine remorse.

[82] Juries Act 1974, s 1 and Sch 1, Part 2.

CHAPTER 4
JUROR DISCLOSURE AND SECTION 8 OF THE CONTEMPT OF COURT ACT 1981

INTRODUCTION

4.1 This chapter considers consultees' responses to our proposals for reform of the law and procedure in relation to disclosure of jury deliberations in breach of section 8 of the Contempt of Court Act 1981 ("the 1981 Act"). It also sets out our recommendations for reform on these matters. We explain our recommendation for a new defence of disclosure to a court, the police or the Criminal Cases Review Commission ("CCRC") in order to uncover a miscarriage of justice. We also set out our recommendations for relaxing section 8 in order to allow academic research into jury deliberations subject to stringent safeguards. Finally, we make recommendations in relation to the procedure for trying breaches of section 8. In the next chapter, we make further recommendations for improvements to the preventative measures taken to try to ensure that jurors abide by the prohibitions on certain forms of conduct during their jury service.

CURRENT LAW AND PROCEDURE

4.2 Section 8 of the 1981 Act seeks to protect the confidentiality of jury deliberations. It provides:

> **Confidentiality of jury's deliberations**
>
> (1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
>
> (2) This section does not apply to any disclosure of any particulars—
>
> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
>
> (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,
>
> or to the publication of any particulars so disclosed.

4.3 In *Attorney General v Scotcher*[1] it was argued that jurors who breached section 8 with the aim of uncovering a miscarriage of justice should be entitled to a defence. This, it was argued, was necessary to render section 8 compliant with the jurors' right to freedom of expression under article 10 of the European Convention on Human Rights ("ECHR"). The House of Lords held that such a defence was unnecessary because disclosure to a court (even after a verdict)

[1] [2005] UKHL 36, [2005] 1 WLR 1867.

was not prohibited by section 8 and, therefore, had the juror written (directly or indirectly) to the court or judge, the section would not have been breached.[2]

4.4 Furthermore, it was held that section 8 did not preclude the judge from inquiring into concerns which had been disclosed to the court before the verdict was delivered. In consequence, section 8 was found to be compatible with the ECHR. The section amounted to an interference with the juror's article 10 rights, but that interference was proportionate given the importance of the secrecy of jury deliberations in the criminal justice system.

4.5 Since the *Scotcher* decision, the European Court of Human Rights ("ECtHR") has also considered section 8 in *Seckerson v UK* and *Times Newspapers Ltd v UK*.[3] In that case, the ECtHR held that section 8 as an "absolute rule cannot be viewed as being unreasonable or disproportionate" given the importance of promoting "free and frank discussion" through the confidentiality of deliberations.[4] In consequence, it found no violation of article 10. Section 8 also criminalises research involving the disclosure of jury deliberations. It is notable that in *Seckerson*, the ECtHR observed in the course of its judgment that it was:

> not called upon in the present case to assess the compatibility with article 10 of section 8 in circumstances involving a conviction for research into jury methods. Nor is the court concerned with a case where the interests of justice could be said to require the disclosure of the jury's deliberations.[5]

4.6 Arguably, the prohibition contained in section 8 could, in article 10 terms, be seen as disproportionate in relation to undertaking research into jury deliberations and disclosures which can be said to be in the interests of justice, such as in relation to a miscarriage of justice.

4.7 Disclosures made by jurors purporting to act in the public interest and the interpretation of section 8 are closely related to the issue of the common law inadmissibility of jury deliberations as evidence. The inadmissibility rule was explained in *R v Smith*:

> (1) The general rule is that the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room … .
>
> (2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or

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

[3] (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10).

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

[5] (2012) 54 EHRR SE19 (App Nos 32844/10 and 33510/10) at [45].The disclosures under consideration in *Seckerson* were aimed at raising concerns about medical evidence generally, rather than about a possible miscarriage of justice in the case in question.

> tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all … .
>
> (3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible … .
>
> (4) The common law has recognised exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences … .[6]

4.8 Evidence of jury deliberations is therefore inadmissible in any subsequent proceedings subject to the exception under section 8(2)(b), set out above,[7] and to situations where the jury has been "affected by… extraneous influences". Although the issue of admissibility of evidence is separate to that of criminal liability of jurors for disclosure, the two are nonetheless closely related because the existence of the evidence depends on there having been such disclosure.

4.9 The procedure for dealing with jurors who disclose information in breach of section 8 involves proceedings being brought by the Attorney General or the court proceeding on its own motion. The current procedure falls under the Civil Procedure Rules ("CPR") Part 81. Proceedings will normally be brought by the Attorney before the Divisional Court's summary jurisdiction.[8] In consequence, the civil rules of evidence apply, although the defendant is entitled to the enhanced provisions of article 6(2) and 6(3).[9] It is unclear whether legal aid is available[10] and whether the protections of the Bail Act 1976 apply.[11] The only avenue of appeal is to the Supreme Court.[12]

4.10 The maximum penalty for breach of section 8 is also an unlimited fine and/or imprisonment for up to two years.[13]

PROBLEMS WITH SECTION 8

4.11 Section 8 has been criticised on a number of grounds. The terms of the section appear to have gone beyond what was necessary to fill the lacuna in the common

[6] *R v Smith (Patrick)* [2005] UKHL 12, [2005] 1 WLR 704 at [16].

[7] See para 4.2 above.

[8] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 11-361.

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

[10] "Criminal proceedings" for which legal aid is available are defined under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This definition covers only contempts committed in the face of the court (s 14(g)), and although "other proceedings… may be prescribed", other types of contempts do not appear to have been so prescribed.

[11] It depends on whether contempt proceedings are "proceedings for an offence" under s 1(1) of that Act. If the Bail Act 1976 does not apply, the common law of bail may do so, but the lack of legal clarity here could give rise to a breach of article 5 of the ECHR. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.67.

[12] Administration of Justice Act 1960, s 13.

[13] Contempt of Court Act 1981, s 14. On the approach of the Court of Appeal to appeals against sentences for contempt, see the recent case of *B (Algeria) (FC) v Secretary of State for the Home Department* [2013] UKSC 4, [2013] 1 WLR 435.

law identified in the *New Statesman* case.[14] That case, which led the government to enact section 8, held that the common law did not prohibit the disclosure of jury deliberations. Notably, Lord Chief Justice Widgery explained in that case that there had previously been many unproblematic disclosures where the individuals involved remained anonymous and, whilst some restrictions were needed, they did not have to be absolute.[15]

4.12 It has also been argued that section 8 is incompatible with the right to freedom of expression under article 10 because the section's "absolute nature" makes it a disproportionate interference with freedom of expression, which includes a juror's right to impart information.[16] That argument is especially strong where the disclosure seeks to uncover a miscarriage of justice. In addition, the section may be seen as disproportionate given the important public interest in subjecting the jury system to analysis (including by the media):[17] allowing greater public scrutiny of the system could lead to its improvement.[18] There is also a public interest in academic research being undertaken into the system of trial by jury[19] but research which would involve the disclosure of deliberations is prohibited by section 8. Historically, it has been argued that the section 8 prohibition has "created confusion about what jury research can and cannot be conducted and has contributed to an information vacuum about juries in this country".[20]

JUSTIFICATIONS FOR SECTION 8

4.13 Nonetheless, various justifications have been put forward in support of the section 8 prohibition. It has been argued that jurors must feel that they can express their views, without fear of ridicule or recriminations.[21] It is notable that the vast majority of jurors regarded that safety as important.[22] In addition, the jury's verdict should be final and prohibiting the disclosure of deliberations

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

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

[16] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 229; G Robertson and A Nicol, *Robertson and Nicol on Media Law* (5th ed 2007) p 454. See also A Ashworth, "Juries: Contempt of Court Act 1981, s 8" [2004] *Criminal Law Review* 1041, 1044.

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

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

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

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

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

[22] A study carried out by Professor Thomas in 2010 found that 82% of jurors "felt it was correct that jurors should not be allowed to speak about what happens in the deliberating room": *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

prevents the reopening of cases[23] and a subsequent "retrial" by media.[24] It is also important to protect the privacy and security of jurors,[25] and there is a risk that jurors could be induced or intimidated into making false disclosures if such evidence were admissible on appeal.[26] As to the compatibility of section 8 with the ECHR, the fact that a juror can raise concerns with the court, without breaching section 8, may be sufficient to establish article 10 compatibility.

4.14 Leaving aside the arguments of principle about whether section 8 should be maintained, in the CP we raised concerns that the section may be increasingly flouted. The internet and social media make it easier for friends, families and others to make contact with jurors, and jurors to make contact with them.[27] It also allows jurors to communicate with a potentially huge audience and to do so anonymously if they choose. Indeed, since we published the CP, there has been another appeal against conviction based on postings of a juror on Facebook which appear potentially to be in breach of section 8.[28]

REFORM IN RELATION TO MISCARRIAGES OF JUSTICE

4.15 In light of the criticisms that have been levelled at section 8, we asked consultees whether they considered that it was necessary to amend the section. Specifically, we asked if a defence should be provided where a juror discloses deliberations to a court official, the police or the CCRC in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice.

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

[24] *Hansard* (HC), 2 Mar 1981, vol 1000, col 41 by the Attorney General; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4. Although it has been argued that there are, in any event, many instances of the media reconsidering verdicts and suggesting they were wrongly decided (albeit without approaching the jurors in the case), such as the BBC television series *Rough Justice*: J Jaconelli, "Some Thoughts on Jury Secrecy" (1990) 10 *Legal Studies* 91, 99 to 100.

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

[26] See the debate in *Hansard* (HC), 16 Jun 1981, vol 6, col 934; Lord Reed, "The Confidentiality of Jury Deliberations" (2003) 31(1) *The Law Teacher* 1, 4.

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

[28] *Mahil* [2013] EWCA Crim 673 at [63]. See also *Lewis* [2013] EWCA Crim 776, [2013] All ER (D) 284 (May).

The views of consultees

4.16 In response, the vast majority of consultees agreed that it was necessary to amend section 8 in this way. Twenty-five consultees were in favour of the amendment, including the CCRC, the Criminal Bar Association and the Council of Circuit Judges, as against four who disagreed with the amendment. Six other consultees agreed in part or in principle, or expressed no view.

4.17 The CCRC, which probably has the most expertise on this issue in practice, undertakes interviews with jurors when examining potential miscarriages of justice, within the confines of section 8. The CCRC explained in their response that jurors "often do not understand what they can/cannot do or say". However, since "the CCRC 'does not know what it does not know'… it is not possible to say whether or not there would have been a better interview" with the juror, with more helpful disclosure, without the impediment of section 8. The CCRC also highlighted that the issue of self-incrimination when interviewing jurors is a significant one and so the defence would be helpful from that point of view. But fundamentally, it argued that:

> The important thing is to uncover misconduct, and the CCRC could not agree that a miscarriage of justice is a price worth paying for juror confidentiality.

