CONTEMPT OF COURT

A JUDICIAL RESPONSE TO LAW COMMISSION CONSULTATION PAPER NO 209

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Contempt of Court

This response to the Law Commission's consultation on Contempt of Court has been prepared by Lord Justice Treacy and Mr Justice Tugendhat. It reflects the views of the President of the Queen's Bench Division, the Senior Presiding Judge, Lord Justice Leveson, Lord Justice Goldring, and other senior judges. It has not been possible, however, to consult all relevant judges.

This response is made on the basis of the judiciary's interest in the effective administration of justice, an aspect of which is ensuring that trials are fair and effective. Comments are made on the substantive law and the merits of proposals where the administration of justice is directly engaged. The focus is on the practical effects of the Law Commission's proposals.

Overview

1. The internet, and the ease with which it can be accessed, has increased some problems and created other new problems. But proceedings, or threats of proceedings, against publishers and jurors should be the last measure to be taken to address this. Any measure that is likely to increase proceedings for contempt, or for crime, against members of a jury may also undermine the trust which must exist between judge and jury, and lead to what will be perceived as repetitions of *Bushell's case [1670] 124 E.R. 1006*.

Rationale for contempt by publication

2. As stated in para 2.4, a rationale for the law of contempt of court is to protect the right to a fair trial. But it also protects other rights of suspects, defendants and witnesses, in particular their rights to reputation and privacy. This is illustrated in relation to defendants by a comparison with French law, where the Civil Code Art 9-1 creates a

right to respect for the presumption of innocence. The right is breached where, before conviction, a person is represented publicly as guilty of acts which are the subject of a criminal investigation. The remedies include an injunction, damages and an order requiring publication of a correction. This point is most obviously relevant to the question whether the names of those arrested should be published (see Question 6.3 below). It is not possible to consider the law of contempt by publication without regard to other speech related rights.

Historical Background

3. One reason for the jurisdiction to punish publications that may affect a trial, and in some cases to grant injunctions, is that juries are no longer required to be kept together during a trial. As the editors of Arlidge Eady & Smith on Contempt 4th ed explain at para 10-192, until 1897, it was regarded as necessary in all cases of felony that the jury should remain together from the time the prisoner was given into their charge at the beginning of the trial until their verdict was delivered. This would protect them from exposure to risk of interference by anyone, including from publications in the media. Restrictions upon juries were always understood to put undue pressure on them. So the law was relaxed, and is now set out in the Juries Act 1974 s.13. But the relaxation of the demands put upon juries has had a corresponding effect in that it requires greater interference with freedom of expression than would otherwise be called for. This effect was not intended. Even the Juries Act s.13 appears to imply that the general rule has remained the same, but with an exception. In fact it is the exception that almost always applies. The section reads (as substituted as recently as the Criminal Justice and Public Order Act 1994, s43(1)): "If, on the trial of any person for an offence on indictment, the court thinks fit, it may at any time (whether before or after the jury have been directed to consider their verdict) permit the jury to separate."

Types of information relevant to contempt of court

4. The problems in relation to publishers and jurors are different, but overlap in part. The following is a (non-exhaustive) list of categories of information which commonly give rise to problems:

(1) information prejudicial to a defendant (or witness) the publication of which may constitute a contempt of court on the part of the publisher, and may also give rise to a contempt of court on the part of a juror, if the juror seeks it out. Typical of this type of information is a report of reprehensible conduct which has not been adduced in evidence, e.g. a previous conviction.

(2) information prejudicial to a defendant (or witness) the publication of which is not a contempt of court, but which may give rise to a contempt of court on the part of a juror, if the juror seeks it out. This may be information published by a defendant/witness himself on a social networking site, for example a photograph of a defendant brandishing a weapon, or of a complainant in a drunken or indecent state. It may also be information which was unobjectionable when it was published, and which has since been held on an archive by a publisher.

(3) information which is not prejudicial in itself, and the publication of which could not constitute a contempt of court on the part of the publisher, but which may give rise to a contempt of court on the part of a juror, if the juror seeks it out. Typical of this kind of information is research into applicable law, or technical information of a kind which, if given in evidence, will be given by an expert witness.

