



MASTER OF  
THE ROLLS

**Report of the Committee on Super-Injunctions:  
Super-Injunctions, Anonymised Injunctions and Open  
Justice**

## Foreword

The Committee on Super-Injunctions was set up in April 2010 in order to examine well-publicised issues of concern to Parliament, the judiciary, the media, and the wider public, following the *Trafigura*<sup>1</sup> and *John Terry* cases<sup>2</sup>. These concerns centred round the perceived growth in the use and application of super-injunctions and the increasing frequency with which proceedings were being anonymised.

Those concerns were raised by a number of people with the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel (CMS Select Committee), as succinctly set out in its report of 24 February 2010 (the CMS Report)<sup>3</sup>. They were also raised by the Lord Chancellor and Ministry of Justice (MoJ) officials with the senior judiciary. As a result of those discussions and the Select Committee's report I decided to establish this Committee<sup>4</sup>.

The Committee's **terms of reference** were:

- To examine issues of practice and procedure concerning the use of interim injunctions, including super-injunctions and anonymised proceedings, and their impact on the principles of open justice bearing in mind section 12 of the Human Rights Act 1998;
- To provide a clear definition of the term super-injunction; and
- Where appropriate, to make proposals for reform, and particularly to make recommendations for any changes to the Civil Procedure Rules (CPR) and Practice Directions.

The Committee has examined, and makes recommendations on, the following:

- The practice and procedure governing interim injunctions which restrict freedom of speech, including super-injunctions and anonymised injunctions;
- The use of specialist judges to determine applications for super-injunctions;
- Super-injunctions and the reporting of Parliamentary proceedings;

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<sup>1</sup> *RJW & SJW v The Guardian newspaper & Person or Persons Unknown* (Claim no. HQ09).

<sup>2</sup> *Terry v Persons Unknown* [2010] 1 FCR 659.

<sup>3</sup> CMS Report Vol. I 31ff & 131ff.

<sup>4</sup> The Government's Response to the CMS Report at 2 – 3.

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- The collection of data about super-injunctions, and anonymised injunctions, and the communication of information concerning the same to Parliament and the public.

The Committee's recommendations, once implemented, are intended to ensure that the proper balance is struck between the interests of claimants and defendants (who are usually media organisations). They should also ensure that exceptions to the principle of open justice will only be allowed when they are strictly necessary in the interests of justice, and that when allowed they will go no further than is strictly necessary. This should mean that super-injunctions will only be granted in very limited circumstances and, at least normally, for very short periods of time.

It would have been inappropriate for the Committee to have considered issues of substantive law reform. It has not, for instance, considered issues concerning the development of the right to respect for privacy under Article 8 of the European Convention on Human Rights (Article 8), the law of defamation, the rule in *Bonnard v Perryman*<sup>5</sup> or the introduction of a pre-notification requirement by media organisations<sup>6</sup>. These are issues which can, and where appropriate should, be considered by Parliament or by the courts.

For the same reason, the Committee has not considered whether a failure to pre-notify should, as recommended by the CMS Select Committee, be an aggravating factor in the assessment of damages for breach of Article 8, or whether the CPR should be amended to '*stipulate that no entitlement to aggravated damages arises in cases where there is a public interest in the release of that private information*'<sup>7</sup>. These are matters concerning the substantive law, not procedural law and could not be effected simply by changes to the CPR.

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<sup>5</sup> [1891] 2 Ch. 269.

<sup>6</sup> See, for instance, Phillipson, *Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions*, (2009) 1 Journal of Media Law 73; Scott, *Prior Notification in Privacy Cases: A Reply to Professor Phillipson*, (2010) 2(1) Journal of Media Law 49, CMS Report Vol. I at 28 – 31.

<sup>7</sup> CMS Report Vol. I at 31.

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## **The Committee members were:**

Lord Neuberger of Abbotsbury, Master of the Rolls and Head of Civil Justice (Chairman)

Desmond Browne QC (Barrister, 5 Raymond Buildings)

Rod Christie-Miller (Partner and Chief Executive at Schillings, Solicitors)

Michelle Dyson (Head of Legal Policy, Ministry of Justice)

Lord Justice Moore-Bick (Deputy Head of Civil Justice)

Marcus Partington (Chair of Media Lawyers Association, and Deputy Secretary/Group Legal Director, Trinity Mirror Plc)

Alasdair Pepper (Partner at Carter-Ruck, Solicitors)

Gillian Phillips (Director of Editorial Legal Services, The Guardian)

John Sorabji (Barrister, Legal Secretary to the Master of the Rolls)

Mr Justice Tugendhat (Judge in charge of the Jury/Non-Jury Lists)

Lord Judge, Lord Chief Justice, attended the Committee meetings as an observer.

## **Secretary to the Committee:**

Peter Farr (Private Secretary to the Master of the Rolls)

I would like to thank every member of the Committee for the considerable work which they put into the preparation of this report, and the invaluable experience and expertise which each of them contributed. I would also like to thank all those who assisted the Committee, in particular, David di Mambro (Barrister, Radcliffe Chambers) and Chloe Strong (Judicial Assistant to the Master of the Rolls).

Lord Neuberger of Abbotsbury, Master of the Rolls

20 May 2011

## Summary of Conclusions and Recommendations

### (1) Privacy and Confidentiality

- Serious concerns have been frequently expressed about issues both of substantive law and of policy relating to privacy and freedom of speech, the balance to be struck between them in a democratic society and the proper application of section 12 of the Human Rights Act 1998 (HRA s12). Such issues can only properly be considered and resolved by judges in individual cases before the courts or, at a more general level, by Parliament legislatively.

### (2) The Principle of Open Justice

- The principle of open justice is a fundamental constitutional principle, although it is not an absolute principle. It applies to interim injunction applications as it does to trials.
- Derogations from open justice can only properly be made where, and to the extent that, they are strictly necessary in order to secure the proper administration of justice.
- Applications for such derogations must be supported by clear and cogent evidence, and should be subjected to careful scrutiny by the court. Where a derogation is appropriate the court should consider what information can properly be put into the public domain. Without such consideration it is not possible for the court to ensure that any derogation from open justice is the minimum necessary to secure the proper administration of justice.
- The Civil Procedure Rule Committee (CPRC) is invited to review, and where necessary revise, CPR 39.2 so that it makes appropriate reference to the strict necessity test and is internally consistent.

### (3) Super-injunctions and Anonymised Injunctions

- A super-injunction is an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; **and** (ii) publicising or informing others of the existence of the order and the proceedings.
- An anonymised injunction is an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated. The proper approach to anonymisation has been clarified in the *JIH* case<sup>8</sup>.
- Since the *Terry* case, as far as the Committee is aware, only two known super-injunctions have been granted to protect information said to be private or confidential. One was set aside on appeal (*Ntuli v Donald* [2010] EWCA Civ 1276). The other was granted for seven days for anti-tipping-off reasons (*DFT v TFD* [2010] EWHC 2335 (QB)). As far as the Committee is aware, applicants now rarely apply for such orders and it is even rarer for them to be granted on anything other than an anti-tipping-off, short-term, basis<sup>9</sup>.

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<sup>8</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

<sup>9</sup> It appears that one further injunction, described as a super-injunction, was granted to protect Article 2 Convention rights rather than Article 8 rights: see footnote 101 below.

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- As they incorporate derogations from the principle of open justice, super-injunctions and anonymised injunctions can only be granted when they are strictly necessary. They cannot be granted so as to become in practice permanent.
- Where super-injunctions and anonymised injunctions are granted they should be kept under review by the court.
- Anyone aware of a case where a super-injunction was granted without a return date, and/or where the proceedings have not been pursued, should raise the issue with the applicant's solicitors, as occurred in one recent case concerning two super-injunctions<sup>10</sup>. If no satisfactory solution is proposed, the issue should be raised with the court, either formally or informally under CPR 23, so that the court can review the continuing necessity of the order and give appropriate directions.

#### **(4) Practice Guidance on Interim Non-Disclosure Orders**

- Practice Guidance should be issued, setting out the procedure to be followed when applying for interim injunctions, with the aim of protecting information said to be private or confidential pending trial. Such interim injunctions should in future be referred to as 'interim non-disclosure orders'. Draft Guidance is set out in **Annex A**.
- The Guidance should articulate the proper approach to the principle of open justice and to applications for derogations from that principle. It should stress the importance of properly complying with HRA s12 and state that it will be a very rare case where advance notice of such an application to media organisations, which are likely to be affected by any order, can be justifiably withheld.
- The Guidance should also set out a standard form of irrevocable undertaking to be given to the court by third parties not to use information said to be private which is provided to them in advance of any hearing, other than for the purpose of the proceedings. Such an undertaking will continue to operate beyond the conclusion of the proceedings
- The Practice Guidance should be accompanied by a Model Order. A draft Model Order is set out in **Annex B**.
- The Practice Guidance and Model Order should be reviewed by the Master of the Rolls twelve months after they become operative in order to assess its efficacy and make any necessary revisions and thereafter reviewed regularly. Concerns about its operation should be sent to the Master of the Rolls' Office ([masteroftherollsoffice@judiciary.gsi.gov.uk](mailto:masteroftherollsoffice@judiciary.gsi.gov.uk)) as they arise during the course of the first year of operation.

#### **(5) Fast-Track Appeals**

- There is no justification for introducing a fast-track appeals process or a compulsory appeal process for super-injunctions or anonymised injunctions. It is already possible to seek expedition of appeals from such orders.

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<sup>10</sup> *Goldsmith v BCD* [2011] EWHC 674 (QB).

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- The current practice guidance on appeal expedition, set out in the *Unilever* case<sup>11</sup>, should be updated generally to clarify its application to appeals from orders which adversely affect the exercise of rights under Article 10 of the European Convention on Human Rights (Article 10).
- Reference to the practice guidance on the expedition of appeals, should be incorporated into the Practice Guidance on Interim Non-Disclosure Orders.

## **(6) Specialist or Non-Specialist Judges**

- The use of specialist judges to hear applications for interim non-disclosure orders, including super-injunctions and anonymised injunctions, is neither justifiable nor practicable.
- Non-specialist judges who are likely to hear such applications should continue to be given training by specialist judges.
- Parties and their legal advisers should ensure that they comply with the high duty to provide full and frank disclosure of all material matters of fact and law on without-notice applications for interim non-disclosure orders.

## **(7) Data Collection**

- The MoJ's Chief Statistician should, with Her Majesty's Courts and Tribunals Service (HMCTS), examine the feasibility of introducing a data collection system for all interim non-disclosure orders, including super-injunctions and anonymised injunctions.
- If such a system is feasible, data should be collected and published annually. A standard form should be used for data collection by HMCTS in the High Court and Court of Appeal (Civil Division). A draft standard form is set out in **Annex C**.
- Provision should be made either in the CPR or in a Practice Direction to authorise the transmission of such data to the MoJ and subsequent publication of the collated information to the public notwithstanding any prohibition in any such orders.