4.18 The four respondents who disagreed with this proposal included some of the senior judges whose views were presented by Lord Justice Treacy and Mr Justice Tugendhat, the Chancery Bar Association and two other individuals. In particular, Lord Justice Treacy and Mr Justice Tugendhat had concerns that the amendment would undermine jurors' confidence in their role because the safeguard of confidentiality would be weakened and the phenomenon of "juror's remorse" would mean that unnecessary and undesirable disclosures would occur. In addition, it was argued that:

> If the court has sanctioned disclosure in an individual case to some other body making enquiry on its behalf, for example the Criminal Cases Review Commission… [that] other person or body would for these purposes be acting as the agent of the court.

4.19 This suggests that the senior judges regard disclosure of deliberations to the CCRC, acting on the direction of the Court of Appeal, as not prohibited by the law. If this interpretation by the judges is correct, then it follows that our proposed amendment would provide clarification of the existing law, rather than represent any new defence in that context.

4.20 However, it may be notable that the CCRC appears to take a different view, considering itself bound by section 8 even when investigating following a direction from the Court of Appeal.[29] This lack of clarity about whether the current law would allow an agent of the court to solicit disclosure of deliberations is a further reason why introducing a statutory defence of disclosure to the police, a court official or the CCRC would be of benefit. Such a defence would not only provide clarity for those working within the criminal justice system, but would also

[29] See, for example, *Lewis* [2013] EWCA Crim 776, [2013] All ER (D) 284 (May) at [19].

assist jurors – with much less knowledge of the current law – to ensure that they were clear about in what circumstances they would be permitted to disclose jury deliberations.

4.21 We now consider the concerns raised by consultees in relation to the importance of juror confidentiality, and the problem of jurors disclosing out of remorse at the verdict, rather than because of a genuine belief that they are uncovering a miscarriage of justice.

The role of juror confidentiality

4.22 We recognise the full force of the argument that the confidentiality of jurors' deliberations is important, both to jurors themselves and to the wider criminal justice system, as explained by Lord Justice Treacy and Mr Justice Tugendhat. However, it should be noted that, even at present, the prohibition contained in section 8(1) is not absolute. Section 8 contains two clear exceptions: first, deliberations can be disclosed to the court in which the jury is sitting. Indeed, it is undoubtedly a common occurrence that the trial court is provided with information in relation to the jury's deliberations (for example, when jurors seek guidance from the judge and disclose in notes how their views are divided).

4.23 Secondly, evidence of the jury's deliberations may be used in "subsequent proceedings for an offence alleged to have been committed in relation to the jury",[30] for example, if there was an attempt to tamper with the jury.[31] Such evidence can also be used in appellate proceedings, for example, where it is argued that the jury may have been influenced by extraneous material.[32] In light of this, jurors clearly cannot (and should not) expect that the confidentiality of their deliberations will be absolute.

4.24 Furthermore, both of these exceptions to the confidentiality of jury deliberations exist in order to protect, first and foremost, the administration of justice. We consider that an exception for disclosure of a (potential) miscarriage of justice serves the same purpose: it cannot be in the interests of justice that cases where something has gone seriously amiss in the jury room remain undiscovered because jurors fear prosecution for disclosing what occurred. Indeed, limiting the defence to cases where a juror discloses to a court official, the police or the CCRC (rather than say, the media) emphasises that the purpose of such disclosure is to further the interests of justice. Jurors, the public and the defendant should have nothing to fear from one of these organisations knowing the content of deliberations. Indeed, we imagine that most jurors' desire for confidentiality arises from concerns that the general public and/or press will be able to identify them or their views. Our proposal clearly maintains this confidentiality, and recognises its importance.

[30] Section 8(2)(b).

[31] See, for example, the approach adopted in the Criminal Practice Directions, issued 7 October 2013, 39M.18.

[32] See *Smith* [2005] UKHL 12, [2005] 1 WLR 790 at para 4.7 above.

Jurors' remorse

4.25 In respect of the other concern which has been raised – that of "jurors' remorse" – we consider that this can best be addressed by appropriate drafting of the defence in clear and narrowly-defined terms.[33] This will avoid the risk of unmeritorious disclosures leading to unnecessary investigations and appeals. In addition, we think that, where disclosures are made because of "jurors' remorse", any investigation which is started into what occurred in the jury room is likely to be short lived because it will quickly become apparent from interviews with the other 11 jurors that the disclosure lacks merit because there was no misconduct or wrongdoing by jury members. This means the resource implications of such cases will be limited, because such unmeritorious cases are unlikely to lead to a full appeal.[34]

4.26 We consider that the terms of the defence can be drafted in a manner which will give confidence to jurors that they can disclose deliberations in the right way, if the need demands it, but also warn them that they should not disclose in any other circumstances. Any jurors making a disclosure in bad faith can of course still be prosecuted, as at present.

Our recommendation

4.27 In consequence, in light of the strong support from consultees, we consider that it is right in principle to reform section 8. **We recommend reform of section 8 of the 1981 Act to provide a specific defence where a juror discloses deliberations to a court official, the police or the CCRC in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice.**

4.28 During the trial, we would anticipate that jurors would raise concerns with the judge by informing the usher or jury bailiff in the way they do at present. Jurors are informed by the trial judge of how they should act if anything occurs which concerns them.[35] We do not consider that it is necessary to make further provision for disclosure during the trial. We are confident that a juror who, despite the judicial instruction to approach a court official, instead chose to approach the police, would be directed to inform the court of his or her concerns. No prosecution for breach of section 8 would ever be likely in such cases.

4.29 In relation to disclosures made after the verdict, we think it is important to include a defence where the disclosure is to a court official. Under the current law such a disclosure would not breach section 8,[36] but it is not clear that jurors are aware of that defence to section 8. A statutory defence applying in terms to such conduct would clarify the position.

[33] Indeed, the risk of breach of section 8 because of jurors' remorse exists now: see *AG v Pardon* [2012] EWHC 3402 (Admin).

[34] The defendant can be notified of the disclosure for the purposes of deciding whether to appeal in accordance with the procedure laid down in the Criminal Practice Directions, issued 7 October 2013, 39M.21-22.

[35] The Criminal Practice Directions, issued 7 October 2013.

[36] See *Scotcher*, para 4.3 above.

The form of any new defence

4.30 We suggest that the key elements of the defence could be formulated as follows:

(1) The defence would only apply in respect of conduct relating to deliberations conducted by jurors in criminal trials.

Following discussions with judges involved in coroners' inquests and civil jury trials, we consider that it is unnecessary for the defence to apply to jurors in non-criminal cases. The mischief which the defence seeks to address is cases of miscarriage of justice involving individuals wrongly subject to criminal conviction (and the sanction which inevitably follows). Whilst the matters at stake in an inquest or a civil jury trial (in the latter case, certain claims against the police for false imprisonment, malicious prosecution and such like[37]) are undoubtedly important, they do not involve individuals facing immediate and prolonged loss of liberty on account of wrongful conviction for a criminal offence. In light of the importance of juror confidentiality, we consider that the new defence should be drawn in narrow terms so that it only applies to miscarriages of justice involving criminal trials.

(2) The disclosure must be to a court official, the police or the CCRC.

We do not consider that it is necessary to extend the terms of the offence beyond these limited bodies[38] in order to address the problem with the current section 8 which we have identified. Again, for reasons which we have explained, we have sought to define the defence in a way which will be useful for jurors as narrowly as possible. As well as providing a defence to jurors who disclose details of the deliberations in the limited circumstances provided, the defence will also apply to the CCRC, police and court officials when they solicit that disclosure.

(3) The disclosure must be made because of a genuine belief that it is necessary to uncover a miscarriage of justice.

This should be the juror's subjective belief, genuinely held, that the disclosure was necessary.

(4) The concept of a "miscarriage of justice" could be defined. If so, such definition should be non-exhaustive.

One example of a definition might include the fact that one or more jurors had demonstrated a tendency or intention not to obey their oath and not try the case solely on the evidence.

[37] We note that jury trials in cases of defamation will cease under the Defamation Act 2013, s 11 (not yet in force).

[38] We considered whether disclosure to solicitors should also be included, but were concerned that this might result in defence lawyers trying to obtain disclosures from jurors in order to find grounds for appeal. This would clearly be undesirable, as it could put jurors under pressure and compromise their anonymity after the trial was over. We are confident that no prosecution would be brought in circumstances where a juror sought legal advice from his or her solicitor, not connected with the case, before deciding whether to make a disclosure to one of the permitted entities such as the police.

(5) The defence should be framed so that the evidential burden would rest on the juror-defendant, with the legal burden falling on the prosecution.

An evidential burden will simply impose the burden of providing sufficient evidence to raise the matter, while the legal burden requires the Crown to prove the matter beyond reasonable doubt. This will help to ensure compliance with the ECHR.[39]

REFORM FOR THE PURPOSES OF ACADEMIC RESEARCH

4.31 In the CP, in addition to proposing reform of section 8 of the 1981 Act to provide for a defence in relation to uncovering a miscarriage of justice, we also asked consultees whether they considered that section 8 unnecessarily inhibits research. If so, we asked whether section 8 should be amended to allow for such research and, if so, what measures should be put in place to regulate this research.

The views of consultees

4.32 In response to this proposal, 21 consultees – the clear majority of respondents to this question – agreed that section 8 inhibits research and should be amended.

4.33 However, the question of the necessity and desirability of reforming section 8 is one that has proved controversial amongst academics. Professors Ellison and Munro favoured reform of section 8. They provided us with a detailed explanation of the research which can currently be undertaken in relation to jurors in this country (by way of post-verdict questionnaires on matters other than deliberations, mock jury simulations, shadow juries and statistical analysis of verdicts). They also explained that in their view:

> there are a range of crucial research questions that cannot be addressed in a satisfactory and thorough manner under the current regime.… section 8 *does* prevent the conduct of research that examines the substantive content of jury deliberations – including the evidential factors, credibility assessments and factual assumptions that influence their outcomes. It also prevents important research into the broader discursive dynamics of the deliberations as they unfold, unmediated by participants' retrospective recollection.
>
> Amongst other things, then, section 8 prevents research that seeks to observe, analyse and ultimately improve, the ways in which jurors discuss the evidence/'facts' of a given case, the group dynamics that structure (and potentially inhibit) that discussion, and the process of verdict construction – both individual and collective – as it plays out in the jury room. Researchers are also unable to explore jurors' responses to particular types of evidence, the ways in which their prior beliefs/attitudes impact on decision-making, the ways in which their (mis)understandings of the law impact on decision-making, the

[39] Article 6(2) establishes that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. See *Salabiaku v France* (1988) 13 EHRR 379 (App No 10519/83); *DPP ex p Kebilene* [2000] 2 AC 326, [1999] 3 WLR 972 and *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264.