<u>Contempt by Publication</u>

Active proceedings

5. Question 6.3: A decision by the police to publish the name of a person arrested must be made after consideration of the rights of such persons, including their rights under ECHR Art 8, on a case by case

basis. The police arrest many people who are never charged. If there were a policy that the police should consistently publish the fact that a person has been arrested, in many cases that information would attract substantial publicity, causing irremediable damage to the person's reputation. Even if the fact that the person was not charged were subsequently published, that would not receive the same publicity, and would not prevent subsequent internet searches disclosing that the person had been arrested. See eg *HM Attorney-General v MGN Ltd [2012] 1 WLR 2408; [2011] EWHC 2074 (Admin)* (the case of Christopher Jefferies, who was arrested on suspicion of the murder of his tenant). We adopt the words of Leveson LJ in his Report at G Ch 3 para 2.39: "the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public. It may be that the civil law should be reformed to give a remedy for the publication of prejudicial information, in addition to the law of contempt. But that is beyond the scope of this consultation.

6. Question 6.5: we agree.

7. Questions 6.2 and 6.4 raise important issues which we would wish to consider further.

Prejudicial information for which the publisher may be in contempt of court

8. The main risk from (and for) publishers is the publication of prejudicial information which is not put before the jury as evidence, for whatever reason. This is not a new problem, but just an old problem which has become increasingly common. Measures against third parties, such as the media and bloggers, are likely to be practicable only in relation to the first of the three categories of information listed above.

9. There have always been high profile defendants who are so prominent or notorious that jurors will have read or heard about their activities before being called to jury service e.g. *R v Hamza [2007] 1 Cr App Rep 27, [2006] EWCA Crim* 2918 paras 89-107. It has never been the law that such people cannot be tried fairly. English law does not require the standing down of any juror in waiting who has heard of a defendant before being called for jury service. Juries are taken to be able to observe an appropriate explanation by the judge of what it means to give a true verdict according to the evidence. The effect of the internet is, in practice, to increase the number of defendants about whom information is widely known or easily accessible.

10. Before a proposal is made for the reform of the law of contempt, consideration should be given as to whether this problem can be addressed through the trial process. In other words, if there is something questionable online, could it in some cases be dealt with by it being raised in court by whichever side considers that it might be prejudicial, so that it can be the subject of submissions and directions to the jury? We would favour this approach (if it is workable) both in principle and for practical reasons.

11. The principle is that if matters are explained openly to a jury, they can be trusted to understand why information is irrelevant or unfairly prejudicial (that is the basis on which a number of abuse of process cases have been decided). However, in some cases it will obviously be too much to ask a jury to disregard certain information.

12. Alternatively, should judges consider asking prospective jurors questions with a view to standing them down if they have read inadmissible material on the internet (compare Archbold (2013) paras 4-293 to 295)? Of course, in some cases, to raise the matter at all might defeat the object sought to be achieved.

13. The internet has also given rise to a practical reason why the courts should hesitate before invoking the law of contempt of court against

publishers. Persons who can in practice communicate with the public at large are no longer confined to those who have the use of expensive printing presses or broadcasting facilities. Anyone can do it, including those who are outside the jurisdiction of the court, or whose limited means puts them out of reach of financial sanctions.

14. The court ought not to grant injunctions requiring persons to do an act abroad when they are not personally subject to the jurisdiction of the court (*Babanaft v Bassatne [1990] Ch 13*, White Book para 15-84). And even if the defendant is personally subject to the jurisdiction, the order should contain the *Babanaft* proviso ("Provided always that no person other than the defendants themselves shall in anywise be affected by the terms of this order"). That is so, even if in practice foreign publishers commonly choose to comply with certain kinds of order (as they commonly do in the case of orders to disclose the identities of those who post anonymously on the internet).

15. So if injunctions are sought to restrain publications, they are likely to be available and effective against the UK based established print media and TV broadcasters (most of the time), and unavailable or ineffective against many individuals in the UK, and almost all persons abroad.

16. This is considered further under *Take down orders* below.

The test for prejudice or impediment – Questions 6.6 to 6.9

17. As to questions 6.6 to 6.8, impediment is infrequently a basis for an application for a remedy for contempt. There are occasions where it is essential, but the cases are so infrequent that we question whether it is worth considering a reform of the law.