## **(8) Communications between the Courts and Parliament**

- The House of Parliament's *sub judice* rules are an example of the way in which Parliament and the courts are concerned to ensure that each refrains from trespassing on the other's province. Their proper application ensures that the rule of law is not undermined and that a citizen's right to fair trial is not compromised.
- The *Trafigura* case demonstrated that where a super-injunction or an anonymised injunction exists, there is no adequate mechanism to enable the relevant Parliamentary authorities (the House authorities) to ascertain whether there are active proceedings in place.
- The MoJ, HMCTS and the House authorities should consider the feasibility of a streamlined system for answering *sub judice* queries from the Speakers' offices.

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<sup>11</sup> *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243 at 246 – 247.

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- Such a communication system will require the creation of a secure database containing details of super-injunctions and anonymised injunctions held by HMCTS, which could be easily searchable following any query from the House authorities.

## **(9) Reporting Parliamentary Proceedings and so-called hyper-injunctions**

### (i) Parliamentary Privilege and Court Orders

- Article 9 of the Bill of Rights 1689 recognises and enshrines a longstanding privilege of Parliament: freedom of speech and debate. It is an absolute privilege and is of the highest constitutional importance.
- Any attempt by the courts to go beyond that constitutional boundary would be unconstitutional. No super-injunction, or any other court order, could conceivably restrict or prohibit Parliamentary debate or proceedings.

### (ii) So-called hyper-injunctions

- A Court order which prohibits individuals from discussing matters with third parties generally is effective, and, where the prohibition refers to named individuals that merely emphasises the fact that the prohibition on discussing the order applies to them.
- Erskine May states that Parliamentary privilege does not extend as a general rule to communications between a constituent and his or her MP. Where it does arise, and to the extent that it does arise, court orders cannot oust that privilege nor is there any evidence that any order has purported to do so.

### (iii) Media reporting of Parliamentary Proceedings

- Media reporting of Parliamentary proceedings is protected by the Parliamentary Papers Act 1840, which provides an absolute immunity in respect of civil or criminal proceedings for Hansard and any other publication made by order of Parliament. It also provides an absolute privilege for any individual who publishes a copy of Hansard.
- The 1840 Act also provides a qualified privilege in civil or criminal proceedings for individuals who publish a summary of material published in Hansard.
- Qualified privilege arises where such a summary is published in good faith and without malice. There is no judicial decision as to whether a summary of material published in Hansard which intentionally had the effect of frustrating a court order would be in good faith and without malice.
- Where media reporting of Parliamentary proceedings does not simply reprint copies of Hansard or amount to summaries of Hansard or parliamentary proceedings they may well not attract qualified privilege.
- Where media reporting of Parliamentary proceedings does not attract qualified privilege, it is unclear whether it would be protected at common law from contempt proceedings if it breached a court order. There is such protection in defamation proceedings for honest, fair and accurate reporting of Parliamentary proceedings. There is no reported case which decides whether the common law protection from contempt applies. There is an argument that the common law should adopt the same position in respect of reports of Parliamentary proceedings as it does in respect of reports of court proceedings.



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## One – The Principle of Open Justice

### (1) Introduction

1.1 This report concerns the principle of open justice and the development, and use, of interim injunctions, including so-called super-injunctions and anonymised injunctions, which restrict the exercise of free speech in order to protect legally enforceable rights to privacy and confidentiality in civil proceedings. It does not consider restrictions on open justice in Family proceedings or proceedings in the Court of Protection, where a variety of statutory mechanisms provide for restrictions on open justice<sup>1</sup>.

1.2 The principle of open justice is a long-established and fundamental aspect of our justice system and of any liberal democracy committed to the rule of law. Super-injunctions are however, in some respects, a recent development; at least, they carry the ‘*nomenclature of novelty*<sup>2</sup>’. They are a controversial development, owing to the extent to which they depart from open justice. They are controversial for another reason, namely that they are the most obvious form of the recent development of the substantive law of privacy as a consequence of the enactment of the Human Rights Act 1998 (HRA).

1.3 The substantive rights which interim injunctions are used to protect are normally neither controversial nor novel, although their application to the facts of a particular case might be. Recently, however, super-injunctions have been used, albeit not exclusively, to protect rights which are controversial because they are novel and are often recent developments of the substantive law. In cases of confidentiality, however, the information which such injunctions seek to protect has long been capable of protection in English law. Confidential information, which is sometimes but not necessarily sexual information, passing between individuals in certain types of relationship<sup>3</sup>, where the source of the information is a party to that relationship, has long been held to be capable of protection by court order<sup>4</sup>: *Prince Albert v Strange* (1849) 41 ER 1171, where Lord Cottenham LC

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<sup>1</sup> See paragraph 1.22 below.

<sup>2</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [47].

<sup>3</sup> For a discussion of situations which may not be protected see: *A v B* [2003] QB 195 at [11(xi)] and [45].

<sup>4</sup> *Goldsmith v BCD & Khan v BCD* [2011] EWHC 674 (QB) at [1].

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observed that the real issue in the case was privacy<sup>5</sup>; 1 Mac & G 25, *Argyll v Argyll* [1967] Ch 302, *Stephens v Avery* [1988] Ch 449. The law of confidence has also for a long time protected commercial secrets.

1.4 Since the HRA incorporated the European Convention on Human Rights (the Convention), and specifically Article 8 which accords respect for privacy and family life<sup>6</sup>, into domestic law the courts (as Parliament anticipated<sup>7</sup>) have developed the common law in light of the Convention and its jurisprudence<sup>8</sup>. One consequence of this has been the development of the torts of breach of confidence and misuse of private information. Those developments have led some to argue that the courts have, improperly, developed the substantive common law to introduce a right of privacy into English law, notwithstanding the clear statement to the contrary by the House of Lords in *Wainwright v Home Office* [2004] 2 A.C. 406 at [35].

1.5 Another consequence has been the development of the court's approach to freedom of expression. Indeed the HRA was, amongst other things, specifically intended to reinforce freedom of expression, not least where interim injunctions were concerned<sup>9</sup>. As Jack Straw MP, then Home Secretary, put it in the Parliamentary debates during the HRA's passage through Parliament, '*... we have always believed that the Bill would strengthen rather than weaken freedom of the press.*<sup>10</sup>' One way in which this was to be achieved was through HRA s12<sup>11</sup>, which the government introduced into the Act as a particular safeguard for the Article 10 right. As Jack Straw MP went on to say, '*... the provision (HRA s12) is intended overall to ensure ex parte injunctions are granted only in exceptional circumstances. Even where both parties are represented, we expect that injunctions will continue to be rare, as they are at present.*<sup>12</sup>' This was to be achieved because the courts were to take account of HRA s12, particularly subsections (2) and (4),

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<sup>5</sup> (1849) 41 ER 1171, 1 Mac & G 25 at 47, '*In the present case, where the privacy is the right invaded, the postponing of the injunction would be equivalent to denying it altogether.*'

<sup>6</sup> *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [62].

<sup>7</sup> Lord Irvine of Lairg LC Hansard, HL Debates, 24 November 1997, col 771, 783 and 785.

<sup>8</sup> HRA s2.

<sup>9</sup> As Lord Bingham noted the HRA guaranteed for the first time, in the law of England and Wales, the right to freedom of speech, HL Deb 03 November 1997 vol 582 col 1246.

<sup>10</sup> Jack Straw MP, Hansard, HC Debates, 02 July 1998, col. 535.

<sup>11</sup> HRA s12 is reprinted at **Annex D** to this report.

<sup>12</sup> Jack Straw MP, Hansard, HC Debates, 02 July 1998, col. 536.

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when finding the balance between Articles 8 and 10<sup>13</sup>. As with the development of breach of confidence and misuse of private information, there is reasonable and legitimate argument whether the courts have interpreted HRA s12 as Parliament intended.

1.6 Currently, there is a vigorous on-going debate concerning the development of the law regarding privacy and freedom of expression in light of the HRA's enactment. That debate has a number of strands, some of which are: whether the courts have developed long-established forms of privacy protection appropriately since the HRA was enacted; whether they have struck the right balance between privacy and freedom of expression; whether they have properly applied and interpreted the public interest defence in favour of freedom of expression where privacy or confidentiality is in issue; and whether they have properly applied and interpreted the mandatory stress on freedom of expression, provided by HRA s12, when balancing Articles 8 and 10<sup>14</sup>.

1.7 It is not, however, the function of this Committee or this report, and indeed it would be inappropriate for this report, to express a view on these important issues of substantive law and policy. Nor would it be appropriate for this Committee or report to endorse or reject those developments or, for instance, to endorse or reject a right to reputation. These are points which give rise to issues of substantive law and policy; issues which require reasoned debate about the nature of fundamental rights. It is a debate which, as noted earlier, calls for judicial consideration by the courts or legislative consideration by Parliament. The establishment of a Commission to examine a British Bill of Rights may well prove to be a forum or catalyst for considering the substantive law in this area<sup>15</sup>.

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<sup>13</sup> Mike O'Brien MP, Hansard, HC Debates, 02 July 1998, col. 561: *'The hon. and learned Gentleman asked whether the new clause went further than the current law. I hope that my right hon. Friend the Home Secretary was able to reassure him to some extent. We are seeking to put in place some new safeguards to provide help and clarity in the law. When we introduce something as important as the convention, it is important to ensure that the courts understand how we intend it to be interpreted. The provisions in subsections (4) and, especially, (2) offer safeguards. The hon. and learned Gentleman says that those safeguards are acknowledged to some extent in the practice of the courts, but now they will be acknowledged in statute, and the added clarity in the law will give them substance.'*

<sup>14</sup> Lord Irvine LC, Hansard, HL Deb 03 November 1997 vol 582 cc1242 – 1243, *'The right to privacy is not absolute. I am confident that our courts, obliged by Clause 2 to take account of Strasbourg jurisprudence, will not misinterpret the law and will not grant prior restraints through interim injunctions to restrain alleged infringements of personal privacy where the defendant seeks reasonably to rely upon a public interest defence, any more than the courts now do in cases of alleged libels.'* See *Campbell v MGN Ltd* [2004] AC 457 at [153] & [159]; *Re S (a child)* [2005] 1 AC 593; *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360; *Von Hannover v Germany* [2004] EMLR 21.

<sup>15</sup> MoJ (2010) at 4.2.

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1.8 One particular strand of this debate, however, has been the use of interim injunctive relief to protect information said to be private and confidential pending trial, and the development of so-called super-injunctions and of anonymised injunctions. Such injunctions are procedural remedies ancillary to substantive law. They are used to protect, and enforce, substantive legal rights. Accordingly, no injunction, whether or not a super-injunction or anonymised injunction, can be obtained unless a substantive legal right exists.

1.9 Recently, interim injunctions, including super-injunctions and anonymised injunctions, have often been used to protect novel rights or recent extensions of existing rights, namely rights stemming from Article 8, which have been incorporated into the law of confidentiality. They have however also been used to protect types of confidential information which has passed between individuals in a commercial or an established and confidential personal relationship which, depending on the nature of the relationship, has long been held to be capable of protection by court order.