> influence of information extraneous to the trial, juror compliance with various judicial directions/warnings in the course of deliberations, and their interpretation and application of the burden/standard of proof. There is, as a result, a great deal that we do not, and currently cannot, know about the workings of the jury system….
>
> Research of a sort currently prohibited by the Contempt of Court Act 1981 can assist researchers in exploring these concerns further, and can ensure that – where concerns are merited – researchers are in a better position to develop and test possible remedies that would promote more accurate, fairer and better informed juror decision-making. It is, of course, possible that some of these concerns are overstated and/or misplaced, in which case carefully conducted research could equally provide some reassurances and allay certain fears about the operation of the jury system in England and Wales.[40]

4.34 Other commentators too have called for greater research into "how real juries reach their decisions in real cases" through the amendment of section 8.[41]

4.35 However, Professor Thomas observed that the "myth of section 8" has encouraged researchers to think that almost all research about juries is prohibited, when in fact that is not the case.[42] She suggests that:

> Any reform of the law of contempt as it relates to juries should be based on reliable empirical evidence about what jurors do, what they think and what helps them do their job to the best of their ability. Nothing in the current law prevents jury research in this country that will help achieve this.[43]

4.36 Aside from the necessity for reform of section 8, others have cautioned against the desirability of allowing further jury research. Professor Michael Zander QC considers that research should not be conducted into juries because:

> the public's confidence in the jury system as the best available system would be shaken if such "shortcomings" were exposed to view – because of unrealistically high expectations as to how it does work

[40] Note our recommendation would not extend to include observation of deliberations. See para 4.50 below.

[41] S Gilchrist, "Time for Real Jury Research" [2013] 177 *Criminal Law and Justice Weekly* 171. See also the first recommendation of the Royal Commission on Criminal Justice (Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 188); C Tapper, *Cross and Tapper on Evidence* (12th ed 2010) p 173; A Sanders, R Young and M Burton, *Criminal Justice* (4th ed 2010), pp 606 to 607. Most respondents to a consultation by the Department for Constitutional Affairs were in favour of "allowing some degree of research into the jury decision-making process": Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005), p 6.

[42] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 501.

[43] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 502. See also C Thomas, "Exposing the myth" [2013] *Counsel* Apr, 25 to 27.

and should work. I do not believe that would serve the public interest.[44]

4.37 Eight of the consultees who responded to our CP were against the proposed amendment to section 8, including the Criminal Bar Association, the CPS and the Council of Circuit Judges and some of the senior judges whose views were presented by Lord Justice Treacy and Mr Justice Tugendhat. Many argued that academics are currently able to undertake jury research without infringing the section and that therefore there is no need for the amendment.

The benefits and limits of jury research

4.38 As we have explained, many of the consultees who were against this proposal argued that academics are currently able to undertake research without infringing section 8 and that therefore there is no need for the amendment. It is undoubtedly true that valuable research is undertaken while still respecting the prohibition in section 8. As we are now realising the benefits in terms of learning from the existing jury research, the question really becomes whether it is worth relaxing the restriction in section 8 (subject to stringent safeguards) to allow for different forms of jury research to be conducted so that the fullest picture of juries at work can be produced. We were told by academic consultees who conduct research in this area that despite the available methods of jury research there are some aspects of the jury system about which we do not know and about which we cannot know because of the current law.[45]

4.39 For example, we do not currently know whether real jurors in real cases actually draw adverse inferences from a defendant's failure to respond to questions in a police interview or failure to mention in a defence statement matters subsequently relied upon in evidence.[46] Asking jurors after the trial whether they looked unfavourably on the defendant because of this would clearly involve disclosure of "particulars of statements made, opinions expressed, arguments advanced or votes cast" during deliberations. Seeking information from jurors about these issues could have important implications for the criminal justice system. In particular, if the research found that jurors did not generally consider making adverse findings against a defendant because of failure to mention in a defence statement matters subsequently relied upon in evidence, this could be useful information for defence lawyers in making tactical decisions in such cases. Such findings may also mean that Parliament would want to reconsider whether other sanctions should be applied, in order to encourage provision of the defence statement and prevent so-called ambush defences.

4.40 A further example could involve undertaking more research into how jurors during deliberations use "routes to verdict" documents which they are sometimes given by trial judges. The aim of such documents is to set out a series of questions which jurors must consider in reaching a verdict. They are, in effect, a flow chart

[44] M Zander, "Research Should Not Be Permitted in the Jury Room" (2013) 177 *Criminal Law and Justice Weekly* 215. See also M Zander, "Why research in the jury room is a bad idea" *The Times*, 28 February 2013, available at www.thetimes.co.uk/tto/law/article3700181.ece (last visited 1 October 2013).

[45] See the response from Professors Munro and Ellison at para 4.33 above.

on the law which helps jurors identify what issues to address and in which order to address them. Research could not currently be undertaken within the confines of section 8 which involved asking jurors what use they made of such documents in deliberations, whether they understood the questions and what matters were discussed in relation to each question. Yet the findings from such research could serve an important public interest in improving the documents given to jurors to ensure that they accurately apply the law each case.[47]

4.41 There are undoubtedly other examples of research which could yield useful results but which would require enquiries to be made of the jurors' deliberations in their case.

4.42 Nonetheless, we are alert to the fact that research involving the disclosure of jury deliberations would have limitations. Studies which employed the methodology of asking jurors to disclose what occurred during deliberations would obviously be limited by the recollections of the jurors themselves and their willingness to inform researchers about their deliberations. In addition, there would be limits to what such research could show, because of the difficulties of establishing causation:[48] it would be impossible to prove that one factor as recalled by a juror to be significant in deliberations actually led to a particular verdict. There are too many variables for direct causation such as this to be established. Using our example from above, proving that adverse inferences are in fact drawn by jurors would involve undertaking controlled trials with mock jurors. Those trials would have to be set up so that the only variable between the cases would be whether the jury were invited to draw an adverse inference from a defendant's failure to respond to questions in a police interview or the failure to mention in a defence statement matters subsequently relied upon in evidence. That would be the only mechanism by which causation could be established – namely, whether the failure to provide the information led to the conviction. Asking jurors about their deliberations – whilst of value and likely to provide an interesting perspective – could not demonstrate that failure to respond to questions in a police interview or to mention in a defence statement matters subsequently relied upon in evidence leads to adverse inferences being drawn or increases the chances of conviction.

4.43 However, the use of mock juror panels for the purposes of research also has limited value. Whilst using hypothetical scenarios or mock jurors would give an indication of the approach of real jurors in real cases, researchers could not be sure that such an indication would be a reliable demonstration of how decisions

[46] Pursuant to the Criminal Justice and Public Order Act 1994, s 34.

[47] Professor Thomas' recent research demonstrates just how important written directions are for jurors. Every juror who served on a jury which was provided with written directions on the law in their case said the directions were helpful, and 85% of jurors who were not given written directions said they would have liked to have them: C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 497 to 498. Given the value of written directions, having the most comprehensive research possible into their use and effectiveness is important.

[48] Causal studies would be those capable of establishing that a single factor led to a verdict. In contrast, correlational studies would use case data to establish whether any statistically significant correlations exist between specific case factors and outcomes. We are grateful to Professor Cheryl Thomas for highlighting this.

are made in practice. It is easy to imagine that the way in which jurors make decisions is different when faced with the real pressure of having to deliver a verdict which will have a profound impact on the lives of the defendant, complainant and others. Mock jurors or hypothetical scenarios with real jurors cannot replicate the reality of jury service. Other methods of research into jurors can also be employed, including interviews with jurors and surveys of jurors to understand their perceptions of cases and processes. These studies cannot establish what caused a particular verdict. They can ask about what jurors did during the trial, except, of course, that questions cannot be asked about what jurors discussed during the crucial phase of deliberations.

4.44 As noted above, research into juries is already ongoing. What we are examining is whether the removal of the restriction on section 8 would lead to a fuller picture on the way jurors work.

4.45 The optimal research data on the working of the jury would, it seems, be achieved using a mixture of sources and methodologies. Mock jurors in controlled trials combined with research undertaken into the deliberations of real jurors in real cases (and other research methods where available) are most likely to produce results which are of use to researchers and serve an important public interest in obtaining greater understanding about jury decision-making. The different sources and methodologies can be combined or "triangulated", in order to increase the credibility and validity of the results. It is therefore clear that the relaxation of section 8, in order to allow jurors to disclose the contents of their deliberations to researchers, would be of benefit even if such research methodology could not, on its own, provide definitive answers.

Removing the "chilling effect"

4.46 Aside from what research can or cannot currently be lawfully undertaken without infringing section 8 as a matter of fact, there are concerns that the section has been misinterpreted so that its impact on jury research is greater than necessary. Research which could currently be undertaken lawfully, but from which academics might be dissuaded due to (needless) concerns about section 8, could be carried out in confidence if section 8 were reformed.

Public confidence

4.47 Some consultees also had concerns about the risk of research undermining public confidence in the jury system. Maintaining that public confidence is of course an important consideration. We acknowledged in the CP that jurors value the protection that section 8 provides for their deliberations.[49] We consider, however, that safeguards can be provided so that jurors who may be part of a research project are made aware that they will be guaranteed complete anonymity. In particular, it is anticipated that the studies and results will not only be anonymised with respect to the individuals, but that the type of case and specific court will also remain undisclosed. This should ensure that there is no way in which the published research will tie back to a member of the jury, the lawyers involved, the judge, the defendant or the witnesses. If this guarantee is provided and jurors are aware that the comments they make in the course of the

[49] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.55.

research may assist people sitting on juries in the future, we consider that no damage to public confidence will flow. There is a clear need for the public and those working in the criminal justice system are well-informed about whether all aspects of the system, including jury deliberations, work effectively and if not, why not.

4.48 Whilst fully acknowledging the limits (discussed above[50]) of research involving real jurors disclosing their deliberations, such research methodology could nonetheless contribute to better public understanding of the jury system. If what emerges from research is that reform of some aspects of the jury system might be needed, we consider that it is better to know this and to undertake such reform to improve the system, and to be making such changes on the basis of the fullest research picture that can be created. Knowing what works and what does not may well strengthen public confidence in the jury system because such confidence would be based on evidence.

Our recommendation

4.49 In consequence, we think it right in principle to reform section 8, but that, undoubtedly, appropriate safeguards need to be put in place to protect the trials on which jurors participating in the research sit and to protect jurors themselves. **We therefore recommend that section 8 of the 1981 Act should be reformed to provide an exception allowing approved academic research into jury deliberations.** We consider below the safeguards which would be appropriate to accompany such reforms.

Safeguards

4.50 In response to our question in the CP, various safeguards were proposed by consultees in relation to any such research. Some of these are already safeguards applicable to research that is permitted under the existing law. The responses to our consultation suggested safeguards which included:

(1) only undertaking research after the case has concluded and the jury finished deliberating (ie that there should be no access to the jury room) – although there was not universal agreement amongst consultees on this point;

(2) requiring the consent of the jurors participating in the research;

(3) establishing a regulatory/authorising body (suggestions included authorisation or regulation being the responsibility of the Ministry of Justice, the Secretary of State, the Attorney General, the Lord Chief Justice, the Senior Presiding Judge, or a sub-committee of judges);

(4) devising a code of conduct for researchers and/or the use of normal academic ethical controls on empirical research;

[50] See para 4.38 and following, above.

(5) requiring the research to be clearly defined, with a specific purpose and based upon identified cases (rather than any type of "roving remit") and/or making such research exceptional rather than the norm;

(6) the use of anonymised results so that the case and the jurors cannot be identified and

(7) limiting research to "bona fide academics in academic posts (not self-employed self-styled academics)" nor research students nor journalists.