18. As to question 6.9, different standards are applied in the contempt cases and some of the applications to discharge the jury, on the one hand, and the abuse cases and appeals against conviction on the other hand. The tests must remain different. Whether the tests should be

brought more closely into line is an issue which cannot be resolved in a consultation which is only about contempt of court.

19. In cases of publicity the courts only very rarely accede to an abuse of process argument to preclude the trial of a defendant. But judges seem more ready to discharge a jury. There may be occasion to consider whether judges should be less ready than they are to discharge juries. The decision whether or not to discharge the jury has to be made in circumstances which have not been foreseen, where a decision must be made without delay, and where the judge may not have before him submissions from all those who may be affected by his decision. A judge's decision to discharge a jury may indirectly affect a person subsequently alleged to have been in contempt of court. If the jury is discharged, that may make it more likely that an application will be made to commit an alleged contemnor, and, if there is a finding of contempt, the fact that the jury has been discharged may lead the court to regard the contempt as more grave. On a committal application an alleged contemnor cannot argue that the jury need not have been discharged. The court hearing the application to commit will not have any jurisdiction to review the trial judge's decision. The decision of a trial judge to discharge a jury is in practice never the subject of review. The question whether or not a trial judge should be less ready to discharge a jury following a publication is outside the scope of this Consultation.

20. *R v Bellfield [2012] EWHC 2029 (Admin)* may demonstrate the confidence that can rightly be placed in the jury. Having convicted him of murder of one girl (in the most horrific of circumstances), the jury nevertheless continued their deliberations for the rest of the afternoon on the charge of kidnapping another girl, before being discharged by the judge the following morning. If the jurors had been susceptible to being swayed by prejudicial material, it might be thought that they would have convicted of the kidnapping as soon as they convicted of the murder.

21. Judges in the Crown Court regularly try cases involving many counts of sexual offences. Queen's Bench Judges also see many such cases in the form of applications under s.31. These cases commonly involve multiple counts with different complainants, different time frames and offences of different gravity (e.g. rape, at one extreme, and minor sexual assaults, at the other). Experience shows that juries commonly return verdicts of guilty on some counts and not guilty on other counts. The extent to which juries do this supports the inference that they follow the judge's direction that they give separate consideration to each count, and that, in considering the counts on which they acquit, they do not allow themselves to be swayed by prejudicial evidence on the counts on which they convict.

Section 5

22. Question 6.10: we agree that s.5 should be retained in its present form.

Intentional Contempt by publication

23. Question 6.11: we express no view on whether intentional contempt should be defined in a statute.

Evidence and procedure

24. Questions 6.12, 6.15 and 6.17: we express no view on these questions.

25. Questions 6.13, 6.14 and 6.16: Proceedings for contempt of court by publication involve an interference with freedom of expression. So do prosecutions for a number of other speech related public order offences. But speech related prosecutions or applications require a balancing of the rights of defendants with the rights of others, and assessments of what is necessary and proportionate. Juries are not well placed to carry out any balancing exercises that may be required, or, if they are, then they are unable to explain their reasoning. It may

be possible for them properly to apply Art 10 in trials of speech offences under the Public Order Act 1984 (e.g. because there is unlikely to be any possible Art 10(2) argument where the speech is intentionally distressing or there are threats of violence). But the assessment of whether speech is a contempt of court may be more complicated, and requires knowledge which jurors cannot have (or easily be given), such as the measures that may be taken by the judge to address what might otherwise raise a risk of unfairness at a trial. We do not favour trial on indictment or a change to the present arrangements.

Reporting restrictions

26. Questions 6.18 and 6.19: we would favour a scheme for making accessible on a central database the existence of s.4(2) and reporting restriction orders. We do not consider that this need include those relating to children under the Children and Young Persons Act 1933 s.39, where the need for restraint in reporting will be obvious. Court orders should be well and widely promulgated to prevent contempt occurring, although, if a reporting restriction order contains the very information that it protects, such as a name, care will be needed. We note the Scottish solution to that tension, referred to in the consultation paper, which has been to publish on the Scottish Court Service website the names of all cases in which an Order has been made but no other details; orders are e-mailed to a distribution list of media contacts and media legal advisors, and the media can also check if an order has been made in a case and then if needed request that a copy of the Order be sent to them. We assume that any changes in the distribution of orders will have no impact on the responsibility of publishers and editors to comply with reporting restrictions.