1.10 It is well-established that the court's jurisdiction to grant injunctive relief is '*without limit, and (can) be exercised either in support of any legal right, or in the creation of a new equitable right, as the court (thinks) fit in the application of equitable principles.*<sup>16</sup> Where a new legal right is created, or an existing legal right is extended, injunctive relief can properly be used to protect that right. An apparently novel use of injunctive relief in such cases stems from the novelty of the substantive law. The development of the super-injunction, which is in some respects a recent development in procedural law, is a consequence of that novelty.

1.11 It is for the courts, through a consideration of the law and its development since 2000, to examine the substantive legal issues in individual future cases taking account of the individual circumstances that arise in such cases, and, where appropriate, to provide an authoritative statement of the law, and it is for Parliament, if and to the extent that it thinks fit, to examine and resolve these issues at a general level, through legislative action. In this regard the Committee draws particular attention to what Lord Bingham said during the HRA's passage through Parliament:

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<sup>16</sup> Spry, *The Principles of Equitable Remedies*, (8<sup>th</sup> Edn., 2010) (Sweet & Maxwell) at 331.

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*‘Questions are bound to arise on the line that divides the right to privacy from the right to freedom of expression. In the absence of statutory guidance, the courts will have to decide such questions when challenges are made. They will be guided by the case law in Strasbourg. They will pay attention to cases in other jurisdictions around the world which have provisions and which have given helpful answers to analogous questions. The judges will strive to give effect to the public policy underlying the convention. If they fail to do so, they are open to correction by Parliament or by the European Court of Human Rights. I find it hard to see why this country—alone among European nations—should fail to reconcile these competing principles in an acceptable manner.’<sup>17</sup>*

1.12 For present purposes the important point is that concern about these contentious issues underlies much of the disquiet about the grant of injunctions to protect and enforce such substantive rights, to prohibit the misuse of private information and to prevent breaches of confidence, whether made pending trial, or after final judgment is given. Disquiet about the increasing use of injunctions, and the development of super-injunctions and anonymised injunctions, to protect private information, is, similarly, significantly attributable to the increased ability to protect such information as a consequence of developments in the substantive law following the HRA.

1.13 The increase in number of such injunctions applied for and granted is thus largely a product of the developing substantive law<sup>18</sup>. In *Stephens v Avery* [1988] Ch 449 at 456E there is reference to an anonymised case in 1988. Such proceedings did therefore exist historically, but they were significantly less common. The growth in the number of such injunctions may well also have resulted partly from the recent development of applications being made, and injunctions granted, without prior notice to third parties whom they will effect, generally media organisations. Again this raises issues concerning the proper approach to HRA s12.

1.14 The development of privacy following the enactment of the HRA has not, however, automatically meant that in all such cases where an injunction is granted, it will either be an anonymised injunction or a super-injunction. Whether or not such orders are necessary

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<sup>17</sup> Lord Bingham, Hansard HL Deb 03 November 1997 vol 582 col 1247.

<sup>18</sup> Busuttil (2009) at (4), “*What, I think, is new, however, is, firstly, a marked increase in the prevalence of applications for and the grant of interim injunctions to prevent the publication of confidential or private information by the media; and, secondly, the ancillary orders that make super-injunctions ‘super’: orders anonymising the parties, using letters of the alphabet instead of names, banning any report of the injunction hearing, preventing the publication of any information about the proceedings, including the fact that an injunction has been granted or that the proceedings have been brought at all, and so on.*”

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depends on the nature of the issues involved. In cases such as *Douglas v Hello!* [2008] 1 AC 1 and *Murray v Express Newspapers plc* [2009] 1 Ch 481, the nature of the private information, such as the publication of photographs taken without permission, was not itself sensitive or, in itself, deserving of protection. In such cases, anonymity or a prohibition on reporting the fact of proceedings is unnecessary: publicity would not defeat the purpose of the proceedings. Where, however, the nature of the information is itself sensitive, the circumstances both before and after the HRA might well justify anonymisation. That anonymisation was a rare occurrence historically, and is less so now, may be due not only to the development of the law after the HRA but also, amongst other things, to changes in the nature of society and social attitudes, and to technological changes, such as the growth of the internet.

1.15 In assessing the issues of practice and procedure concerning the use of super-injunctions and anonymised injunctions to protect and enforce substantive rights, the implementation of any procedural recommendations will not resolve the substantive debate concerning the rights protected. Any recommendations made in this report and subsequently implemented will only be able to remedy procedural problems and concerns, including those identified by the CMS report regarding the operation of HRA s12<sup>19</sup>. In doing so, however, they may bring the substantive debate concerning privacy and freedom of expression into sharper focus.

1.16 An examination of the proper approach and practice relating to interim injunctions which protect private and confidential information, including super-injunctions and anonymised injunctions, requires them to be placed in their context. In order to provide that context, this part of the report defines and discusses the principle of open justice. Super-injunctions and anonymised injunctions exist as derogations from that general principle, and can therefore only be justified by reference to it.

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<sup>19</sup> CMS Report Vol. I at [21] – [39].

### (2) The Principle of Open Justice

1.17 It has been a fundamental principle of the common law since its origins that justice is conducted, and judgments are given, in public<sup>20</sup>. This principle is, as Lord Shaw described it in *Scott v Scott* [1913] A.C. 417, ‘a sound and very sacred part of the constitution of the country and the administration of justice. . .<sup>21</sup>’. Open justice is of constitutional importance because it is ‘on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.<sup>22</sup>’

1.18 Its fundamental importance, and the important role the media has in giving effect to it through accurate reporting, has most recently been restated by Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65,

*‘Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.*

*There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, . . . In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.*

*Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report. One element would report those matters which reflect its distinctive social or political stance, and a different section of the media will report on different matters, reflecting a different, distinctive position. This may very well happen*

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<sup>20</sup> *Richmond Newspapers, Inc. v Virginia* 448 (US) 555; *Daubney v Cooper* (1829) 109 E.R. 438; 10 B & C 237 at 240; *Scott v Scott* [1913] A.C. 417 at 438 (per Lord Haldane LC).

<sup>21</sup> [1913] A.C. 417 at 473 per Lord Atkinson; see *Attorney General v Leveller Magazine* [1979] A.C. 440 at 449 – 450.

<sup>22</sup> [1913] A.C. 417 at 463; and Lord Shaw at 476; *Axen v Germany* (1984) 6 E.H.R.R. 195 at [25] – [27].



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*with this judgment, reflecting the diversity of the media, and symbolising its independence. In short, the public interest may support continuing redaction, or it may not. If it does not, each element of the media will decide for itself what, if anything, to publish. In the context of two further features of the evidence I should add that the investigative role of the media exists independently of the principle of open justice, and that the right of the media to enlist the assistance of legislation like the Freedom of Information Act to acquire access to information is similarly distinct. Neither diminishes the principle of open justice.*<sup>23</sup>

Open justice is thus not only an aspect of freedom of speech: it is also an aspect of the principle that justice is both done and seen to be done, because it is a centrally important way of ensuring that the court fulfils its constitutional duty of ensuring that justice is done<sup>24</sup>. It is in this way that it supports the rule of law in a democratic society<sup>25</sup>.

1.19 While open justice is a fundamental, constitutional principle, it is not an absolute rule.

As Lord Haldane LC stated in *Scott v Scott*,

*‘While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, . . . But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. . . . (in cases) of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield.*<sup>26</sup>

The principle of open justice must therefore yield to privacy or secrecy but normally only when, in the circumstances of a particular case, to adhere to it entirely would frustrate the court’s ability to administer justice properly. A point also made by Lord Loreburn in *Scott v Scott*<sup>27</sup> and reiterated by Lord Diplock in 1979 in *A-G v Leveller*<sup>28</sup>.

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<sup>23</sup> Lord Judge CJ in *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [38] – [40]; and see Lord Neuberger MR in *Al Rawi & Others v The Security Service & Others* [2010] EWCA Civ 482 at [17]. Also see *A-G v Leveller Magazine Ltd* [1979] A.C. 440 at 450; *R v Legal Aid Board ex p Kaim Todner* [1999] 1 Q.B. 966 at 977.

<sup>24</sup> *R v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 at 259; *Hobbs v Tinling and Company Limited* [1929] 2 K.B. 1 at 48.

<sup>25</sup> *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [39]; see also *Diennet v France* (1996) 21 E.H.R.R. 554 at [33].

<sup>26</sup> [1913] A.C. 417 at 437.

<sup>27</sup> [1913] A.C. 417 at 445 – 446, ‘In all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties would be reasonably deterred from seeking it at the hands of the court.’

<sup>28</sup> *A-G v Leveller Magazine Ltd* [1979] A.C. 440 at 450, ‘However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the

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1.20 It is also important to emphasise that in this context the proper administration of justice has two elements. First, and most obviously, it refers to the court's ability to do justice in an individual case as between the parties. Where, for instance, a claim concerns the protection of trade secrets, the court's ability to do justice would be undermined if the proceedings were entirely public or if the judgment disclosed those trade secrets. Equally, a court's ability to do justice by properly protecting private and confidential information, by way of proceedings for the tort of misuse of private information or breach of confidence, may be fatally undermined if the proceedings themselves are conducted entirely in public and the judgment were also entirely public. The same applies where a party is subject to blackmail threats, and either criminal or civil proceedings arise concerning those threats. In these situations, strict adherence to the general principle can be inconsistent with the court's duty to do justice. Exceptions to the general principle can properly be made in order to ensure that the court can do justice as between the parties.

1.21 Its second element goes wider than the need to do justice between the parties. It is an element which was well-described by Richardson J in the decision of the New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481. He said this,

*'... the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.' (Underlining added.)*

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*particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.'*

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Thus, a decision to require proceedings concerning trade secrets or the alleged potential misuse of private information to be held fully in public would not only undermine the court's ability to do justice as between the parties, but it would undermine its ability to do justice in future cases. Knowledge that any future proceedings would likely be conducted in public could deter those who needed to resort to the courts from doing so. This could lead to people taking matters into their own hands, and to public confidence in the courts being undermined, with adverse consequences for the rule of law. Equally, too great a resort to privacy may undermine public confidence in the proper administration of justice.

1.22 In order to facilitate the proper administration of justice, the open justice principle can properly yield to secrecy or privacy in a number of limited circumstances<sup>29</sup>. Some of those circumstances are provided for by Parliament through specific statutory provisions e.g., where, for instance, children are involved<sup>30</sup>. For instance, Parliament has provided through section 51(2)(h) of the Mental Capacity Act 2005 and rules 90 and 91 of the Court of Protection Rules 2007 that, as a general rule, proceedings in the Court of Protection are to be held in private. Orders protecting privacy in Court of Protection proceedings therefore exist against a background of statutory privacy<sup>31</sup>. Moreover, in certain Family, and Children Act 1989 proceedings, the principle of open justice yields to privacy as a consequence of certain statutory provisions and rules of court i.e., by statutory instrument<sup>32</sup>. Orders protecting privacy pending trial and final judgment in civil proceedings do not exist against such a statutory background. They exist as exceptions, or derogations from the general principle of open justice.