4.51 We consider that the aim here should be to ensure that research which is undertaken by academics into jury deliberations can be fruitful research which contributes to an important public interest, whilst also ensuring that the administration of justice is upheld. In particular, the needs of academic research and researchers can only ever be subordinate to the primary function of the jury – to deliver a verdict in a criminal trial. It is also necessary to hold in high regard the interests of jurors themselves, particularly given that they are undertaking a vital, but compulsory, civic duty. As we noted in the CP, jurors value greatly the protection that section 8 provides for their deliberations.[51]

Current authorisation procedure

4.52 At present, any researchers wishing to undertake research using participants in the court system are required to obtain authorisation. This involves securing sponsorship for the research from the relevant HM Courts & Tribunals Service ("HMCTS") "business area" (crime, civil, family or tribunals). Once that sponsorship is achieved, the researcher must apply to the Data Access Panel ("DAP"). As the HMCTS website explains:

> The panel aims to monitor all requests for research or new data collections that affect HMCTS, ensuring that any additional burden placed on the courts is justified, and that the proposed research request is feasible and practical. The DAP also aims to assist researchers by advising whether the data they require is available from other sources which are more easily accessed than case files.[52]

4.53 If approval is obtained from the DAP, it may be necessary to agree a Privileged Access Agreement. This is "a binding agreement between the researchers and the Department that the researcher will fully anonymise all information collected, and that certain other safeguards will be met",[53] including in relation to obligations under the Public Records Acts 1958 and 1967 and the Data Protection Act 1998. The process of securing DAP approval under the present law already provides many of the safeguards that consultees suggested.

[51] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.55.

[52] HM Courts & Tribunals Service – Information for Researchers, http://www.justice.gov.uk/publications/research-and-analysis/courts (last visited 1 October 2013).

[53] HM Courts & Tribunals Service – Information for Researchers, http://www.justice.gov.uk/publications/research-and-analysis/courts(last visited 1 October 2013).

4.54 Accordingly, **we recommend that academic research into jury deliberations, within the exception we proposed for section 8 of the 1981 Act, should be subject to the current authorisation procedure.**

4.55 We do not make proposals in relation to which individuals will be able to undertake research, but we would assume that the current procedure would have regard to the academic standing of the applicant researcher and, in particular, that employment at an academic institution with a previous record of successful and ethical empirical research would be a factor for the current authorising body to consider.

4.56 If necessary, conditions can be imposed on such research. This could include, for example, permitting only research which is to be undertaken after the trial on which the jury has been sitting has completed and all verdicts in the case (and any related case) have been returned. This ensures that no research can be said to have interfered with the trial process and, in particular, jeopardised the integrity of the jury's deliberations and their verdict(s).

4.57 Further conditions may be imposed with regards to the requirement for the consent of the jurors concerned, the need for the research to abide by a code of conduct or other appropriate ethical standards, and limitations on the use to which research can be put. A Privileged Access Agreement can be used to ensure that results of the research are only ever published in anonymised form so that neither the trial on which the jurors sat nor the jurors themselves nor any other individual in the proceedings can be identified. We consider that the detail of the conditions which are imposed on any research will be a matter for the current authorising body to consider on a case-by-case basis.

The form of any exception to section 8

4.58 Whilst, again, we have not engaged in drafting legislative provisions, we consider that our recommendations for reform of section 8 to allow academic research could most easily be put into practice by adding an additional sub-section to the current legislation. The section in its existing form provides:

> **Confidentiality of jury's deliberations**
>
> (1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
>
> (2) This section does not apply to any disclosure of any particulars—
>
> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
>
> (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,
>
> or to the publication of any particulars so disclosed.

4.59 We suggest that an additional subsection (c) could be introduced which would provide that the section does not apply to the disclosure of any particulars to a person who has the leave of the authorising body. Section 9 of the 1981 Act contains a similar provision in relation to the use of tape recorders or other such instruments in court, for which leave may be given. In relation to such leave under section 9(1)(a), it is provided that:

> Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.

4.60 There seems to be no reason why a similar provision could not be included within section 8 to allow for approved academic research.

REFORM OF THE PROCEDURE

4.61 As we explained above,[54] there are concerns about the procedure currently used to try breaches of section 8. In particular, trial in the Divisional Court using a civil procedure means there is a lack of clarity about the availability of legal aid[55] and there are concerns that the current process does not allow the defendant to know adequately the case against them, because there is no charge sheet or indictment. It is also unclear whether the protections of the Bail Act 1976 apply[56] and there are questions about whether the use of the civil – rather than criminal – disclosure regime is appropriate. Currently, the only avenue of appeal is to the Supreme Court.[57]

4.62 As with cases involving extraneous research undertaken by jurors into the case that they are trying, it is hard to see the justification for treating the procedure for breach of section 8 differently from other forms of similar criminal misconduct. Furthermore, there are concerns about the extent to which this current procedure complies with the requirements of articles 5, 6 and 7 of the ECHR, given the concerns we raised above.[58]

4.63 We therefore suggested in the CP that there could be merit in reforming the law so that breaches of section 8 are tried only on indictment. One of the advantages of trying such matters on indictment would be that the existing, well-established

[54] See para 4.9 above.

[55] “Criminal proceedings” for which legal aid is available are defined under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This definition covers only contempts committed in the face of the court (s 14(g)), and although “other proceedings… may be prescribed”, other types of contempts do not appear to have been so prescribed.

[56] It depends on whether contempt proceedings are “proceedings for an offence” under s 1(1) of that Act. If the Bail 1976 Act does not apply, the common law of bail may do so, but the lack of legal clarity here could give rise to a breach of article 5. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.67.

[57] Administration of Justice Act 1960, s 13.

[58] See para 4.11 and following above.

and familiar rules of evidence and procedure would apply as a matter of course, thereby ensuring protection of the alleged contemnor's human rights.

4.64 However, in the CP we also raised concerns that trial by jury may not be the most appropriate mechanism for dealing with such conduct, as jurors may be unwilling to convict someone for misconduct related to their service as jurors. We discussed an alternative proposal to deal with this concern: to adopt a trial process incorporating the protections inherent to trial on indictment, such as the criminal rules of evidence and procedure, but presided over by a judge alone in a trial "as if on indictment". We asked consultees whether they considered that breaches of section 8 should be tried as if on indictment by a judge sitting alone and, if so, whether it should be a specific level of judge in all cases or whether the trial judge should be allocated by the presiding judge on a case-by-case basis.

4.65 In addition, we asked consultees whether the current maximum sentence for a breach of section 8 is appropriate and, if not, what it should be. We also asked whether community penalties should be available as a sanction for breach of section 8.

The views of consultees

4.66 In response to our question in the CP about whether breach of section 8 should be tried as a normal criminal offence, instead of by the use of the contempt procedure before the Divisional Court, 11 consultees favoured trial on indictment with a jury, whilst seven were against this. In addition, one response contained the caveat that whilst trial on indictment with a jury should be possible, a court should also have the power to proceed on its own motion. Seven consultees responded that they were in favour of trial "as if on indictment" by judge alone whilst 10 were against this idea.

4.67 If these cases were to be tried "as if on indictment" by judge alone, two consultees argued that the judge should be allocated by the presiding judge on a case-by-case basis. Another response agreed that the presiding judge should have such power but that only a High Court or Circuit Judge should be able to try such cases. A further response explained that:

> There is no reason why such cases should not be tried by Circuit Judges, though the presiding judge should have the discretion to allocate the case to a more senior judge where appropriate.[59]

4.68 One consultee thought that any judge who sits in the Crown Court could try the case. Another response suggested that "it would be best to specify the minimum level of judge in all cases".

4.69 The general view of consultees on the trial of breach of section 8 accorded with their view on the trial of any new statutory offence of intentionally seeking information related to the case that the juror is trying. Most consultees favoured trial on indictment by judge and jury over trial in the Divisional Court or trial "as if on indictment" by judge alone. In addition, many consultees highlighted the benefit of consistency in trying the two different forms of juror contempt in the

[59] Response of the Chancery Bar Association.

same manner. Even those who felt the current procedure in the Divisional Court acceptable could see the merit in trying section 8 on indictment with a jury if any new statutory offence were also so tried.

4.70 As we explained above, we raised in the CP[60] the option of trial "as if on indictment" by judge alone because of possible concerns that, if trial by jury were adopted, jurors could be unwilling to convict other jurors of breach of section 8. We again acknowledge that such fear was speculative and have been reassured that consultees did not generally share this concern.

Our recommendation

4.71 In light of the views of consultees, **we recommend that breach of section 8 of the 1981 Act should be triable only on indictment.** This could be considered unusual as most modern statutory offences are triable either way; however this step has been taken because the misconduct arises only out of Crown Court trials. As we stated in Chapter 3,[61] it is important for misconduct by jurors in the Crown Court is dealt with by the Crown Court.

4.72 Again, this would ensure that the ordinary criminal process would apply to a juror accused of breaching section 8. The investigative process (including police powers) would be governed by the Police and Criminal Evidence Act 1984, which would also mean that the Act's safeguards would apply to those suspected of breaching section 8. Upon charge, the juror would first appear in the magistrates' court whereupon the case would be sent to the Crown Court under section 51 of the Criminal Justice Act 2003. Bail for the accused juror would fall within the terms of the Bail Act 1976. Once the case was sent to the Crown Court, the usual procedure involving a preliminary hearing and a plea and case management hearing would apply. The ordinary criminal disclosure regime under the Criminal Procedure and Investigations Act 1996 would operate, as would the usual rules of evidence. The trial would take place before a jury. In addition, the defendant-juror could benefit from criminal legal aid. Appeals against convictions would be heard in the Court of Appeal (Criminal Division).

4.73 On sentencing for breach of section 8 of the 1981 Act, the general view of consultees was that the current maximum sentence under section 14 of the 1981 Act (an unlimited fine and/or up to 2 years' imprisonment) was appropriate. Eighteen consultees thought that the current maximum should be retained whilst two consultees supported a reduction in the maximum sentence on the basis that it is currently "excessive".

4.74 There was significant support for the introduction of community penalties for breach of section 8. Twenty consultees were in favour of their introduction, with only one response against.

4.75 Since there was general agreement that the current maximum sentence of an unlimited fine and/or two years' imprisonment should remain, and that community penalties should be available, we regard this point as uncontroversial. In

[60] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.70 and following.

[61] See para 3.80 above.

particular, we consider that all the usual criminal sentencing provisions should apply as normal if a breach of section 8 were made triable on indictment. This means that, in addition to community penalties, it will be possible for the court to impose discharges, fines, suspended prison sentences, hospital orders, or any other order which would be available to a sentencing court following a trial on indictment. Furthermore, we again suspect that many examples of these offences will be suitable for community penalties because, given the requirements for jury service, many jurors are likely to be of previous good character which could militate against the imposition of a prison sentence.[62]

4.76 In consequence, **we recommend that the normal criminal sentencing provisions should apply in relation to a breach of section 8 of the 1981 Act, if it is tried on indictment. We also recommend that the maximum penalty should be two years' imprisonment and/or an unlimited fine.**

4.77 It may also be necessary to amend the wording of section 14 of the 1981 Act to clarify that the normal sentencing provisions applicable following a trial on indictment should be available in respect of a breach of section 8 of that Act.