Sanctions

27. Questions 6.20 to 6.23: we are not aware of any case in which the existing powers have been thought to be too low to be adequate. We

agree that provision should be made for community penalties, and that the Divisional Court should have the power to make wasted costs orders. As to fining by a percentage of turnover, this is too crudely stated. This topic is to be considered in the forthcoming Sentencing Council Consultation Paper on Environmental Offences to be published mid-March 2013.

Definition of publication and section of the public

28. Questions 6.24, 6.26, 6.27 and 6.33: we agree that the definition of publication ought to be statutory. So too should responsibility for publication (paras 3.30 to 3.49), although no question is asked about this point.

29. The Defamation Bill (HL Bill 84) cl 10 provides for a single publication rule (i.e. at the date of first publication). That has in practice been the rule applied at common law in relation to defences of privilege in defamation. A privilege subsisting at the time of first publication is not lost by reason of the statement being continuously available thereafter: Gatley on Libel and Slander 11th ed para 14.16. The meaning of publication adopted in ***Harwood*** at para 11 (following ***Beggs***) should be set out in a statute, if it is to be adopted.

30. Question 6.25: we see no need for a definition of a section of the public.

31. Questions 6.26 and 6.27: we express no view on these.

Take down orders – paras 3.75 to 3.86

32. Questions 6.28 to 6.31: we have some reservations about the suggested new powers, as for the reasons given below, cases are likely to be rare.

33. Para 3.80 reproduces what is said in Arlidge Eady & Smith 4th ed at para 6-43. To establish the case for an injunction in the context of a strict liability contempt, the court must be sure (1) that the alleged acts

are going to be carried out and (2) that they would create a substantial risk that the course of justice would be seriously impeded or prejudiced (*Ex p HTV Cymru (Wales) Ltd [2002] EMLR 184* para [25]). So in the context of information already lawfully on the internet, it is (2) that would be the issue.

34. In order for the court to be satisfied that the course of justice would be seriously impeded or prejudiced, it would (following *A-G v MGN Ltd [1997] 1 All ER 456, 460*) have:

    a. To consider "(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";

    b. To "remember that in this, as in any exercise of risk assessment, a small risk multiplied by a small risk results in an even smaller risk";

    c. To "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 are circulated";

    d. To "consider amongst other matters: (a) the prominence of the article in the publication, and (b) the novelty of the content of the article in the context of likely readers of that publication";

    e. To "consider amongst other matters: (a) the length of time between publication and the likely date of trial, (b) the focusing effect of listening over a prolonged period to evidence in a case, and (c) the likely effect of the judge's directions to a jury";

    f. To "credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them."

35. Arlidge Eady & Smith para 6-4 cite the words of Lord Donaldson MR in *P v Liverpool Daily Post and Echo Newspapers plc [1991] 2 AC 370* at

381-2 in which he gives two reasons why *quia timet* injunctions to restrain publication are rarely appropriate:

> "Where the contempt would consist of impeding or prejudicing the course of justice, it will rarely be appropriate for two reasons. The first is that the injunction would have to be very specific and might indirectly mislead by suggesting that other conduct of a similar, but slightly different, nature would be permissible. The second is that it is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences. Unlawful street trading and breaches of the provisions of the Shops Acts are well-known examples."

36. A court will not grant an injunction unless it is satisfied that it is necessary to take some measure to avoid a substantial risk of prejudice to the administration of justice and therefore of protecting the defendant's right to a fair trial. But even if the court is satisfied that it is necessary to adapt some measure for that purpose, it does not follow that it will be necessary to take one that interferes with the right of freedom of expression (Art 10 requires that there be no interference with the right to freedom of expression unless that is necessary and proportionate). There are thus two separate tests of necessity which the court must consider.