1.23 Circumstances where open justice in civil proceedings (and other types of proceeding) can properly yield to privacy are provided for by Article 6 of the Convention (Article 6), which states that 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*

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<sup>29</sup> In *Scott v Scott* [1913] A.C. 417 at 485 Lord Shaw said that only Parliament could add to the grounds. But Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at 604, took a different view, saying: '*it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.*' Lord Steyn however made no reference to Lord Shaw's statement.

<sup>30</sup> E.g., The Children and Young Persons Act 1933 s39; Senior Courts Act 1981 s67.

<sup>31</sup> See *Independent News Media v A* [2010] 1 WLR 2262 at [17]ff.

<sup>32</sup> For instance, Administration of Justice Act 1960 s12, Children Act 1989 s97, Family Proceedings Rules 2010 r. 7.16, 11.7, 12.73, 14.14, 24.8, 27.10, 33.5

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*private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'*

1.24 At common law, the final exception stated in Article 6, was authoritatively stated in *Scott v Scott* by Lord Haldane LC:

*' . . . unless it is strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is a contest between the parties.'*<sup>33</sup>

The wording of Article 6 effectively replicates Lord Haldane's statement of principle<sup>34</sup>.

1.25 Whether the basis of this exception is referred to as one of strict necessity (as stated in *Scott v Scott* and Article 6) or one of necessity (as expressed in CPR 39.2(3)(g) and as recently described in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 0794 at [67]) the test is the same. Strict necessity and necessity are in this context synonymous: see Maurice Kay LJ in *Ntuli v Donald* [2010] EWCA Civ 1276 at [52] – [53]. The test requires, as Lord Haldane LC went on to say in *Scott v Scott*, the party seeking secrecy or privacy to '*satisfy the Court that by nothing short of the exclusion of the public can justice be done*'. It is also clear that the approach to this exception accords with Article 6, which refers to the protection of the '*private life of the parties*'<sup>35</sup>, as well as with judicial statements made in cases where other, competing Convention rights are engaged: see *In re Guardian News and Media Ltd* [2010] 2 WLR 325 at [50] – [52] and *Secretary of State for the Home Department v AP (No.2)* [2010] UKSC 26 at [7]; and *Ntuli v Donald* [2010] EWCA Civ 1276 at [51] – [54].

1.26 Whether an exception to the general principle is sought either to protect the private life of parties, or to further the interests of justice in some other way, the court will ultimately have to apply the same test - that of strict necessity. It is therefore readily apparent why limits imposed on the general principle will only ever properly be '*wholly*

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<sup>33</sup> [1913] A.C. 417 per Haldane LC at 438.

<sup>34</sup> *Gray v UVW* [2010] EWHC 2367 (QB) at [6] – [8].

<sup>35</sup> *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [38] – [42].

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*exceptional*<sup>36</sup>, and why, for instance, there is no generally available exception from the general principle which applies to all cases where a party seeks to restrain publication of private information<sup>37</sup>. Such cases still require the party to demonstrate that an exception on such grounds is, in all the circumstances, strictly necessary<sup>38</sup>. A number of further points can be derived from the authorities.

1.27 First, the onus is on the applicant who seeks a derogation from the general principle to establish through very clear and cogent evidence that it is strictly necessary i.e., that without the specific exception justice cannot be done<sup>39</sup>. It must be demonstrated therefore that the exception sought is both necessary and proportionate<sup>40</sup>.

1.28 Secondly, applications to derogate from the general principle, whether on-notice or without-notice, must be subjected by the court to ‘*intense scrutiny*’<sup>41</sup>, before it decides whether to grant or refuse it. It is of particular importance that this requirement is complied with by the court, and that it is assisted in this by litigants and their legal advisers in accordance with the obligation imposed on them by CPR 1.3. The need for intense scrutiny is particularly acute in respect of without-notice applications, or where the applicant seeks to serve, or has served, third parties with orders containing derogations from CPR PD 25A 9. Where derogations from the general principle are sought on a without-notice application, applicants are required, as part of their high duty, to ensure that the correct procedure is followed and to draw the court’s attention to the requirement that those exceptions must be subjected to intense scrutiny<sup>42</sup>.

1.29 Thirdly, the court, and therefore the parties, must give careful consideration to what information can be prevented from entering the public domain when a derogation from the principle of open justice is considered to be strictly necessary. The court must ensure that derogations from open justice are kept to the absolute minimum, and the parties are

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<sup>36</sup> *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] Q.B. 227 at 235 per Sir John Donaldson MR (as he then was).

<sup>37</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21(2)].

<sup>38</sup> *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103 at [3]; *Gray v UVW* [2010] EWHC 2367 (QB) at [1].

<sup>39</sup> [1913] A.C. 417 at 438 – 439.

<sup>40</sup> *Ntuli* at [54].

<sup>41</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [108]; *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21(4)].

<sup>42</sup> *Memory Corporation Plc v Sidhu* [2000] 1 W.L.R. 1433 at 1459.

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(as mentioned above) under a duty to assist the court in this exercise. Consideration will therefore have to be given to what information can properly be put in the public domain, without compromising the proper administration of justice; as Maurice Kay LJ put it in *Ntuli*, ‘the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [an applicant] is entitled.’<sup>43</sup> Parties who intend to apply for a derogation from open justice should, as explained in *Ambrosiadou v Coward* [2011] EWCA Civ 409 at [52] in the context of private hearings, consider whether any ‘less drastic course’ of action could be adopted in the particular case.

1.30 Fourthly, such applications are of their very nature case-sensitive and depend on a proper consideration of all the circumstances of the case. Amongst those considerations may be the respective, and perhaps, competing Convention rights of the parties, as well as the Article 10 rights of the public<sup>44</sup>. In some cases the names of the parties may be, if strictly necessary, suitable for anonymisation. In others, anonymisation may not be strictly necessary. In some cases where short-term secrecy is strictly necessary, i.e., anti-tipping-off situations, it may be necessary to impose a super-injunction for a short period of time. In others, no greater derogations from open justice than those imposed in *Ntuli* will be strictly necessary.

1.31 Fifthly, the court cannot simply give effect to an agreement between the parties to derogate from the principle of open justice. Unless the strict necessity test is satisfied, such agreements are both inconsistent with the public interest element of the proper administration of justice and infringe the Article 10 Convention rights of the public, which parties cannot agree to waive<sup>45</sup>. Where the parties are in agreement regarding the strict necessity to derogate from the general principle, as is sometimes the case where injunctive relief is sought to protect private and confidential information pending trial, it is incumbent on the court to assess necessity and to do so with as much scrutiny as it would on a contested application.

1.32 Sixthly, while the principle of open justice used not to apply to interim proceedings, there is now no difference between an application for interim injunctive relief to protect

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<sup>43</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [54].

<sup>44</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [52] – [54].

<sup>45</sup> *Gray v UVW* [2010] EWHC 2367 (QB) at [33]; *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21(7)].

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information said to be private and confidential and a trial insofar as open justice is concerned. In this the common law may go further than Strasbourg jurisprudence<sup>46</sup>, which recognises that only in some circumstances do injunctive relief applications come within the ambit of Article 6 and its protection of open justice<sup>47</sup>.

1.33 Finally, in assessing whether to direct that an exception to the general principle should be made under CPR 39.2(3)(g), or under any other part of CPR 39.2, the court is not exercising a ‘wide discretion’, as is suggested in the current edition of the White Book (2011) Vol. 1 at 39.2.7. A grant of such an exception is not a question of discretion: it is a ‘matter of obligation’ if it is justified. Once the court has applied the relevant test, it is, as Tugendhat J stated at first instance in *AMM v HXW* [2010] EWHC 2457 (QB) at [34], under a duty to either grant the derogation or refuse it. There are, of course, a wide range of circumstances which might potentially give rise to a claim for an exception to be made. In this regard, we **invite** the *White Book* editors to consider clarifying the notes to CPR 39.2 to reflect the difference between the circumstances when an exception might be made and the nature of the exercise the court is carrying out, and the duty imposed on it when deciding whether to make or refuse an order imposing an exception to the general principle. It may also be helpful if the *Green Book* editors were also to consider adding a note on this point to its commentary.

1.34 CPR 39.2 is troubling for a further reason. There was no comparable provision under the Rules of the Supreme Court, under which exceptions to the principle of open justice were simply governed by the common law and statute. Nor was it anticipated in the draft CPR annexed to the Final Woolf Report that this would change<sup>48</sup>. The introduction of CPR 39.2 in 1999 was no doubt a response to the incorporation of Article 6 into domestic law by the HRA. It is clearly drafted to mirror Article 6 and to be consistent with the common law position set out in *Scott v Scott*.

1.35 Procedural law ought not however replicate, let alone conflict with, substantive law; and the approach of the CPRC is not to replicate substantive law in the CPR. As it is presently drafted CPR 39.2 might be said to breach that principle in that it mirrors Article

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<sup>46</sup> *ABC Ltd v Y* [2010] EWHC 3176 (Ch) at [33]; *Ntuli v Donald* [2010] EWCA Civ 1276.

<sup>47</sup> *Micallef v Malta* (17056/06) [2009] ECHR 1571 at [75]ff.

<sup>48</sup> Woolf, *Access to Justice, Draft Civil Proceedings Rules*, (HMSO) (July 1996).

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6. It also fails to make appropriate reference to strict necessity in all places where that is the applicable test. It further appears, in parts, to be internally inconsistent. These drawbacks may provide an opportunity for the confusion that is exemplified by the White Book's gloss on CPR 39.2 to arise: a wide discretion under CPR 39.2 is substituted for the obligation which Article 6 imposes. In order to minimise the prospect of such confusion arising in the future, and to ensure that CPR 39.2 is drafted so that it neither replicates nor conflicts with, substantive law, makes appropriate reference to strict necessity and is internally consistent, we **invite**, the CPRC to review it and make appropriate recommendations with regard to its amendment.

### (3) Conclusion

1.36 The principle of open justice is an essential aspect of our constitutional settlement. It exists in order to facilitate the proper administration of justice and the rule of law. It is not an absolute principle. This is the case because in certain circumstances strict adherence to the principle would undermine, or frustrate the proper achievement of justice, and thereby undermine the rule of law. Derogations from it can only be made where they are strictly necessary to enable the court to do justice, and are a proportionate means to facilitate the proper administration of justice.

1.37 This is the background against which the growth of super-injunctions and anonymised injunctions should be assessed. In the following two parts of this report, super-injunctions, as exceptions to the principle of open justice, are examined, and recommendations for reform are made. What is clear, though, is that the impression, which, as Tugendhat J noted in *Terry v Persons Unknown* [2010] 1 FCR 659 (*Terry*), 'claimants' advisers' seemed to have gained 'that extensive derogations from open justice should be routine in claims for misuse of private information'<sup>49</sup>, is misconceived<sup>50</sup>. Derogations from open justice can never be matters of routine. They can only ever be exceptional and can only be justified on grounds of strict necessity.