[62] See para 3.80 above.

CHAPTER 5
OTHER MEASURES TO PREVENT JUROR MISCONDUCT

INTRODUCTION

5.1 In Chapter 4 of the CP, we explained the preventative measures currently taken to try to ensure that jurors abide by the prohibitions on certain forms of conduct during or after jury service. We also set out a number of provisional proposals designed to improve the effectiveness of these measures and to promote greater clarity and consistency in their application. These included very general measures such as improving the understanding of the public at large and young people in particular of the importance of jury service. They also include reforming the steps taken prior to empanelling a jury – from the moment a person is notified that they have been summoned for jury service – to the procedures in place during jury service itself once the trial is underway. In this chapter, we examine the responses we received in relation to each proposal in the CP.

5.2 Research is now being undertaken by Professor Cheryl Thomas into the most effective methods of informing people about their obligations as jurors.[1]

5.3 We consider that this research, which is due for completion by the end of 2013, will provide an important empirical basis for shaping the precise means by which information is provided to jurors.

SUMMARY OF PROPOSALS IN THE CP

5.4 In the CP, we sought to address the underlying causes of juror misconduct. We emphasised the need to make clear to jurors not just that they are prohibited from certain conduct, but also *why* those prohibitions are crucial to ensuring a fair trial. We noted in particular the importance of all members of society understanding the need for jurors to try cases fairly on the evidence, and suggested that this should include teaching in schools about the role and importance of jury service. This would equip people who are later called to do jury service with the necessary background knowledge to fulfil their functions as jurors properly.

5.5 We also underlined the importance of all jurors being told more precisely, clearly and consistently that they must not undertake research or seek out information about any matters related to the trial and why this is so.[2] Likewise, that they should not disclose information related to the case and the reasons for this restriction. The warning should be detailed and give specific examples.[3] It should

[1] C Thomas, "Avoiding the perfect storm of juror contempt" [2013] *Criminal Law Review* 483, 499.

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

[3] L Whitney Lee, "Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 *De Paul Law Review* 181.

be reviewed regularly and if necessary updated in order to take account of technological developments.[4] Jurors should also be told that failure to follow the warnings could result in them being prosecuted and imprisoned. Jurors should be informed of "what to do about improper behaviour, including when and how to report it"[5] and that as jurors they have a duty to report such conduct by other jurors.[6] Judges should issue this warning at the start of the trial and then repeat it in summary at the end of every court sitting day for the duration of the trial.

5.6 We provisionally proposed that the appropriately drafted warnings to jurors should be delivered in the guide sent to jurors with their summons; in the jury DVD; in the speech by the jury manager; on eye-catching, memorable and well-designed posters in the court building;[7] and on conduct cards which jurors should carry with them to use as a reminder.[8]

5.7 Additionally, we provisionally proposed that the oath should be amended to include wording which commits jurors to abide by the terms of section 8 and not to undertake research about the case.[9] We also asked consultees whether the oath should be reproduced in a written declaration to be signed by jurors, as well as being spoken out loud.

5.8 We proposed that jurors be given clearer instruction on how to ask questions during the proceedings and encouragement to do so. We considered that this might discourage them from undertaking research to try to find their own answers.[10]

5.9 We also suggested that internet-enabled devices should not automatically be removed from jurors throughout their time at court but that judges should have a statutory power to require jurors to surrender their internet-enabled devices. Further, internet-enabled devices should always be removed from jurors whilst they are in the deliberating room. We proposed that whether jurors should

[4] We acknowledged that any such warning will need to include a "catch all" provision, to guard against the risk of being too specific and missing out certain social networking sites, websites or software. The precise terms will be a matter for the Judicial College.

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

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

[7] See, for example, the mobile phone poster used in some Californian courts, http://www.courts.ca.gov/documents/Jury_Poster_11x17.pdf (last visited 24 September 2013).

[8] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.80. The use of conduct cards was mentioned in *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50 and we understand that Professor Thomas is currently undertaking research into their effectiveness.

[9] N Haralambous, "Educating Jurors: Technology, the Internet and the Jury System" (2010) 19(3) *Information and Communications Technology Law* 255, 260 to 261. Note that in Queensland, Australia, the wording of the jurors' oath commits them not to disclose details of their deliberations unless permitted by law: see Oaths Act 1867 (Qld), s 22.

[10] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.85.

surrender their internet-enabled devices at times other than when in the deliberating room should be left to the discretion of the trial judge.[11]

5.10 We also proposed putting in place systems to make it easier for jurors to report their concerns about fellow jurors' misconduct.[12] Finally, we asked consultees whether other preventative measures should be adopted to assist jurors and, if so, what they should be.

5.11 In the next section of this chapter, we examine the responses we received in relation to each of our provisional proposals and make recommendations which we consider would strengthen and clarify existing preventative measures.

MEASURES PRIOR TO JURY SERVICE

5.12 The vast majority of respondents were in favour of our provisional proposal that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service. Twenty-six consultees supported the proposal, many for the reasons we explained in the CP with respect to juror misconduct, but also for wider benefits of improving public understanding of the role and importance of the criminal justice system.

5.13 As a helpful starting point for any future steps, the CPS explained that they:

> worked with the Ministry of Justice to produce an interactive website called "Your Justice Your World" to provide young people aged 7 to 16 with an understanding of criminal, civil, family and administrative law and court proceedings. The website was launched in July 2009 and was linked to the Citizenship and PSHE modules for GCSE. Although highly regarded, the website has now been archived, but if revived, the section on Crown Court juries could be reviewed to emphasise the role and importance of juries.

5.14 Only two consultees responded that they were against the proposal, although they did not provide reasons for their views.

5.15 We consider that jurors are more likely to comply with their obligations if they understand precisely why those obligations are so important. As we noted in the CP, incidents of misconduct by some jurors may arise from ignorance about the court process and procedure, which in turn may reflect a more general lack of knowledge about the operation of the criminal justice system.[13] It is crucial, therefore, that jurors understand how the prohibitions on certain forms of conduct during their service relate directly to the important goal of securing the defendant's right to a fair trial. Education from an early age in schools would help to ensure that everybody receives the necessary information and therefore create a wider understanding among the general public. The National Curriculum currently includes an element dealing with "the legal system in the UK… and how

[11] See Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 4.86 to 4.90.

[12] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.91.

[13] See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 4.78.

the law helps society deal with complex problems."[14] We consider that material on jurors' responsibilities could be included within that element.

5.16 In consequence of the views of consultees, **we recommend that the Department for Education should look at ways to encourage schools to deliver teaching about the role and importance of jury service.**

MEASURES PRIOR TO EMPANELLING THE JURY

Information and warnings given to jurors

5.17 Twenty-nine consultees agreed with our proposals for informing jurors, both before and during their service, about what they are and are not permitted to do. Various consultees who were in agreement with us made suggestions for additional measures which could be taken. The Criminal Cases Review Commission ("CCRC") responded that:

> jurors should be asked to sign a declaration to the effect that they have had the relevant matters explained, and have understood them, and that they will try the case only according to the evidence and in accordance with their oath (which could be set out in writing for them, as well as it being given orally by a juror in court on empanelment.) The CCRC uses a similar process when it interviews jurors, and it gives them the opportunity to raise questions if they do not understand anything they have been told or have more general concerns.

5.18 The Media Lawyers Association and Independent Print Limited also thought that there could be merit in a signed statement or written agreement between the court and the juror. The CPS had concerns about the language abilities of some jurors, and proposed that "any written material should also be translated into the first language of any jurors whose first language is not English".

5.19 Anthony Arlidge QC was in the favour of the proposals, with the exception of the use of posters. The only elements of disagreement came from three consultees. The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) responded that, whilst they agreed with the other proposals, "the issuing of 'conduct cards' seems to be a step too far".

5.20 Similarly, the Council of Circuit Judges responded that:

> Essentially we agree with these proposals which to a large extent reflect present good practice. However, we do consider that they include some elements which are unnecessary. The provision of a card would be unlikely to have much if any effect. Repetition of warnings even in summary form at the end of every day is unnecessary. It has the danger of becoming a mantra which all ignore… .

[14] Department for Education, *National Curriculum in England Framework Document* (2013) at page 186. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210969/NC_framework_document_-_FINAL.pdf (last visited 24 September 2013).

5.21 On the one hand, concern about the benefits of repetition of warnings is clearly a legitimate one. On the other, we understand anecdotally that the warnings given by some judges in their courts are inconsistent with warnings given by other judges in other courts and that this creates confusion for jurors. In addition, part of the purpose of repeating the warning is to emphasise to jurors the seriousness of the matter and to help them remember it.

5.22 It is clear that steps need to be taken to improve the instructions given to jurors about their obligations during jury service. Findings from Professor Thomas' most recent research that 23% of jurors were "confused about the rule on internet use"[15] demonstrate that the current instructions to jurors are not providing sufficient clarity. The research also reveals that practice differs between different court centres across the country. We therefore consider that there is a need to harmonise the information that jurors are given.

5.23 However, we consider that reforms undertaken in this area should be based on evidence about the best methods of informing jurors about their obligations. Account therefore needs to be taken of the results of Professor Thomas' research, including that which she is currently undertaking. The position is different with the new offence recommended in Chapter 3. That is necessary for the reasons of consistency and principle (that Parliament should declare what is criminal) and to introduce a more appropriate procedure for trial of such allegations. At this stage, **our recommendation is therefore that the Judicial College and HMCTS should implement measures to improve information provided to jurors about their obligations during jury service including awareness of the new offence we recommend.**

5.24 Some general observations can be made at this stage, however. The terms of the warning given to jurors before they are empanelled should be regularly updated in order to take account of technological developments and be detailed and give specific examples.[16] It is important to avoid a situation whereby prohibitions on certain internet services are listed, lest this give the impression that any service not named in the list can be used by the juror without restriction. Any attempt to produce an exhaustive list would undoubtedly fail as such a list would be endless, and would need amending all too frequently as new services become available and use of the internet changes. The key issue is to convey to jurors the categories of activity which are prohibited so that jurors can understand the scope of the prohibition and apply it in practice to their use of the internet in their lives.

5.25 In addition, consideration should be given to whether on their first day of service, after having watched the DVD and listened to the speech by the jury manager, all jurors in the court centre could be addressed together by a single judge, possibly the resident judge for that court centre, in open court.[17] Alternatively, individual

[15] C Thomas, 'Avoiding the perfect storm of juror contempt' [2013] *Criminal Law Review* 483, 488.

[16] L Whitney Lee, "Silencing the 'Twittering Juror': The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age" (2010) 60 *De Paul Law Review* 181.