37. There is an analogy with s.4(2) orders, discussed by Arlidge Eady & Smith at paras 7-240 to 7-243. According to *Independent Publishing Co Ltd v Att Gen of Trinidad and Tobago [2004] UKPC 26 at [69]; [2005] 1 AC 190*:

> "[I]n considering whether it was 'necessary' both in the sense under section 4(2) of the 1981 Act of avoiding a substantial risk of prejudice to the administration of justice and therefore of

protecting the defendant's right to a fair trial under article 6 of the Convention and in the different sense contemplated by article 10 of the Convention as being 'prescribed by law' and 'necessary in a democratic society' by reference to wider considerations of public policy, the factors to be taken into account could be expressed as a three-part test; that the first question was whether reporting would give rise to a not insubstantial risk of prejudice to the administration of justice in the relevant proceedings, and if not that would be the end of the matter; that, if such a risk was perceived to exist, then the second question was whether a section 4(2) order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; that, nevertheless, even if an order would achieve the objective, the court should still consider whether the risk could satisfactorily be overcome by some less restrictive means, since otherwise it could not be said to be 'necessary' to take the more drastic approach; and that, thirdly, even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by articles 6 and 10 of the Convention."

38. These tests were framed in the early 1990s for the purpose of construing the 1981 Act to conform to Art 10 and the ECHR jurisprudence. It would seem unlikely that any new statutory jurisdiction could be framed on the basis that a lower or different test should be applied. This view is consistent with that expressed by a majority of the Court of Appeal of Victoria in *Digital News Media Pty Ltd & Anor v Mokbel & Anor [2010] VSCA 51 (18 March 2010)* at paras 11 and 60-98:

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2010/51.html?stem=0&synonyms=0&query=mokbel

39. The Human Rights Act 1998 ("HRA") s.12(3) requires that “No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.” This is not the *Cyanamid* test. As explained in *Cream Holdings v Bannerjee [2005] 1 AC 253* at para [22]:

> “the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave”.

40. In the context of an injunction, the court is generally unlikely to be satisfied that archive material would create the substantial risk of serious prejudice unless the court has first considered whether the risk could satisfactorily be overcome by some less restrictive means than an interference with freedom of expression. One such measure might be asking prospective jurors whether they had read the material, and, if they had, then standing them down. The matter would depend on the

facts of the case, and whether there is a practical solution which would avoid an interference with the right of freedom of expression.

41. Moreover, cases in relation to enforcing injunctions in defamation and privacy show that applications and enforcement, while generally trouble free, can in some cases be very costly, time consuming and uncertain as to outcome. With the financial constraints that exist for parties in the Crown Court it is difficult to envisage how a procedure for orders that material be removed from the internet can work fairly.

42. In *R v Harwood [2012] EW Misc 27* (CC) (20 July 2012) Fulford J ordered the removal of two articles from the internet. He described the UK based publishers as "co-operative" (para 36), the circumstances as "straightforward" (para 41) and said that injunctions to remove archive material "are rarely appropriate" (as stated in Arlidge Eady & Smith on Contempt para 6.1). Even so, one blog with inadmissible material remained accessible (para 36). There does not appear to have been any submission to him that other measures might have been available to him or appropriate, e.g. asking jurors in waiting if they had read the material, and empanelling only those who had not.

43. Further, judges in the Crown Court will be at a disadvantage when seeking to balance the competing public interests in the right to freedom of expression and the right to a fair trial, because they will not receive the submissions that they require. Advocates in a case in the Crown Court are likely to be unfamiliar with the law on freedom of expression. Even where they are familiar with this area of the law, they will be unable properly to represent the rights of the public, because the rights of the public to freedom of expression may conflict with the interests of the defence and the prosecution.

44. Art 10 rights are rights of the public at large, not just of the commercial press. Even commercial publishers do not have the resources to instruct lawyers on a regular basis: *Press Association, R (on the application of) v Cambridge Crown Court [2012] EWCA Crim 2434*.

Members of the public who wish to exercise their individual right to freedom of expression are even less well placed to defend in court the rights of the public.

45. As discussed above, orders should not be made requiring persons not personally subject to the jurisdiction to perform acts abroad. So an application for an injunction or other order may in many cases fail at the second test: it will not eliminate the risk in those cases where the website is outside the jurisdiction and is lawfully entitled to ignore the order, or in the cases where the person concerned refuses to comply with the order even when obliged by law to do so.