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<sup>49</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [107].

<sup>50</sup> As Brooke LJ put it, in the context of anti-social behaviour injunctions and by reference to guidance provided in section 45(2)(a) of the Family Law Act 1996, in *Moat Housing Group-South Ltd v Harris* [2005] 4 ALL E.R. 1051 at [72], departures from the rules of due process warrant the 'existence of exceptional circumstances.' That is as true for interim injunctions, including super-injunctions and anonymised injunctions granted to protect private information, as it is in the context of anti-social behaviour injunctions.



## Two – Super-injunctions and Anonymised Injunctions

### (1) Introduction

2.1 Until recently the term super-injunction was unknown to law of England and Wales<sup>51</sup>.

Since the *Trafigura* case it is an expression which has become well-known. It is however a term which has not been used with precision; and as a result estimates of the number of such injunctions which have been applied for or granted will differ depending on the definition used<sup>52</sup>. The term has been used to describe interim injunctions:

- which provide for party anonymity<sup>53</sup>;
- which contain a prohibition on publishing or disclosing the fact of the substantive order and proceedings<sup>54</sup>;
- which provide both for party anonymity, a prohibition on publishing or disclosing the fact of the substantive order and proceedings, as well as, for instance, restricting access to documents on the court file<sup>55</sup>.

In addition to these possible three definitions it has also been suggested by Professor Zuckerman that super-injunctions have given rise to a form of procedure which the *‘English administration of justice has not (previously) allowed’*; that is, an *‘entire legal process [which is] conducted out of the public view . . . [the] very existence [is] kept permanently secret under pain of contempt.’*<sup>56</sup>

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<sup>51</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [24].

<sup>52</sup> Recommendations are made in **Part Four** of this report regarding the collection of data regarding such injunctions.

<sup>53</sup> Lamont (2009): *‘the “super” bit of the injunction is that it uses the court’s powers to anonymise cases . . . so that the public has no idea what is going on.’*

<sup>54</sup> The Guardian (14 October 2009) *‘A ‘super-injunction’ is one which not only prevents publication, but which is itself secret.’*; Judge (2009); *‘Can we be clear what we mean by what is called “super-injunction”. I understand it to mean that, following an injunction, an order is made that the fact of the injunction shall not be disclosed or published.’*; Heath MP (2009) *‘The second issue is whether such super-injunctions are right in any case. That point has been made by my hon. Friend the Member for Oxford, West and Abingdon and others. The idea that we have somehow lost the principle of open court, and can now not only stop the publication of a particular piece of information by prior restraint but prevent from being known even the fact that it has been before a court, seems a very suspect legal development of recent years, and I question it.’*; Ponsford (2010); and *Ntuli v Donald* [2010] EWCA Civ 1276 at [44] – [46].

<sup>55</sup> Robinson (2009), *‘“Super-injunctions” that prevent news organisations from revealing the identities of those involved in legal disputes, or even reporting the fact that reporting restrictions have been imposed, have recently emerged.’*; Busutil (2009) at (4); and *Terry v Persons Unknown* [2010] 1 FCR 659 at [24].

<sup>56</sup> Zuckerman, *Super Injunctions – Curiosity-Suppressant Orders Undermine the Rule of Law*, C.J.Q. Vol. 29 (2010) at 134.

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### (i) A form of interim injunction

2.2 Given the number of possible definitions and Professor Zuckerman's concerns, it is necessary to identify a clear and authoritative definition of the term super-injunction<sup>57</sup>.

2.3 A super-injunction is a form of an interim injunction i.e., a temporary injunction imposed prior to the issue, or during the course, of proceedings, pending trial and final judgment. Both the principles governing the grant of injunctions (whether final or interim) and the application of those principles are well-established<sup>58</sup>. They are also, generally speaking, uncontroversial.

2.4 As with any interim injunction it can either be directed at prohibiting acts pending trial or at requiring positive steps to be taken pending trial<sup>59</sup>. Super-injunctions normally concern the protection of information pending trial. Such information is usually alleged to be private or confidential information (private information). Such injunctions will therefore, of necessity, engage Article 8, but, because they are seeking to protect information from publication, Article 10 will also be engaged<sup>60</sup>. HRA s12 will therefore come into play.

2.5 It is important to bear in mind that, as a form of interim injunction, a super-injunction is not itself determinative of rights. Like any other interim injunction, it is simply imposed, in appropriate circumstances, in order to '*facilitate the administration of justice at the trial*<sup>61</sup>'. This it achieves by maintaining the status quo prior to trial and judgment, thereby enabling the effective enforcement of substantive rights to take place after a trial<sup>62</sup>. That being said, an application for a super-injunction is one to which the principle of open justice applies<sup>63</sup>.

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<sup>57</sup> See paragraph 2.14 below.

<sup>58</sup> Zuckerman, *Zuckerman on Civil Procedure, Principles of Practice* (Thomson) (2<sup>nd</sup> ed., 2006) at 298ff; *Snell's Equity* at 404ff.

<sup>59</sup> Senior Courts Act 1981, s37(1); CPR 25 and Practice Direction – Interim Injunctions.

<sup>60</sup> Not all injunctions which seek to protect private or confidential information will engage Article 8. Some will engage Article 2 of the Convention, while others may concern commercial or trade secrets. In such cases though, as with Article 8 cases, Article 10 and HRA s12 will be engaged insofar as the injunction seeks to restrict freedom of expression.

<sup>61</sup> *Snell's Equity* (McGhee ed.) (Thomson) (2005) at 404; *Smith v Peters* (1875) L.R. Eq. 511 at 513.

<sup>62</sup> *Jones v Pacaya Rubber & Produce Co Ltd* [1911] 1 K.B. 455 at 457; *Attorney-General v Punch Ltd & Another* [2003] 1 A.C. 1046 at 1054 – 1055.

<sup>63</sup> See footnotes 51 and 52 above.

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2.6 As a form of interim injunction, a super-injunction not only binds those against whom it is issued, but also any third parties who have notice of the injunction, under what is known as the *Spycatcher* principle<sup>64</sup>. Third parties served with copies of such an injunction are, under this principle, subject to the court's contempt jurisdiction, the aim of which is to protect the court's process against '*acts and words tending to obstruct the administration of justice*'<sup>65</sup>. While a super-injunction is in force, breach of its terms, either by those against whom it is issued, or by third parties with notice of it, is an interference with the proper administration of justice and a contempt of court, which may result in committal, the imposition of a fine or sequestration of property<sup>66</sup>.

2.7 By contrast, a final injunction, e.g., one made at trial following the final determination of the parties' substantive rights, only binds those against whom it is made<sup>67</sup>. Once proceedings are concluded (or, in the meantime, if it has lapsed by the expiry of a time limit, or is set aside), like any other interim injunction, a super-injunction ceases to have any effect, and therefore no longer binds any third party who has notice of it. Hence it is of particular importance that the third party is informed as soon as it is no longer in force as the administration of justice, following a trial, has taken place.

2.8 In a number of respects a super-injunction is therefore no different from any other interim injunction. What then renders an interim injunction a super-injunction?

### **(ii) What renders an interim injunction a super-injunction?**

2.9 Super-injunctions will typically have a number of features, but none of those features on its own will render an interim injunction a super-injunction. Those features are as follows.

2.10 First, a super-injunction will not only be served on the respondents to the injunction application, where their identity is known, but will also be served on third parties, i.e., persons who are not parties to the proceedings. Those third parties are usually media organisations, which will usually not have had prior notice of the proceedings<sup>68</sup>. Such

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<sup>64</sup> *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333 at 375, 380.

<sup>65</sup> *Attorney-General v Punch Ltd & Another* [2003] 1 A.C. 1046 at 1066.

<sup>66</sup> See *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333; *Attorney-General v The Times Newspaper Ltd* [1992] 1 A.C. 191.

<sup>67</sup> *Jockey Club v Buffham* [2003] Q.B. 462 at [20] – [26].

<sup>68</sup> See **Part Three**.

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service is intended to bring the media organisation within the ambit of the *Spycatcher* principle. In many cases where the identity of the respondent to the application is unknown, the real value of the order is the ability to serve it on media third parties as it prohibits them from disclosing the information subject to the injunction pending the conclusion of the proceedings<sup>69</sup>. It thus stops the media from publishing stories concerning the protected information pending trial.

2.11 Secondly, the proceedings will often be anonymised, and will, at least normally, be heard in private<sup>70</sup>.

2.12 Thirdly, the injunction will also typically derogate from the provisions of CPR PD 25A 9.2, so that any third party, and in particular any media third party served, will need to apply to the court to receive a note of the hearing and a copy of the materials read by the judge who granted it<sup>71</sup>. The order may also restrict access to court documents. This is commonly, although not entirely accurately, referred to as sealing the court file<sup>72</sup>.

2.13 The feature which transforms an interim injunction into a super-injunction – the ‘super’ element – is, however, none of the above three features, important though they are. The super element is a prohibition on the disclosure or communication of the existence of the order and the proceedings. It is this feature of the injunction which initially brought public attention to super-injunctions in the *Trafigura* proceedings<sup>73</sup>. The term super-injunction was coined by *The Guardian* in relation to the provision in the injunction granted in those proceedings which prohibited reporting the existence of the proceedings<sup>74</sup>. It is this which has authoritatively been identified by the Court of Appeal in *Ntuli v Donald* as being the feature which transforms an injunction into a super-injunction<sup>75</sup>. Importantly, *Ntuli* also confirms that anonymisation of the parties is to be

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<sup>69</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [20].

<sup>70</sup> As a consequence any judgment will also be a private one: *In re Trusts of X Charity* [2003] 1 W.L.R. 2751.

<sup>71</sup> CPR PD 25A 9.1 & 9.2.

<sup>72</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [16]; *ABC Ltd v Y* [2010] EWHC 3176 (Ch) at [8] – [10].

<sup>73</sup> See paragraph 7.A.(b) of Maddison J’s order of 11 September 2009 in *RJW & SJW v The Guardian News and Media Ltd*.

<sup>74</sup> Robinson (2009).

<sup>75</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [43]ff.

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contrasted with the super element of the injunction: anonymity by itself does not render an injunction a super-injunction: it is not even a necessary feature of a super-injunction<sup>76</sup>.

2.14 In the light of the above, and the type of information which they typically protect on an interim basis, **the Committee concludes** that the term **super-injunction** can properly be defined as follows:

**an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, ii) publicising or informing others of the existence of the order and the proceedings (the ‘super’ element of the order)**<sup>77</sup>.

This is to be contrasted with an **anonymised injunction**, which is:

**an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated.**

2.15 The distinction between anonymised injunctions and super-injunctions is of obvious importance when claims are made regarding the prevalence of super-injunctions. The term super-injunction is frequently used incorrectly to refer to an anonymised injunction.