[17] This was suggested by HHJ Tonking.

trial judges could give this guidance to juries on a case-by-case basis. In either instance, the judge would give a prescribed warning about the statutory prohibition of research, in the form discussed above. The precise form of words would be a matter for the Judicial College or the Lord Chief Justice. In light of the other explanations jurors will have received about the new offence, this warning need only be fairly minimal. Indeed, it may be desirable if it does not go far beyond warning jurors of the existence of the new offence, and reminding them of the other standard form information that they have received about the offence.

5.26 It is important to emphasise that this would not recreate the present position where the judge's order creates the terms of the offence. Nor are we recommending implementation of the suggestion in *Beard* and *Davey*[18] that a standard direction emanating from the Judicial College or Divisional Court be given by the trial judge in the absence of a new offence. Under that proposal it would again be the judge's direction (albeit with more consistency across cases) which creates the terms of the offence. For reasons discussed in detail in chapter 3[19] we consider that it is preferable, for reasons of legitimacy and procedural fairness, that the source of the offence is in statute. Under our recommendation, the judge would simply be explaining the terms of the offence as defined by Parliament.

5.27 We also consider that, subject to the ongoing research, there may be merit in jurors signing a written declaration to the effect that they had heard and understood the terms of the warning given by the judge. Consultees' views on our proposal to introduce a written declaration were mixed, with 16 responses in favour and 12 against. On the one hand, the formal process of reading and signing a written declaration should help to underscore the significance of the oath. Since the declaration serves as a confirmation that jurors have understood and accept the oath, it also provides another opportunity for jurors to ask questions should they need to clarify the nature and scope of their obligations.

5.28 There were concerns amongst some consultees, however, that having jurors sign a written declaration could be time-consuming at the start of a trial. In addition, there were concerns about the impact on jurors with low levels of literacy or fluency in the English language. These latter concerns are clearly not limited to the issue of reform of the oath – low levels of literacy and difficulties understanding English are a wider problem given that jurors are expected to understand written and oral evidence in court. Indeed, whilst it could be embarrassing for jurors to have to admit that they cannot read the oath and written declaration in public in court, there may also be a benefit in identifying those jurors who may be unable to understand the written evidence. It would be inappropriate to develop (in effect) a minimum educational standard for jurors to be eligible for service. However, it is appropriate for jurors with limited reading ability (or reading ability in English) to be assigned to particular cases where

[18] *A-G v Davey* and *A-G v Beard* [2013] EWHC 2317 (Admin), [2013] All ER (D) 391 (Jul) (combined judgment) discussed in chapter 3 above at paras 3.15 to 3.16.

[19] See in particular paras 3.19 to 3.20.

there is not much evidence in written form (documentary statements, for example) which they might struggle to understand.[20]

5.29 The ongoing research into jurors' experience of the trial process is likely to provide useful findings about the desirability of introducing a written declaration, as well as the most effective way of doing so in practice if considered desirable. We think that the issue could be resolved in the scheme we set out at paragraph 5.25, by having jurors sign a written declaration after the judge has delivered the warning in court, but after the judge has left the room. The jurors would be able to ask any questions of the jury manager – perhaps a less intimidating figure than the judge – in order to clarify in their minds what is and is not prohibited.[21] We expect that jury managers may need some training so that they can be confident in the advice they give jurors and also to ensure consistency across courts. In case of any serious difficulties or questions which the jury manager cannot answer, the jury manager can of course refer the matter to the judge.

5.30 In respect of jurors who have difficulties reading, we understand that jury managers currently take the time to assist jurors with literacy difficulties understand any paperwork they are faced with at court. We would expect that a jury manager would do the same if a juror was unable to read the declaration – this would involve reading the declaration to the juror and, if necessary, spending some time explaining it to them, before the juror signs it. If the juror's difficulties might affect his or her ability to try particularly complex cases or those with large volumes of written evidence, the jury manager may also need to report the juror's difficulty to the judge, to ensure they are not assigned to an inappropriate case.[22]

5.31 **We recommend that consideration be given to jurors having to sign a written declaration on their first day of jury service, after they have received a warning not to conduct their own research.**

5.32 We anticipate that the choreography of the new scheme might be as follows:

(1) The juror summons includes a document explaining that it is a criminal offence to engage in research while acting as a juror. The information will include examples of what is and is not prohibited and, crucially, emphasise the reason why such conduct is prohibited. The juror will be reassured that further explanation will be provided at the court.

[20] This is recognised in the Criminal Practice Directions, issued 7 October 2013, 39C.1 to 2.

[21] Jurors should of course be made aware that any questions about matters to do with their case or the law should be asked of the judge, not the jury manager/bailiff.

[22] The judge could alternatively exercise his or her discretion to discharge a juror from service entirely under the Juries Act 1974, s 9, or use the s 10 power under that Act to discharge on account of insufficient understanding of English. Furthermore, at the later stage where jurors are being empanelled to sit on a specific case, prosecutors have the right to 'stand a juror by' (i.e. return them to the general jury pool, so that they only try the case in question if there is no other juror available to take their place). *The Attorney General's Guidelines (Jury Vetting: Right of Stand By* (2012) 88 Cr App R 123), which set out how this power should be used, specifically mention illiteracy as a ground for standing a juror by from a complex case as long as the defence agrees (guideline 5b).

(2) When the juror arrives at the court centre for the first day of jury service, he or she will watch the juror DVD which should include a segment on the new offence and why that form of conduct is criminal.

(3) All jurors will receive judicial direction reminding them of the new offence and why it is important, either through a speech from the resident judge at the start of their juror service or by trial judges on a case-by-case basis. In either case, it may be desirable if this direction goes little further than warning jurors of the existence of the new offence and reminding them of the other standard form information which they received about the offence. The text of the judicial direction can be prescribed by the Judicial College.

(4) Jurors will be asked to sign a declaration which the jury manager will give them along with other paperwork to be completed.

(5) In court centres which employ the method of a single speech to new jurors by the resident judge, trial judges directing jurors need say no more than something like "You were told by the resident judge when you arrived about the crime of engaging in research while you are a juror. The judge explained why that is important.." The Judicial College will advise judges about the best way in which this is to be achieved.

5.33 The exact manner in which information is to be provided in such a process will be a matter to be decided in light of the ongoing research by Professor Thomas.

The jurors' oath

5.34 Twenty-four consultees were in favour of amending the wording of the current oath to include an agreement to base the verdict only on the evidence heard in court and not to undertake research about the case or breach section 8. There were eight consultees who were against such an amendment.

5.35 In light of this strong support, **we recommend amending the wording of the current oath to include an agreement to base the verdict only on the evidence presented in court and not to seek or disclose information about the case.**

MEASURES AFTER EMPANELLING THE JURY

Questions from jurors

5.36 On the issue of jurors being encouraged to ask more questions during the trial, as a way of discouraging them from undertaking their own investigations, 24 responses were received in favour of this proposal, whilst four consultees disagreed. Those four included the Senior Judiciary, who responded that they understood that jurors:

> are already made aware of their ability to do this. We see no need to emphasise this further. It raises false expectations since many questions cannot properly be answered or may hamper the efficient progress of the case. Moreover, to encourage questions and then not to answer them because they relate to inadmissible background or irrelevant matters is unsatisfactory.

5.37 Likewise, the Council of Circuit Judges thought that this issue could:

> be dealt with adequately in the "housekeeping" directions. We consider that there are real dangers in encouraging questions. It may lead to some jurors feeling obliged to ask questions and they may not be sensible or relevant. It may lead to issues being raised which are peripheral or cannot be answered by admissible evidence. At present juries do ask questions and frequently they are very pertinent. We do not see any need for encouragement. Provided the jury know it may ask questions that should suffice.

5.38 Since the publication of the CP, one commentator has suggested that "encouragement to participate more fully in the trial might give more confidence to the active juror" and that judges should tell jurors that they have "a duty to ask questions if they are confused or curious" on the basis that "it must be better to openly question the judge and advocates than to secretly surf".[23]

5.39 We consider that the most important issue is that jurors understand that they are permitted to ask questions where they have concerns or queries about the evidence that has been heard in court. Indeed, jurors should be empowered to ask such questions, rather than being discouraged. In addition, jurors need to understand that they must ask questions if they are unsure about what they are permitted to do in relation to section 8 of the 1981 Act or looking for information about the proceedings they are trying. Jurors who are deterred may be more tempted to try to undertake research themselves to find the answer to the questions, rather than raising them with the court.

5.40 It may be that jurors want to ask questions which "cannot be answered by admissible evidence". If they do, jurors will need to be told – as they currently are – that some questions cannot be answered but reminded that they should not try to find the answers to such questions themselves. Jurors asking "peripheral" or "irrelevant" questions may be an indication that they have not understood what matters are relevant to the trial and what they have to decide. In such a scenario, a reminder of the matters in dispute could be useful and important to ensure that the jury is focusing on the right matters in issue.

5.41 **We therefore recommend that the Judicial College consider, in light of research findings, a form of direction to reflect what we consider to be the correct balance between being too explicit in seeking questions from jurors, which could lead to judges being inundated and time wasted with unanswerable or irrelevant questions, and deterring jurors from asking proper and pertinent questions.**

Internet-enabled devices

5.42 On the issue of jurors' use of mobile phones and other internet-enabled devices at court, there was generally widespread support for our suggestions.

[23] J Mackie, 'Juries in the Dock' [2012] 156(46) *Solicitors Journal* 7.

No automatic removal of devices at court

5.43 Twenty-nine responses agreed with our provisional proposal that internet-enabled devices should not automatically be removed from jurors throughout their time at court. The CCRC explained that its staff were divided on the issue but agreed that practices needed to be consistent across courts. Only two consultees were against the proposal, both being in favour of automatic removal for the duration of the jurors' time at court.

5.44 Several consultees highlighted that jury service is an important but compulsory public duty. It is therefore vital that the co-operation and support of jurors is maintained. It is also inevitable that jurors will spend time at court waiting for their case whilst other legal matters are discussed. There is real benefit in ensuring that jurors can keep themselves occupied while waiting and not creating unnecessary frustration and boredom for them. A blanket prohibition on jurors' internet-enabled devices is likely therefore to be counter-productive to the administration of justice, as well as disproportionate.

A statutory power for removal of devices at court

5.45 In the CP we also proposed that, while internet-enabled devices should not automatically be removed from jurors at court, judges should have a power to require jurors to surrender their devices where necessary. There are clearly times when it will be necessary to require jurors to surrender their devices but, as we indentified in the CP, it is not clear that judges currently have the power to order this. Twenty-one consultees agreed that judges should be provided with this power and/or that it should be placed on a surer, statutory footing. A further four agreed in principle but emphasised the need for limits on the use of the power (say, in exceptional circumstances) and appropriate guidance for judges. One of those in favour commented that:

> It is likely that any order to surrender internet-equipped devices could engage Article 8 [right to respect for private life][24] and Article 1 of Protocol 1 [peaceful enjoyment of possessions] of the ECHR ["European Convention on Human Rights"]. Whilst this is not problematic in that both are qualified rights, it does suggest that there should be certainty over the power to order removal and therefore, for the sake of clarity, I would support the proposal to clarify that judges do have the power.

5.46 Six responses were against this proposal, some of which argued that it would be incompatible with the jurors' human rights under the ECHR.