46. There is a great risk of difficulties for parties to some criminal proceedings. There are a small but significant number of individuals who are so convinced of their right to publish what they want to publish that coercive measures against them will either be ineffective, or effective only following the expenditure of time and money which is not available to parties to cases in the Crown Court (a concern Fulford J referred to at para 40 of *Harwood*). Some such people are motivated by a conviction that they are right (and everyone else wrong), others by a desire to inflict injury at almost any price. See e.g. *Cruddas v Adams [2013] EWHC 145*; *McCann v Bennett [2012] EWHC 2876* and *ZAM v CFW [2011] EWHC 476 (QB)*. In *McCann* and *ZAM* the injunction has been ineffective or only partly effective, and contempt proceedings have recently been brought in *McCann: [2013] EWHC 283 (QB)* and *[2013] EWHC 332 (QB)*. In *ZAM* the contempt proceedings have been brought only against the English based defendant and not the foreign based defendant. See also http://www.pressgazette.co.uk/node/47205?qt-most_read_most_commentedt=0

47. In *Contostavlos v Mendahun [2012] EWHC 850 (QB)* the injunction (to remove indecent images of the claimant from the internet) may well have been wholly effective. But, if it has been effective, that has been at a cost in time and money so vast that only the very richest

defendants in criminal proceedings could contemplate such proceedings.

48. A party who applies for an order requiring the removal of a publication from an archive in which its publication had originally been lawful takes a risk that individuals (for example bloggers) may seek to oppose the making of the order, or to frustrate its purpose. They may find that the application for the order leads to more publicity rather than less, and to expensive and time consuming satellite litigation in the Crown Court and interlocutory appeals. Some defendants may welcome the time and costs that such applications may involve as a means of obstructing or delaying the trial.

49. We have set out some of the considerations which we think should be taken into account in considering the suggested new provisions. The proposals would for these reasons benefit from further elaboration and then discussion.

Juror Contempt

50. We welcome the practical focus of this section of the consultation paper. Whilst the potential for juror misconduct has always been present, the advent of the internet and other immediate means of accessing, communicating or exchanging information have greatly multiplied the opportunities for misconduct to take place.

51. There is a strong need given the exacerbation of potential risks to the integrity of a system of trial by jury in this respect for a very clear focus to be brought on what constitutes juror misconduct. Improved measures need to be taken in relation to pre-trial information given to jurors, as well as the instructions given by the judge presiding over the trial.

52. There needs to be clarity about (a) what is prohibited, (b) why it is prohibited, (c) the potential consequences for the trial in terms of cost, delay and integrity of the process, (d) potential consequences for

breach by a juror, (e) the principle of collective responsibility and (f) the need for reporting wrongdoing and the processes for doing so.

53. If jurors are to face criminal consequences for failing to adhere to their duties, clarity is essential. The desirability of fairness to a potential juror defendant is one benefit, but it is likely that added clarity around the topic will have the effect of reducing breaches.

54. There is in our view a good case for introducing a specific offence dealing with jurors who intentionally seek or obtain information about a case which they are trying subsequent to judicial prohibition. 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 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.

55. The scope of any such offence should be broad enough to cover researching any matter relating to the trial in question. It is axiomatic that the jury must reach its verdict based on the evidence seen and heard in the courtroom, together with the judge's directions as to what the relevant law is and how to apply it. Whilst the perils of private evidential research are all too obvious, there is an equally cogent need for the jury to follow the judge's legal directions without the benefit of private research as it is solely on the basis of the judge's directions that an essential check exists as to the fairness of the trial and the safety of the conviction.

56. Jurors who seek external information about a case are likely to be motivated by different reasons. However, their motives should only be relevant, if at all, at the stage of considering sanction for any breach of

the prohibition. Whatever a juror's motivation, the potential harm to the trial process caused by accessing external information is so great that the motivation should play no part as a potential defence to an allegation of breach.

57. As already stated, 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.

58. We do not consider that such an offence would breach jurors' Article 8 and 10 rights. The prohibition would be likely to be regarded as proportionate and necessary.

59. On balance therefore we answer question 6.34 in the affirmative.

60. Turning to the issue of jurors disclosing information and the questions at 6.35 and 6.36, we think that the scale of this problem in terms of jury observance is likely to be significantly less than that relating to the seeking of information.

61. In relation to Section 8(1) we note the prohibition on disclosing [etc] matters "in the course of their deliberations in any legal proceedings". There is a potential ambiguity about this which is undesirable. Consideration should be given to prohibiting disclosure [etc] of particulars of the matters referred to *at any point after the empanelment of the jury*. The purpose of the statute is to maintain the integrity and privacy of matters discussed by the jury during the course of the trial and not just as they consider their verdicts after summing

up. An amendment of the statute would be consistent with the need for clarity in this area of the law.