2.16 The inaccurate use of the term super-injunction to refer to anonymised injunctions, has not only led to a false view that super-injunctions are commonplace. It has also given rise to misconceptions as to how long super-injunctions endure. A claim that a super-injunction has been in place for a number of years adds credibility to the fear that a new form of permanently secret justice has arisen. Where, however, the injunction concerned is merely anonymised, and there is no prohibition on dissemination of the existence of the proceedings and order, such a claim is simply misleading.

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<sup>76</sup> The same point is also made in *Gray v Uvw* [2010] EWHC 2637 (QB) at [19].

<sup>77</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [43]ff.

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### (iii) To what extent are super-injunctions a novel development?

2.17 The next question it is convenient to address is whether super-injunctions are a novel form of order. In order to answer this question it is helpful to detail a number of similar orders, which also restrict publication of the fact of proceedings or restrict publication of aspects of proceedings.

#### (a) Anonymity order

2.18 Anonymity orders provide for the names (and hence the identities) of the parties, or any witnesses, to be anonymised under CPR 39.2(4)<sup>78</sup>. Such orders can either be of temporary or permanent effect. They do not render proceedings private nor do they prohibit reporting the existence, or many of the details, of the proceedings. They simply ensure that the party or witness whose details are anonymised cannot be identified. Subject to this limited exception to the principle of open justice, proceedings and judgments remain public. There is nothing novel about orders of this type; their use in civil proceedings has historically been exceptional<sup>79</sup>. They are, however, a well-established feature of family and criminal procedure

#### (b) Privacy orders

2.19 Privacy orders are also a long established feature of family, criminal and civil procedural law<sup>80</sup>. They have been used only sparingly and only when strictly necessary. They render private a part of proceedings or a judgment where publicity would undermine the efficacy of the legal process<sup>81</sup>, e.g. where questions of blackmail, national security, public interest immunity, trade secrets, or personal privacy or confidence are involved. Subject to limited restrictions imposed to give effect to the privacy order, the identity of the parties, and the existence of the proceedings and any judgments remain public.

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<sup>78</sup> Anonymity is also, for instance, provided for in respect of protected parties by CPR PD 21 1.1; and see *JXF v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB). Anonymity in such cases, as with all cases of derogations from the principle of open justice is exceptional and the test set out in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 applies: *A child v Cambridge University Hospitals NHS Foundation Trust* [2011] EWHC 454 (QB).

<sup>79</sup> Although see paragraph 2.24 below.

<sup>80</sup> They are more widespread in Family proceedings, especially wardship proceedings, due to the private nature of those proceedings and the historical practice of the Family Division. See for instance, *Harris v Harris* [2001] 2 F.L.R. 895 at [345] – [353].

<sup>81</sup> See CPR 39.4.

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### (c) Non-disclosure or anti-tipping-off orders

2.20 A non-disclosure or anti-tipping-off order prohibits the publication or disclosure of the fact of the proceedings, and any order, made for a short period to ensure that the purpose of the order is not frustrated through publicity. Such an order contains what can be characterised as the super-injunction element. Examples of such orders in the context of civil proceedings are, for instance, search orders (CPR 25 PD2A forms)<sup>82</sup> and freezing injunctions. In such cases, temporary secrecy is essential in order to ensure that alleged wrongdoers are not tipped-off to the order's existence, which would then enable them to frustrate its primary purpose<sup>83</sup>. As Lord Judge CJ put it, where, for instance, '*a defendant is committing fraud, and you believe that he has a number of associates, an order preventing him from reporting the fact that an injunction (that is to say a freezing injunction) [is] issued against him . . . because without it, he would be able to inform his dishonest colleagues, and they would immediately take steps to hide away assets.*'<sup>84</sup> Once the order is served, and by their very nature such orders are served as soon as practicable, and its purpose carried into effect, the secrecy provisions lapse.

2.21 In the context of family justice, non-disclosure orders are a well-established means to prevent tipping-off in proceedings concerning the location of missing children. Again, tipping-off in such cases would frustrate the purpose of such proceedings. Temporary secrecy via non-disclosure of the fact of proceedings and the order is thus an essential feature of the proper administration of justice in such cases<sup>85</sup>. In the context of criminal proceedings, such orders could (as in any other jurisdiction) protect witnesses, secure evidence or protect national security<sup>86</sup>.

2.22 Whether made in civil, criminal or family proceedings, the temporary secrecy provided by a non-disclosure order is required and justified where, without it, the court would not be capable of fulfilling its primary constitutional duty of doing justice. As Munby LJ has said, the absence of secrecy '*in such circumstances (would be likely) to*

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<sup>82</sup> See, paragraph 20 of the standard form search order, '*Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly in-form anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 pm on the return date or further order of the court.*'

<sup>83</sup> See, *Terry v Persons Unknown* [2010] 1 FCR 659 at [138]; Zuckerman (2010) at [138].

<sup>84</sup> Judge (November 2009).

<sup>85</sup> See *PM v KH & Another* [2010] EWHC 870 (Fam) at [36] – [37] & [45].

<sup>86</sup> Contempt of Court Act 1981 s4(2), s11.

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*lead, directly or indirectly, to a denial of justice . . .*<sup>87</sup>. The use of non-disclosure orders in such cases is entirely sensible, justified and unobjectionable as long as, and only insofar as, they provide a form of short-lived, temporary, secrecy which lasts no longer than strictly necessary.

### *(d) Super-injunctions and anonymised injunctions*

2.23 Super-injunctions and anonymised injunctions can be analysed as a species of anonymity order and a form of privacy order, as well as a species of non-disclosure, or anti-tipping-off, order. As such they are an example of forms of procedure which have long been recognised by the law of England and Wales as justifiable and proper derogations from the principle of open justice. Historically however the use of anonymity, privacy and non-disclosure orders has tended to be limited to specific circumstances e.g., where blackmail is involved, where there is a risk of violence towards parties or witnesses, where publicity would frustrate the purpose of the order through tipping-off the subject of the order before it is served, or where children are involved. In each instance however they have been used to ensure that the purpose of the proceedings was not frustrated by adherence to the principle of open justice or to prevent harm. They were, and are used, to ensure that the courts do justice.

2.24 However, as mentioned earlier, super-injunctions and anonymised injunctions represent a new extension of established forms of anonymity, privacy and non-disclosure orders in that, they are used to protect substantive legal rights which have, in accordance with the HRA, developed beyond their previous historical limits. In the recent past, they have also sometimes been more widely used than is strictly necessary. As Lord Rodger recently observed in the Supreme Court, in connection with anonymisation in asylum and immigration cases, that which was properly only exceptional had become ‘*a widespread phenomenon*’<sup>88</sup>. The same point can be made about the grant of anonymised injunctions in proceedings to protect private and confidential information; historically, anonymity was not granted in respect of the parties, who would be named and the information protected<sup>89</sup>.

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<sup>87</sup> *PM v KH & Another* [2010] EWHC 870 (Fam) at [37].

<sup>88</sup> *In re Guardian News and Media Ltd* [2010] 2 WLR 325 at [1] & [2]; and see *Secretary of State for the Home Department v AP (No.2)* [2010] UKSC 26.

<sup>89</sup> E.g., *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.



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2.25 This trend towards anonymisation has been deprecated by the Court of Appeal in the context of interim injunctions in proceedings to protect private information<sup>90</sup>. The Court has also emphasised (in the *Pink Floyd* and the *JIH* cases) that in the context of appellate proceedings, the necessity of such anonymisation remaining in place during the course of proceedings is a matter which the court is under a duty to keep actively under review. It is not to be presumed that anonymity granted early in proceedings remains justified on any appeal<sup>91</sup>. In addition to ensuring that anonymisation is only granted when strictly necessary, as set out in **Part One** above, it is **recommended** that the necessity of keeping anonymity under review, once granted, should be applied during all stages of the life of proceedings. Such active review by the court is required in order to ensure that any exceptions to the general principle endure for no longer than strictly necessary. Parties are also under a duty to assist the court in carrying out this active scrutiny: see CPR 1.1 and 1.3.

2.26 The unprincipled use of super-injunctions is of particular concern, as they keep the very existence of the proceedings, as well as the evidence in and parties to the proceedings, secret. An anonymised injunction is a less extensive derogation from open justice, as the proceedings and judgments, subject to necessary redactions, remain in public view. There is a clear danger that the use of super-injunctions, unless kept within strict bounds, could be thought to create, or to have created, a form of permanent secret justice. In this regard it is important to appreciate the significant developments which have occurred over the last twelve months, since *Terry*.

2.27 The recent case law shows that far from becoming common place super-injunctions are rarely applied for and rarely granted, as the following, indicative, summary shows:

- (i) *DFT v TFD* [2010] EWHC 2335 (QB) (27/09/2010): an interim injunction was granted to protect private information pending trial, where there were allegations of blackmail concerning the information. A super-injunction with anonymisation was granted at the first without-notice hearing. The super-injunction element was justified as there was a risk that the respondent would be tipped-off prior to service of the injunction if they were aware of the proceeding's existence. The proceedings came back before the court 7 days after the initial order was granted. The injunction and anonymisation was continued. The court refused to continue the super-injunction, as after service on the respondent it was no longer necessary.

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<sup>90</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21(1) & (2)].

<sup>91</sup> *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 at [66] – [69].