Prohibition on devices in the deliberating room

5.47 There was general support for our proposal that internet-enabled devices should always be removed from jurors while they are in the deliberating room. Some consultees responded that this was already the practice in the Crown Courts, although in discussion with some stakeholders we were told that this was not the

[24] In that this applies to arbitrary interferences by the State (*Hokkanen v Finland* (1994) 19 EHRR 139 at para 55) but also to the respect for his communications and the most common internet-enabled device a juror is likely to have is a mobile telephone.

case in every court. Twenty-two responses received were in favour of always removing devices when jurors are in the deliberating room. However, a number of consultees added the qualification that arrangements would need to be put in place so that jurors' family members could contact the court in case of a personal emergency.

5.48 Professor Gillespie supported the proposal, explaining that it would:

> not, of course, prevent them [jurors] from conducting research since they could do so at home or whilst travelling to or from work but it is likely to demonstrate the importance of not doing so.

5.49 Ten consultees were against the proposal, among whom at least five responded that they would prefer to leave the matter to judicial discretion, rather than having automatic removal at certain times.

5.50 Whilst a prohibition on internet-enabled devices in the jury room would not preclude jurors from undertaking research at times when they are not at court, we accept the argument that this approach has the benefit of emphasising for jurors the importance of the task of deliberation, and the importance of the prohibition on undertaking research.

5.51 We also consider that the need to remove internet-enabled devices will be greatest at this point in the trial. While in the deliberating room, the jurors will be discussing the case in the absence of the judge and parties to the proceedings and, unlike in the jury assembly area, will be left entirely to their own devices while deliberating. This is also the time when gaps in the evidence are likely to become apparent, as the judge will have told the jury in summing up that they will hear no more evidence. It is also likely that at this time jurors will feel the most pressure to reach the "right" verdict. Removing them from this temptation is therefore particularly important during deliberations. We cannot conceive that there will be cases where it would be inappropriate to take this step.

Judicial discretion for removal at times other than deliberation

5.52 On the issue of judicial discretion for removal of internet-enabled devices at times other than when jurors are deliberating, 19 consultees were in favour of our proposal, although again some added the caveat that jurors would need to be contactable in case of an emergency. Professor Thomas raised concerns that judicial discretion is "likely to breed inconsistent practices at courts"[25], although she was supportive of our approach in not having an automatic ban on jurors' devices.[26] One consultee also raised the issue of the need to provide secure lockers at court. Likewise, since the publication of the CP, Professor Thomas has observed that this proposal would require some modification of current systems because courts currently have safes for mobile phones but these are often too

[25] C Thomas, 'Avoiding the perfect storm of juror contempt' [2013] *Criminal Law Review* 483, 500.

[26] C Thomas, 'Avoiding the perfect storm of juror contempt' [2013] *Criminal Law Review* 483, 499.

small for laptops.[27] Professor Thomas' research is likely to provide helpful guidance on the practicality of removing from jurors internet-enabled devices (including larger devices such as laptops) other than when deliberating.

5.53 A further three consultees supported the idea of judicial discretion in principle, but again wanted safeguards to be put in place and guidance given to judges. For example, the Senior Judiciary explained that "removal of such items, save for the time when the jury are in their deliberating room, should only occur when necessary, proportionate and justified".

5.54 Eight responses disagreed with the proposal.

5.55 We consider that a statutory power should be granted to judges allowing temporary removal where it was necessary in the interests of justice, with suitable guidance to be provided by way of a practice direction about its use. This will help to ensure consistency across courts. We anticipate that it would only be necessary for judges to exercise this discretionary statutory power in limited cases. One example might be during a court visit to the scene of the crime. Requiring surrender of internet-enabled devices would preclude the risk of jurors taking pictures or filming the scene, or otherwise using applications on their devices (for example to measure distances between various significant points at the crime scene). A second, exceptional, scenario in which the statutory power may be necessary is where a jury is sequestered, for example due to a threat of jury tampering. Whenever the statutory power to remove internet-enabled devices is exercised, mechanisms should be put in place by the court to ensure jurors can be contacted in the case of a personal emergency.

5.56 In any case where it is proposed to remove access to an internet-enabled device while the jury is not deliberating, jurors should have the opportunity to make representations to the judge. The judge would inevitably have to balance the risk posed to the interests of justice by jurors maintaining their internet-enabled devices with the inconvenience to the jurors of surrendering the relevant items and any other concerns raised by jurors. As the Senior Judiciary explained "removal of such items, save for the time when the jury are in their deliberating room, should only occur when necessary, proportionate and justified." There is no question of removing jurors' access to devices while they are at home or at work.[28]

5.57 **We recommend that:**

(1) there should not be an automatic prohibition on jurors having or using internet-enabled devices in the court building;

(2) judges be provided with a statutory power to remove internet-enabled devices from jurors;

(3) the power should be automatically applied every time a jury is

[27] C Thomas, 'Avoiding the perfect storm of juror contempt' [2013] *Criminal Law Review* 483, 500.

[28] If necessary in extreme cases, a jury could still be sequestered: see Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2014), at D19.9.

deliberating in the jury room and

(4) judges should also have discretion to remove internet-enabled devices from jurors at other times, where necessary in the interests of justice and proportionate.

Reporting juror misconduct

5.58 There are still clear grounds for concern regarding the likelihood of jurors understanding of what they should do if they become aware of misconduct by other jurors. Professor Thomas' research has revealed that when asked about whether they would know what to do if something improper occurred during jury deliberations, almost half of the jurors (48%) said they either would not know what to do or were uncertain.[29]

5.59 In addition, the most recent research revealed that "if a juror introduced additional information into deliberations that had not been presented [in evidence] in the trial, 14 per cent [of the jurors] said they would not do anything about it because they did not feel comfortable doing so" [30]

5.60 There was widespread support for our proposal in the CP that systems should be put in place to make it easier for jurors to report their concerns. Twenty-five consultees were in favour. One, Professor Gillespie, supported:

> the belief that there should be ways in which jurors should be able to raise concerns. Trials, particularly Crown Court trials, are quite imposing particularly with everyone sitting in their robes and a judge presiding. A juror, who may not have had any contact with the court system before being summoned to a jury, may well be unclear as to how he reports allegations and to whom….

5.61 However, four consultees responded with a note of caution. One was the CCRC, which highlighted that, although it agreed with the proposal:

> it is easy to see that such mechanisms might make it easier for a "rogue" juror, whether acting alone or at the behest of another, to de-rail a trial. Most important is how the judge deals with any issues raised. The CCRC experience suggests that, at least in the first instance, jurors must be given the opportunity to give information without other jurors knowing, as jurors can be reluctant to "break ranks" (which might be one reason why jurors wait until a trial is over before raising matters that concern them)… .

5.62 As to the specific means which should be provided for reporting juror misconduct, the Council of Circuit Judges noted that it did not see the necessity for a drop-in box:

> Provided the jurors are told that they should bring any matter or

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

[30] C Thomas, 'Avoiding the perfect storm of juror contempt' [2013] *Criminal Law Review* 483, 499.

problem which concerns them to the judge's attention and that they should do so in a note, we see no reason for such measures as drop-in boxes. If a juror has an opportunity to drop a note into the box we find it hard to believe the same juror could not hand it to the jury bailiff whilst en route to court.

5.63 Ten consultees were in favour of our suggestion of a telephone helpline, five in favour of an email helpline and six in favour of a website with frequently asked questions which jurors could consult for guidance. That said, some consultees, although supportive of the ideas, acknowledged that they could be resource intensive, not least because:

> there must be timely and regular checks made for any messages [and phone calls] relating to that day or the next days' trial, so that they can be dealt with at the most relevant time.[31]

5.64 The Senior Judiciary doubted "the value or wisdom of a hotline. Only the judge should give advice or a response to a particular query."

5.65 We anticipate that Professor Thomas' ongoing research will provide evidence of jurors' experiences which will help to shape the most effective systems to make it easier for jurors to report any concerns. We also understand that the Ministry of Justice is to digitise the process of jury summoning, so that jurors could reply to the summons via a website. We consider that this website could in turn also provide information for jurors on who to speak to about a particular difficulty. This could be done, for example, in the form of a flow chart, raising certain categories of problem and advising the juror whether they should speak to the jury manager, the judge or someone else about the problem. The precise form of the website should be created in light of the results of the ongoing research. However, in broad terms, we envisage the webpages as simply advising jurors about who to speak to about a particular problem, rather than answering "frequently asked questions" (where there is a risk that the advice on the website might differ from that given by the judge, creating confusion). **We therefore recommend that the Ministry of Justice establish additional webpages providing advice to jurors about how to resolve any queries they may have about their jury service.**

5.66 Other consultees made suggestions for alternative preventative measures, which included:

(1) the use of plain English in instructions to jurors;

(2) "in-court training prior to empanelment with the opportunity to ask questions";

(3) better posters around the court building;

(4) blocking internet signals from some areas of the court. "The removal of the capability may be sufficient to deter the majority of jurors from temptation in areas such as deliberating rooms" and

[31] Quote from the Criminal Bar Association.

(5) "putting a question to the jury at the end of the summing-up, seeking confirmation that they have properly fulfilled their duties and that they have discharged faithfully their oath to return a verdict solely in accordance with the evidence. The judge would need to emphasise that the jurors were under a continuing duty in this respect until verdicts had been delivered. While this could provide a final opportunity for any misgivings to be mentioned or considered, and operate as a formality which could deter juror remorse, there is a danger that it may lead to jurors raising issues that cause difficulties or confusion. Careful consideration would need to be given to the advantages and potential disadvantages of such a proposal."

5.67 Six consultees responded that no further preventative measures (beyond those listed elsewhere in the CP) were necessary.

5.68 In addition, since the publication of the CP, one academic commentator has suggested that jurors could undertake an "e-learning package" before jury service to ensure that they understand responsibilities as jurors; that jurors could be allowed to submit concerns about fellow jurors through a secure website (which is more discrete than a drop-box); and/or that the internet service provider for each juror could monitor or restrict access to certain websites for the period of jury service.[32]

5.69 As we have explained, support for our suggestions of a telephone helpline, an email helpline and a website with frequently asked questions was more muted than in relation to some of our other proposals. The most support (10 consultees) was for our suggestion of a telephone helpline, although six consultees did not think any further measures were necessary. Concerns were also raised that a hotline could cause difficulties if the advice given was inconsistent with that given by the judge. This would be especially so in cases where the judge has taken a different approach to the usual one (for example, using the discretionary power to remove internet-enabled devices other than during deliberations) because the particular circumstances of the case demanded it.

5.70 We believe that the preventative measures we have recommended above will prove sufficient in trying to protect jurors and protect the defendant's right to a fair trial. If so, the alternative measures which were suggested by consultees would be unnecessary. Since none of these alternative measures would require primary legislation, they could be introduced at a future date if necessary. We therefore consider that the best approach would be to assess the success of our other proposed measures in light of ongoing research into the functioning of juries before taking any further steps.