62. As to the scope of Section 8, it has to be read alongside the case law which has developed in relation to the common law. In addition to the authorities cited in the consultation paper, we draw attention to *R v Adams [2007] 1 Cr App R 34* where the Court of Appeal considered the question of hearing evidence from jurors to resolve an issue of alleged jury bias raised on an appeal.

63. The question in the consultation paper appears to contemplate an amendment to Section 8, permitting disclosure to others in the belief that such disclosure is necessary to uncover a miscarriage of justice. We think that it is undesirable that there should be a weakening of the prohibition on non-disclosure by a juror. As research shows, jurors appear to support the present prohibition and understand it. They undoubtedly derive confidence in the tasks they are called upon to perform from the fact that what they say in the jury room is to be treated as totally confidential. Anything which weakens that is highly undesirable.

64. The phenomenon of “juror’s remorse” is well known. The experience of taking responsibility as a juror and working towards a collective decision with other jurors produces emotional strains and tensions of an intense kind, sometimes resulting in self doubt and questioning afterwards, particularly if a juror did not share the view of the majority. Such “juror’s remorse” often results in unfounded assertions being made about what occurred. An amendment to provide a specific defence which allows for the juror’s subjective belief that such disclosure was necessary would be highly undesirable as it would loosen the present constraints and permit this to occur where there was no reasonable ground for doing so.

65. Under the law as it presently stands a disclosure by a juror to the court would not amount to a contempt of court. Provided jurors are clearly

informed of their right to communicate with the court, we see no reason for any statutory amendment. Part of jury information on the topic should include those to whom communication is permitted (e.g. judge, usher, court clerk, court manager). Nor do we foresee any difficulty 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. Such other person or body would for these purposes be acting as the agent of the court.

66. This is not an area of the law which is causing significant problems in the way that jurors seeking information is. We consider that the common law should be left to develop.

67. In relation to the suggestion that Section 8 be amended to allow for jury research, we draw attention to the fact that Professor Cheryl Thomas has carried out extensive research, and in her 2010 paper 'Are Juries Fair?' noted that 'section 8 … does not prevent comprehensive research about how juries reach their verdicts'. This is a very far reaching proposal with considerable implications and dangers. It therefore is a question that needs to be considered with great care and in considerable detail, beyond this consultation. The judiciary would wish to be involved in any such discussion.

68. We turn next to the questions at 6.37 to 6.40. 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.

69. If such a course is appropriate to a new offence relating to seeking information, it is hard to see how a different conclusion would arise in relation to the Section 8 offence of disclosing information. On the other

hand no evidence is presented that the present procedures under Section 8 do not work satisfactorily.

70. If a breach of Section 8 were to become triable on indictment, again there is no warrant for trial by judge alone.

71. Question 6.41 and 6.42 relate to penalties. A two year maximum for either seeking or disclosing information is appropriate. The option of a Community Penalty should be available, to reflect different levels of gravity in offending. Moreover, jury service is a service provided to the community by the members of the jury and some forms of Community Order may in an appropriate case be particularly apt in requiring service to the community as a penalty for such offending.

72. We turn finally to preventative measures raised in questions 6.43 to 6.52. We have already commented on the need for clarity in relation to a jury's obligations. It is however important to bear in mind that jurors are being required to give their time and efforts in serving as jurors compulsorily. Nothing should be done in a way which is unduly minatory as it is unlikely to foster cooperation.

73. The steps at paragraph 4.80(1) to (3) are plainly necessary. Suitable notices, without overkill, in the jury assembly area and jury room would be appropriate, but the issuing of "conduct cards" seems to be a step too far. We are aware that some judges provide the jury with printed copies of the directions given to them at the start of the case about their role in the trial, which the jury then keep with their case papers. This appears to us to be a good practice.

74. Whatever is said or done pre-trial by others, we regard the role of the trial judge as essential in drawing matters appropriately to the jury's attention during the trial. Clear guidance from the Judicial College and/or the Lord Chief Justice is therefore appropriate. Such guidance will no doubt reflect modern conditions and would focus on the matters highlighted earlier in this section.