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As with any other non-disclosure or anti-tipping-off order once it was served, and had been served quickly, it was no longer necessary and could not continue. An anonymised injunction could protect the information without needing to prohibit reporting the fact of proceedings. A reasoned judgment is publicly available;

- (ii) *AMN v HXW* [2010] EWHC 2457 (QB) (07/10/10): an interim injunction was granted to protect private information pending trial, in proceedings where an allegation of blackmail was involved. The proceedings were anonymised. No consideration was given to whether a super-injunction should be granted. The court did refer however to the fact that Sharp J did not grant a super-injunction at the with-notice hearing in *DFT v TFD*. A reasoned judgment is publicly available;
- (iii) *Gray v UVW* [2010] EWHC 2367 (QB) (21/10/10): an interim injunction was granted to protect private information pending trial. One of the parties was anonymised. The applicant stressed that an application for a super-injunction was not being made (see paragraph 19 of the judgment). A reasoned judgment is publicly available;
- (iv) *Ntuli v Donald* [2010] EWCA Civ 1276 (16/11/10): the Court of Appeal upheld an interim injunction granted to protect private information pending trial. It set aside the anonymisation of the proceedings. It further allowed an appeal from the decision at first instance to grant a super-injunction. There was in this case no non-disclosure or anti-tipping-off rationale for a super-injunction. The private information could properly be protected simply through a prohibition on disclosure of the information itself. A reasoned judgment is publicly available;
- (v) *KJH v HGF* [2010] EWHC 3064 (QB) (24/11/10): an interim injunction was granted to protect private information, which had allegedly been stolen and where allegations of blackmail were being made, pending trial. Both parties were anonymised. No super-injunction application was considered by the court and none was granted. A reasoned judgment is publicly available;
- (vi) *XJA v News Group* [2010] EWHC 3174 (QB) (03/12/2010): an interim injunction was granted, by consent of the parties and upon the court's approval, to protect private information pending trial. The order anonymised one of the parties. The order did not contain any provision to render the injunction a super-injunction. A reasoned judgment is publicly available;
- (vii) *CDE & FGH v MGN Ltd & LMN* [2010] EWHC 3308 (QB) (16/12/2010): an interim injunction was granted and continued on a temporary basis until trial. Anonymity was granted in order to avoid the possibility of jigsaw identification. No super-injunction was granted, or apparently applied for. A reasoned judgment is publicly available;
- (viii) *POI v The Person Known as 'Lina'* [2011] EWHC 25 (QB) (13/01/11): an interim injunction was granted to protect private information pending trial in circumstances where there were allegations of blackmail. The applicant was granted anonymity. The order did not contain any provision rendering it a super-injunction. A reasoned judgment is publicly available;

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- (ix) *YYZ v YVR* [2011] EWHC 274 (QB) (04/02/11): an interim injunction was granted to protect private information, contained in an email sent to the defendant in error. Anonymity was granted in order to avoid the possibility of jigsaw identification. No super-injunction was granted. A reasoned judgment is publicly available.
- (x) *Hirschfeld v McGrath* [2011] EWHC 249 (QB) (15/02/11): an interim injunction was granted to restrain publication of confidential information. The proceedings were anonymised at the initial hearing on 04 February 2011. Anonymity was necessary at that stage to enable the judge at the return date to consider all the possible options. It was not however necessary to maintain anonymity. A reasoned judgment is publicly available;
- (xi) *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 (31/01/11): the parties properly agreed the grant of an interim injunction to protect private information pending trial. Although also agreed between the parties, anonymity was refused by Tugendhat J. The Court of Appeal allowed an appeal from that refusal and reinstated anonymity. The Court gave guidance regarding the grant of anonymity. The order in question did not contain any provision rendering it a super-injunction. A reasoned judgment is publicly available;
- (xii) *MNB v News Group* [2011] EWHC 528 (QB) (09/03/11): an interim injunction was granted to protect private information pending trial. The proceedings were anonymised in order to prevent jigsaw identification, and the order granted by consent, with the court's approval. No super-injunction element was included in the order. Anonymity was granted because it represented less of an encroachment on open justice than a super-injunction, which the claimant's advisers and the judge regarded as unnecessary and too draconian. A reasoned judgment is publicly available;
- (xiii) *Goldsmith v BCD & Khan v BCD* [2011] EWHC 674 (QB) (22/03/11): interim injunctions to protect confidential information were granted in 2008. The information was alleged to have been stolen and a criminal investigation concluded with *BCD* accepting a caution. In 2008 the proceedings were anonymised and two super-injunctions were granted. The claims did not proceed as the claimants in both actions did not fulfil their undertakings to the court to serve the claim forms. In December 2010 solicitors for a media organisation, which had been served with the super-injunctions, wrote to the claimants' solicitors querying whether the derogations from open justice in the order were still necessary. The proceedings subsequently came back before the court at which time the super-injunctions and the claimants' anonymity were set aside, and it was noted that they should have lasted no longer than was necessary to effect service of the orders in 2008. Anonymity was however still justified in respect of the defendant. A reasoned judgment is publicly available;
- (xiv) *ZAM v CFW & TFW* [2011] EWHC 476 (QB) (07/03/2011): an interim injunction was granted to prevent publication of an alleged libel, see *Greene v Associated Newspapers Ltd* [2005] QB 972 at [57]. The parties were anonymised. The grant of anonymity was a novel development in respect of interim libel injunctions. It was granted because there were allegations of blackmail, which is a well-established basis for the grant of anonymity, and as the defendants' conduct

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was capable of constituting harassment contrary to the Protection from Harassment Act 1997. No super-injunction was granted<sup>92</sup>. A reasoned judgment is publicly available;

- (xv) *Ambrosiadou v Coward* [2011] EWCA Civ 409 (12/04/2011): an interim injunction initially granted following a ‘without-notice on notice’ hearing was subsequently refused at a with-notice hearing by the High Court. The Court of Appeal allowed an appeal from that refusal to a limited extent. It was allowed, and an interim injunction granted, in order to ensure that material which contained private information provided to third parties by the Defendant prior to the with-notice hearing was not capable of lawful publication by those non-parties whom had been served with the interim injunction. In the absence of interim injunctive relief the non-parties would have been free to publish the information. The Court of Appeal hearing was conducted in public, subject to reporting restrictions. Anonymity was not necessary, nor was a super-injunction considered. A reasoned judgment is publicly available;
- (xvi) *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 (19/04/2011): an application for an interim injunction to protect private information pending trial was refused by the High Court. The Court of Appeal allowed an appeal from that decision. The parties were granted anonymity. No super-injunction was granted. A reasoned judgment is publicly available;
- (xvii) *MJN v News Group Newspapers Ltd* [2011] EWHC 1192 (QB) (11/05/2011): an interim injunction was granted in order to protect private information pending trial. It was not argued that publication of the information would serve the public interest. The order permitted publication of various matters relating to a relationship said to have taken place between two individuals. Publication of the applicant’s name, and certain details of the relationship, was prohibited and the proceedings were anonymised. The hearing of the application was heard in public, subject to reporting restrictions. No super-injunction was granted, or apparently applied for. A reasoned judgment is publicly available; and
- (xviii) *CTB v News Group Newspapers Ltd & Thomas* [2011] EWHC 1232 (QB) (16/05/2011): an interim injunction to protect private information pending trial was granted. It was not argued that publication of the information would serve the public interest. Anonymity was granted, applying the principles set out in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42. No super-injunction was granted, or apparently applied for. A reasoned judgment is publicly available.

2.28 Subject to what is noted at paragraph 2.36, the recent, mainly first instance, case law also clarifies a number of points<sup>93</sup>. First, where individuals seek to protect private information by way of interim injunction they now rarely apply for super-injunctions, and in some cases they actually stress the fact that they are not doing so. Secondly, where they

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<sup>92</sup> Reports of the judgment, as with other judgments, incorrectly stated that in this case a super-injunction was granted.

<sup>93</sup> Of the 18 judgments noted, only four are Court of Appeal judgments.

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are applying for super-injunctions they are rarely being granted. Thirdly, the only known case where a super-injunction, in a claim concerned with protecting information said to be private, was granted and not challenged was one where it was needed as an anti-tipping-off measure<sup>94</sup>. In the one known case where a super-injunction was granted and challenged, it was set aside on appeal as being unnecessary<sup>95</sup>.

2.29 Fourthly, the court's approach to granting super-injunctions has been clarified: they should almost always only be granted for a short period, in order to facilitate effective service of the injunction or to maintain secrecy pending an on-notice hearing of the interim injunction application. They can only properly be granted for longer periods where such restraint is strictly necessary on the facts. In light of the Court of Appeal's decision in *Ntuli* at [54], such circumstances will be extremely limited<sup>96</sup>.

2.30 Fifthly, and in contrast to the court's approach to super-injunctions, anonymised injunctions are not restricted to anti-tipping-off situations. They are only being granted to protect information, pending trial or the conclusion of the hearing, in order to ensure that the purpose of the proceedings is not frustrated pending trial.

2.31 In light of the above, it is apparent that a real change has occurred in respect of super-injunctions since the *Terry* case. Parties are not generally applying for them, and where they have been being applied for, they have either been set aside on appeal or granted in the form of a short-term anti-tipping-off order. There has been a further specific development which has ensured, both in respect of anonymised injunctions and super-injunctions, that they cannot become a form of permanent injunction.

2.32 One of the reasons which gave rise to the fear that super-injunctions were developing into a permanent form of secret justice was the fact that such interim orders could in practice become permanent. This possibility was engendered in the period leading up to

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<sup>94</sup> *DFT v TFD* [2010] EWHC 2335. And see footnote 102.

<sup>95</sup> *Ntuli v Donald* [2010] EWCA Civ 1276.

<sup>96</sup> As, for instance, was the case during 2010 when a super-injunction was said to have been granted in order to ensure a news blackout regarding the details of efforts being made to secure Paul and Rachel Chandler's release from Somali pirates. The super-injunction was necessary, as noted by the BBC, in such circumstances to ensure that their lives were not put at risk as a consequence of news reporting: [http://www.bbc.co.uk/blogs/theeditors/2010/11/why\\_we\\_kept\\_silent\\_on\\_the\\_chan.html](http://www.bbc.co.uk/blogs/theeditors/2010/11/why_we_kept_silent_on_the_chan.html). The basis of the injunction was therefore Article 2 of the Convention.

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the *Terry* case by draft orders being submitted to the courts with increasingly extensive derogations from the principle of open justice. One particular derogation was the absence of any return date in the order i.e., it did not specify when the matter had to return before the court<sup>97</sup>. The proceedings in such circumstances could then continue indefinitely, without having to come back before the court, unless, as in the recent case of *Goldsmith v BCD*<sup>98</sup>, a media organisation served with the order took steps to bring it back before the courts. The absence of a return date can be a particularly acute problem where the injunction is granted against persons unknown. Such proceedings are unlikely to be prosecuted to trial, so that, in the absence of steps being taken by third parties served with the order, the interim injunction becomes, in practice, a permanent injunction<sup>99</sup>.

2.33 A strong incentive to such injunctions becoming permanent in practice is the effect of what is known as the *Buffham* problem. In *Jockey Club v Buffham* [2003] Q.B. 462, it was held that interim injunctions do not bind third parties once the proceedings come to an end. Where therefore a claimant has served an interim injunction aimed at protecting privacy on a third party, the protection that it provides will cease as soon as the proceedings end. This may well leave the claimant in an anomalous position where his or her privacy rights are not protected against third parties, but a final injunction has been granted against the defendant. As a consequence of this claimants have an incentive to prolong the life of any interim injunction granted i.e., not prosecute it to trial. The Court of Appeal is due to reconsider the *Buffham* case later this year. (Further, the recent first instance decision of Eady J in *OPQ v BJM*<sup>100</sup>, making a final injunction *contra mundum* (against the world), although on the face of it extending privacy rights, may be a means of ensuring that there is no incentive to claimants to prolong the life of any interim injunction.)

2.34 Tugendhat J's first instance decision in the *Terry* case, examined the question of return dates. His judgment, as had his previous judgment in *G & G v Wikimedia*<sup>101</sup> and as had Eady J in *X & Y v Persons Unknown*<sup>102</sup> emphasised the need to ensure that

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<sup>97</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [20] and [134]ff.

<sup>98</sup> [2011] EWHC 674 (QB).

<sup>99</sup> *Ibid.*

<sup>100</sup> [2011] EWHC 1059 (QB).

<sup>101</sup> [2009] EWHC 3148(QB) at [21]ff.