5.71 Some of the suggestions made by consultees as to other steps which could be taken to assist jurors were impractical or likely to be resource intensive. Blocking internet signals from some areas of the court would likely be expensive to introduce because of the time and technology involved, and could also prove impractical for other court users. Other suggestions (such as monitoring jurors'

[32] R Clarke, 'Juries and Contempt – Compensating for the Internet' [2013] 177 *Criminal Law and Justice Weekly* 85.

internet use) were likely to be a disproportionate interference with jurors' article 8 and 10 rights.

5.72 We have also considered the suggestion of:

> putting a question to the jury at the end of the summing-up, seeking confirmation that they have properly fulfilled their duties and that they have discharged faithfully their oath to return a verdict solely in accordance with the evidence.[33]

5.73 As those who made the suggestion recognised, "there is a danger that it [putting such question] may lead to jurors raising issues that cause difficulties or confusion" and given that such a question would be put at the end of the summing up, it could be a problematic time to invite questions given that no more evidence can be heard at that stage. We think that our other proposals discussed above address the issue in question more effectively because they are preventative in nature and seek to educate jurors about why they are not to undertake research into their case. Asking the question at the summing up stage may lead jurors to admit to misconduct, but by this stage the trial is almost concluded and the cost and inconvenience of the proceedings to the defendant, witnesses and the public have already been incurred. We believe that our proposals in relation to the oath will hopefully help to prevent such misconduct occurring in the first place. In consequence, we do not consider that putting this question to the jury before deliberating is necessary.

5.74 A final suggestion was made that the "use of plain English" would assist jurors. Whilst matters such as the accessibility of the language used in legal directions to the jury is outside of the scope of this project, we can see obvious merit in ensuring that the prohibitions on jurors' conduct are explained in English which is easy to understand for someone not well-versed in legalese. In consequence, **we recommend that in devising appropriate warnings for jurors the Judicial College and HMCTS should strive to use terms which are clear and easy to understand for those who are not legally trained.**

[33] Quote from the Senior Judiciary.

CHAPTER 6
SUMMARY OF RECOMMENDATIONS

MODERN MEDIA

6.1 We recommend the maintenance of the current statutory definition of "publication" under section 2(1) of the 1981 Act.

[paragraph 2.29]

6.2 We recommend retaining section 2(1) of the 1981 Act as it stands without defining whether a communication is "addressed to the public at large or any section of the public".

[paragraph 2.45]

6.3 We recommend clarifying section 2(3) of the 1981 Act to put on a statutory footing the present interpretation: that publication is a continuing act. For the avoidance of doubt, it may also be necessary to define the meaning of "first publication" in the legislation, i.e. the time when the communication first became accessible to the public at large or any section of it.

[paragraph 2.131]

6.4 We recommend that section 3(1) of the 1981 Act be amended to make clear that it applies only in relation to communications that were first made available to a section of the public when proceedings were already active.

[paragraph 2.135]

6.5 We recommend that section 3(2) of the 1981 Act should also be amended to make clear that it applies only where the publication first appeared when proceedings were already active.

[paragraph 2.145]

6.6 We recommend that where the communication was first published before proceedings became active, the person responsible for such a publication should be exempt from liability under section 2 of the 1981 Act unless put on formal notice by the Attorney General of a) the existence and location of the publication which first appeared before proceedings were active, b) the fact that relevant proceedings have become active since that publication and c) the offending contents of the publication.

[paragraph 2.152]

6.7 We recommend that the Attorney General should send a second notice once proceedings are no longer active.

[paragraph 2.149]

6.8 We recommend that section 4(1) of the 1981 Act be amended to make clear that where a publication that first appeared before the present proceedings were active poses a substantial risk of serious prejudice to present proceedings, and the person responsible for the publication has been put on formal notice (as above), the fact that the publication constituted a fair and accurate report of earlier proceedings does not exclude liability for contempt under section 2 in relation to the present proceedings.

[paragraph 2.153]

6.9 We recommend that the procedure for formal notice and for an order and subsequent *inter partes* hearing be formalised through a new Criminal Procedure Rule or statutory instrument.

[paragraph 2.166]

6.10 We recommend that a route to appeal against an order for temporary removal of a publication made under section 45(4) of the Senior Courts Act 1981 be established by the extension of section 159 of the Criminal Justice Act 1988.

[paragraph 2.189]

6.11 We also recommend that the prosecution, the defence or the Attorney General should be able to apply for an injunction. The permission of the Attorney General should not be a prerequisite.

[paragraph 2.192]

6.12 We recommend that, if the Attorney General applies to commit for statutory contempt in the Divisional Court, there should be no opportunity to bring proceedings for common law contempt in the Crown Court in relation to the same publication.

[paragraph 2.194]

6.13 We make no recommendation to deviate from the current maximum penalty as specified in section 14 of the 1981 Act.

[paragraph 2.199]

6.14 We recommend that the issues of place of publication and jurisdiction should be considered in more detail in a separate Law Commission project on social media at a future date.

[paragraph 2.216]

JURORS SEEKING EXTRANEOUS INFORMATION

6.15 We recommend the creation of a new statutory criminal offence for a sworn juror in a case deliberately searching for extraneous information related to the case that he or she is trying.

[paragraph 3.78]

6.16 We recommend that the new criminal offence should be triable only on indictment, in the usual manner.

[paragraph 3.81]

6.17 We recommend that the recommended new offence be punishable by a maximum sentence of two years' imprisonment and/or an unlimited fine.

[paragraph 3.83]

6.18 We recommend that all of the usual sentencing provisions which flow from a trial on indictment, including community penalties, should apply to the proposed offence.

[paragraph 3.86]

JUROR DISCLOSURE AND SECTION 8 OF THE CONTEMPT OF COURT ACT 1981

6.19 We recommend reform of section 8 of the 1981 Act to provide a specific defence where a juror discloses deliberations to a court official, the police or the CCRC in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice.

[paragraph 4.27]

6.20 We recommend that section 8 of the 1981 Act should be reformed to provide an exception allowing approved academic research into jury deliberations.

[paragraph 4.49]

6.21 We recommend that academic research into jury deliberations, within the exception we proposed for section 8 of the Contempt of Court Act 1981, should be subject to the current authorisation procedure.

[paragraph 4.54]

6.22 We recommend that breach of section 8 of the Contempt of Court Act 1981 should be triable only on indictment.

[paragraph 4.71]

6.23 We recommend that the normal criminal sentencing provisions should apply in relation to breach of section 8 of the 1981 Act, if it is tried on indictment. We also recommend that the maximum penalty should be two years' imprisonment and/or an unlimited fine.

[paragraph 4.76]

OTHER MEASURES TO PREVENT JUROR MISCONDUCT

6.24 We recommend that the Department for Education should look at ways to encourage schools to deliver teaching about the role and importance of jury service.

[paragraph 5.16]

6.25 We recommend that the Judicial College and HMCTS should implement measures to improve information provided to jurors about their obligations during jury service including awareness of the new offence we recommend.

[paragraph 5.23]

6.26 We recommend that consideration be given to jurors having to sign a written declaration on their first day of jury service, after they have received a warning not to conduct their own research.

[paragraph 5.31]

6.27 We recommend amending the wording of the current oath to include an agreement to base the verdict only on the evidence presented in court and not to seek or disclose information about the case.

[paragraph 5.35]

6.28 We recommend that the Judicial College consider, in light of research findings, a form of direction to reflect what we consider to be the correct balance between being too explicit in seeking questions from jurors, which could lead to judges being inundated and time wasted with unanswerable or irrelevant questions, and deterring jurors from asking proper and pertinent questions.

[paragraph 5.41]

6.29 We recommend that:

(1) there should not be an automatic prohibition on jurors having or using internet-enabled devices in the court building;

(2) judges be provided with a statutory power to remove internet-enabled devices from jurors;

(3) the power should be automatically applied every time a jury is deliberating in the jury room;

(4) judges should also have discretion to remove internet-enabled devices from jurors at other times, where necessary in the interests of justice and proportionate.

[paragraph 5.57]

6.30 We recommend that the Ministry of Justice establish additional webpages providing advice to jurors about how to resolve any queries they may have about their jury service.

[paragraph 5.65]

6.31 We recommend that in devising appropriate warnings for jurors the Judicial College and HMCTS should strive to use terms which are clear and easy to understand for the lay person.

[paragraph 5.74]

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
28 November 2013

APPENDIX A
LIST OF THOSE WHO COMMENTED ON CONSULTATION PAPER NO 209

Judicial and legal practitioners/bodies

Media Lawyers Association

Anthony Heaton-Armstrong

David Wolchover

The Council of HM Circuit Judges

Doughty Street Chambers (Crime Team)

Chancery Bar Association

Criminal Bar Association

Crown Prosecution Service

Godwin Busuttil

Justices' Clerks' Society

Law Society of England and Wales

Council of HM District Judges (Magistrates' Courts)

Lord Justice Treacy and Mr Justice Tugendhat (on behalf of the President of the Queen's Bench Division, the Senior Presiding Judge, Lord Justice Leveson, Lord Justice Goldring, and other senior judges)

London Criminal Courts Solicitors' Association

Criminal Cases Review Commission

Wiggin LLP

Association of High Court Masters

Western Circuit Judges

Coroners' Society of England and Wales

Corker Binning

Oliver Sells QC

Farrer & Co

Bar Council of England and Wales

South East London Bench

Magistrates' Association

Minter Ellison Lawyers, Australia

Anthony Arlidge QC

Academics

Professor Rosemary Hunter (University of Kent)

Associate Professor Nick Taylor (University of Leeds)

Professors Helen Fenwick and Gavin Phillipson (University of Durham)

Professor Alisdair Gillespie (Lancaster University)

Dr Findlay Stark (University of Cambridge)

Professor Eric Barendt (University College London)

Mr Micheál O'Floinn (University of Southampton)

Professor Chris Reed (Queen Mary, University of London)

Professor Cheryl Thomas (University College London)

Professor Vanessa Munro (University of Nottingham)

Professor Penny Darbyshire (Kingston University)

Professor Louise Ellison (University of Leeds)

Government departments, public bodies and police organisations

Information Commissioner's Office

Association of Chief Police Officers

Police Federation of England and Wales

Inspector Rick Sumner

Non-governmental persons/organisations and interest groups

British Naturism

Pirate Party UK

Internet Services Providers' Association (ISPA UK)

Equality and Human Rights Commission (EHRC)

The Publishers Association

Media Law Resource Center

The False Allegations Support Organisation (FASO UK)

The Media

The Evening Standard and Independent Print (*i,* The Independent and The Independent on Sunday)

ITN

The Newspaper Society

BBC

Guardian News and Media Ltd

Trinity Mirror Plc

Press Association

National Union of Journalists

The Chartered Institute of Journalists

Society of Editors

Joshua Rozenberg

Members of the public

Mr Paul Calverley

Mr Terence Ewing

Mr Bob Stammers

Ms Kathryn Robinson

Mr Robert Lewis

Mr Aaron Leung

Mr William J Read

Ms Ursula Riniker

Mr Tony Buckridge

Ms Anne Kennedy Reeves

Mr John Ekins

Mr James Colgan

We also received five anonymous responses and one confidential response