75. We see no need to reform the oath or to require a signed written declaration at that stage. As to the asking of questions by jurors, we understand they 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.

76. Moreover, to encourage questions and then not to answer them because they relate to inadmissible background or irrelevant matters is unsatisfactory.

77. There is no reason why mobile phones and other internet enabled devices should automatically be removed from jurors whilst they are at court. Such devices, however, should never enter the jury's deliberating room. There should be clarity about a judge's power to require jurors to surrender their internet enabled devices, and that should include a residual power to require them to surrender them at any time when they are in the court building.

78. However, removal of such items, save for the time when the jury are in their deliberating room, should only occur when necessary, proportionate and justified.

79. The jury bailiff or usher is the means of contact between judge and jury. It should be made clear to jurors in the pre-trial information and by the judge himself at the start of the trial that that is the appropriate mode by which a juror may report concerns in writing. Since questions or difficulties are usually fact specific, we doubt the value or wisdom of a hotline. Only the judge should give advice or a response to a particular query.

80. As an additional preventative measure, consideration could be given to 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.

Contempt in the face of the court

81. Dealing with the question at 6.53 about the prevalence of contempt in the face of the Crown Court, we agree that it is relatively infrequent for cases to be dealt with in this manner. We do not doubt that there will be a greater incidence of misconduct which might amount to contempt, but which is sensibly dealt with by warning or other measures short of proceedings for contempt.

82. We envisage proceedings for contempt in the face of the court properly to be reserved for egregious cases which require firm action to deter repetition or to maintain the integrity of the court proceedings.

83. We find the question at 6.54 inviting agreement to the proposition that proceedings for contempt in the face of the court are criminal proceedings somewhat confusing in the light of the Commission's observations at paragraphs 5.84 and 5.85. We do, however, agree that courts would be likely to interpret contempt proceedings as being proceedings to which the hearsay provisions under the Criminal Justice Act 2003 would apply.

84. Turning to the question at 6.56, we do not think there is a need for specific guidance to courts as to when an enquiry into an alleged contempt should be passed to another court. The principles as to bias were well established in *Porter v Magill [2002] 2 AC 357* and are well known. Moreover, the Criminal Procedure Rules specifically provides that the court conducting the enquiry may be the same tribunal that observed the conduct "unless that would be unfair to the Respondent".

85. The court will have to evaluate on a case by case basis what would amount to unfairness. Additional guidance is unlikely to be other than general, and more detailed guidance would risk being unhelpfully specific. The courts are used to making judgments in other situations as to what is or might be unfair.

86. As to the question of replacement of the common law by a new statutory power, we do not see that the need for this has been established. The Commission's analysis at the early part of this section shows that the common law has been capable of dealing with situations which may arise.

87. The outlines of the proposed statutory power at paragraph 5.89 are too narrow in relation to the mental element. Conduct which is reckless as to whether proceedings will or may be disrupted should also be covered. The proposed extension of the court's protection to "friends and relations of witnesses" may be problematic and too wide. At the very least in those cases there would need to be a clearly demonstrated link between the conduct complained of and the court proceedings.

88. We agree with the proposal at 6.58 as to the contemnor's rights when ordered to be temporarily detained. We also agree with the proposals at paragraphs 6.59 and 6.60. We raise the question of whether after a finding of contempt in the face of the court, the court should have power to make a Community Order which may be appropriate in some cases.

89. There may be circumstances in which the contemnor's behaviour is such as to require medical or probation reports. We consider in response to the question at 6.62 that a power to remand for reports could usefully be provided.

90. Dealing with the question at 6.63, we imagine that a court would normally have regard to the likely penalty which would have followed a conviction for a specific offence. However, the fact that the contempt

was committed in the face of the court may well add an additional dimension of gravity which should be reflected in the sentence. We do not think that any specific additional guidance is necessary.

91. Dealing with the question at 6.64, we see no need to reduce the maximum sentence of two years in the Crown Court, which should be preserved. One important factor is that the cases coming before the Crown Court will normally be of greater significance with the consequence that the disruption of those proceedings will be more harmful to the overall interests of justice.

92. If anything, the disparity serves to illustrate that the maximum sentence available to the Magistrates' is too low, and particularly if Section 12(1)(a) of the Magistrates' Court Act were amended to include threats.