<sup>102</sup> [2007] EMLR 290 at [78].

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anonymised injunctions and super-injunctions must contain return dates, in order to ensure that the court was able to manage the proceedings actively<sup>103</sup>. This was said to be of particular importance where the respondent was unknown and the applicant had therefore to take active steps to find him, serve the order and progress the claim beyond the interim stage. Furthermore, Tugendhat J pointed out in *Terry* that no example had been cited to him of any super-injunction which provided for the super element to subsist longer than service on the respondent with no return date. Nor was he aware of any justification for such an order i.e., for an order which would render the super-injunction in practice permanent<sup>104</sup>.

2.35 It is true that, until early 2010, there were justifiable concerns that a form of permanent secret justice was beginning to develop. However, that concern should be dispelled by the decision in the *Terry* case. The requirement that super-injunctions and anonymised injunctions must generally contain a return date ensures that such injunctions cannot in practice become permanent, save in the very, very rare cases where it may be justified e.g., as was the case in *RST v UVW*<sup>105</sup>. It ensures that whatever interest claimants may have in prolonging the life of such an order so as to evade the *Buffham* problem, they cannot do so. Claims must be, and are being, actively managed to their conclusion. Further important guidance on the active management of such injunctions is set out in the first instance decision in *Goldsmith v BCD*<sup>106</sup>.

2.36 The Committee anticipates that some super-injunctions and anonymised injunctions which pre-date *Terry* continue to subsist and have not proceeded beyond the interim stage and the some super-injunctions, which it is unaware of, may have been granted since *Terry*. It also anticipates that some orders may have been made since *Terry* which do not contain return dates and have not proceeded beyond the interim stage. In both of these circumstances the parties to those proceedings, or third parties subject to them, should raise the issue in the first instance with the applicant's solicitors as occurred in *Goldsmith v BCD*. If no satisfactory solution is proposed they should then raise the issue with the

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<sup>103</sup> Also see: *Goldsmith v BCD & Khan v BCD* [2011] EWHC 674 (QB) at [15], 'A return date would be included in any interim order that were made today', and see [30] and [46]ff.

<sup>104</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [141].

<sup>105</sup> [2010] EMLR 13. This did not contain a return date. It was not however a super-injunction, but an anonymised injunction and pre-dated *Terry*. The proceedings in this case are publicly reported

<sup>106</sup> [2011] EWHC 674 (QB) at [60] – [61].

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court, either formally or informally under CPR 23, so that it can review the continuing necessity of such orders and give directions, where necessary, regarding the management of the proceedings<sup>107</sup>.

### (3) The future approach to super-injunctions and anonymised injunctions

2.37 It has been made clear that, as a matter of principle, a super-injunction should never in practice become permanent, and it is now practically inconceivable that this could happen again. This is not to say, of course, that a super-injunction which goes no further than being an anti-tipping-off order or that an anonymised injunction is impermissible. Both can be justified in those exceptional circumstances where, like any other derogation from open justice, they are strictly necessary means to secure the proper administration of justice. Equally, it is not to say that an order i.e., a final injunction, securing permanent secrecy or anonymity regarding private information could not properly be made following trial and judgment if it were necessary to secure the parties' substantive rights<sup>108</sup>.

2.38 The essential point is that if the courts are too ready to grant super-injunctions or anonymised injunctions, this would be inconsistent with the proper approach to any exception to the general principle of open justice. As noted in **Part One** of this report, this requires that such injunctions only be granted following intense scrutiny by the court in the individual case, and only when it is strictly necessary as a means to ensure that justice is done.

2.39 Recommendations are set out in **Part Three** of this report, which reinforce the developments of the past twelve months. Their purpose is to ensure that: derogations from open justice are only ever granted exceptionally, when strictly necessary and following a proper consideration of the rights of those parties and persons affected by them, and of the public; and that interim injunctions, which protect private information, cannot become in practice permanent.

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<sup>107</sup> [2011] EWHC 674 (QB) at [63].

<sup>108</sup> This, again, draws attention to the substantive policy issue regarding the protection of private information and the extent to which individual privacy should properly be protected.



## **Three – Interim Non-Disclosure Orders – Procedural Issues**

### **(1) Introduction**

3.1 There have been a number of procedural improvements since the Committee was formed, but some points of concern still remain. Those are:

- (i) Whether there is a need for clear guidance in the form of a Practice Direction or Guidance setting out the procedure to be followed in applying for injunctions, including super and anonymised injunctions, and, if such guidance is needed, what it should contain;
- (ii) Whether there is a need for a fast track appeal system for appeals against decisions on interim injunction applications which, if granted, limit the exercise of Article 10 rights; and
- (iii) Whether applications for such interim injunctions should be limited to specialist judges.

3.2 These questions are discussed in this part of the report.

### **(2) Practice Guidance and its contents**

#### **(i) Practice Guidance and a Model Order**

3.3 One of the fundamental causes of the problems which have arisen in respect of super-injunctions and anonymised injunctions is the lack of clarity regarding the proper approach. This lack of clarity, and the fact that a large number of the applications for such orders are conducted in the absence of an opposing party, have led to a situation where ever more draconian orders, involving wide-ranging derogations from the principle of open justice, were consistently applied for and granted.

3.4 Recent case law developments have gone some way to remedy this. However, they have not provided a comprehensive or entirely consistent guide to the proper approach to be adopted by litigants and their advisers and by the courts to such applications. Since 2005,

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by way of contrast, the Family Division has had a Practice Direction, Practice Note and Model Order in place in respect of applications for reporting restriction orders<sup>109</sup>.

3.5 The Committee **recommends** that the publication of Guidance similar to that issued by the President of the Family Division be issued. It further **recommends** that the Guidance, following, although not replicating, the approach in the President's Practice Direction and Note, defines such orders as Interim Non-Disclosure Orders in order to bring further clarity to the area, and in order to emphasise to all concerned that they are temporary in nature.

3.6 The Guidance should clarify the proper approach to applications for interim injunctions which seek to restrain the publication of information alleged to be capable of legal protection. It should do so in terms which are readily comprehensible to lawyers and non-lawyers. All the relevant principles and authorities should be summarised in a single document.

3.7 The Guidance should be available to everyone, not just to specialist lawyers in this area. It should ensure that all litigants, potential litigants, and their advisers, are fully aware of their obligations under the law. Thus, it should contain a clear reminder that derogations from open justice can only be justified on grounds of strict necessity. Such Guidance would bring the law clearly out into the open. It would clarify that:

- (i) The starting point for any application for an order which seeks a derogation from the principle of open justice should be that outlined in **Part One** of this report: the question the court must ultimately address is whether, on the facts of the particular case, the derogation applied for is strictly necessary in order to do justice<sup>110</sup>;
- (ii) No super-injunction should, as a general rule, be granted for any longer than any other non-disclosure or anti-tipping-off order can properly be granted. The approach laid down in *DFT v TFD* and *Ntuli v Donald* should be followed;

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<sup>109</sup> President's Direction of 18 March 2005: Applications for Reporting Restriction Orders; Practice Note 'Applications for Reporting Restriction Orders (dated 18 March 2008), containing draft order.

<sup>110</sup> *Ntuli v Donald* [2010] EWCA Civ 1276.

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(iii) There may, as stated in *Terry*<sup>111</sup>, be rare circumstances which justify the grant of a super-injunction for a longer period. Where this is justified on grounds of strict necessity, the order should be kept under active and close scrutiny by the court; and

(iv) In every case, it is essential that (a) the order contains a return date and (b) the court gives proper regard to the Article 10 rights of the public at large. It is impermissible, absent statutory authority, for such an interim order to become permanent, at least without a specific order of the court to that effect i.e., without the grant of a final injunction.

Such Guidance should also summarise the principles to be derived from the current state of the case law<sup>112</sup>, discussed in **Parts One and Two** of this report. It should be updated regularly, as necessary.

3.8 The Guidance should also, as in the case of the Family Division Guidance, and as with freezing injunctions and search orders<sup>113</sup>, be supplemented by a draft Model Order. One of the particular problems in this area has been the practice of submitting draft orders to the court which contain ever more draconian, and unnecessary, derogations from the principle of open justice. The best known example was the submission in the *Terry* case of a draft order containing a super-injunction provision. It was readily conceded at the hearing of the application that such a provision was ‘*not necessary*’<sup>114</sup>, but a super-injunction was nevertheless granted at the hearing of the application on 22 January 2010, and was in place until the decision on the application was delivered on 29 January 2010.

3.9 To eliminate this practice, the draft Model Order should draw a clear distinction between those provisions which any such order should normally contain and those provisions which are only justified in exceptional circumstances. This should also help ensure that judges reject any suggestion that wide-ranging and comprehensive derogations from the principle of open justice are justifiable because they have been granted in previous cases.

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<sup>111</sup> [2010] EWHC 119 (QB) at [141].

<sup>112</sup> As the Practice Guidance: McKenzie Friends (Civil and Family Courts) [2010] 1 WLR 1881 does (<http://www.judiciary.gov.uk/Resources/JCO/Documents/mckenzie-friends-practice-guidance-july-2010.pdf>).

<sup>113</sup> See the annex to CPR PD 25A – Interim Injunctions.

<sup>114</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [137].

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Judges, litigants and lawyers should be reminded by the Guidance and the draft Model Order of the need for strict necessity and the case-sensitive nature of any derogation from the general principle of open justice.

3.10 The publication of Practice Guidance and a draft Model Order, covering all applications for orders which seek to restrict the publication of legally protectable information, which contain reporting restrictions, should assist in providing a blueprint for the just approach to applications for such interim injunctions pending trial.

3.11 Proposed forms of Practice Guidance and Model Order are set out at **Annex A and B** to this report. Subject to any justified objections, they will be issued by the Master of the Rolls, and will take effect, shortly after the publication of this report. At the present time, the Committee does not think it will be necessary to issue, as in the Family Division, a Practice Direction requiring compliance with the Practice Guidance. If it subsequently becomes clear that a Practice Direction is necessary, the Committee **recommends** that this matter be revisited by the Master of the Rolls and the Lord Chancellor with the assistance of the CPRC.

3.12 The operation of the Practice Guidance and Model Order should be reviewed by the Master of the Rolls twelve months after they enter into operation in order to ascertain whether they have operated as intended and whether, in the light of their practical application, revisions are necessary. Any evidence or views regarding their operation during this period should be sent, as they arise during the course of first year of operation of the Practice Guidance and Model Order, to the Master of the Rolls' office<sup>115</sup>.

### **(ii) Notice of applications**

3.13 The Practice Guidance should clarify the position regarding notice of applications for any interim injunction which raises issues concerning Article 10 rights. While this issue does not strictly raise the question whether any derogation from the principle of open justice is justified, it nonetheless raises important questions regarding the proper approach to the procedure to be adopted when seeking such injunctions, so it is dealt with in the Practice Guidance.

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<sup>115</sup> Information should be sent to: [masteroftherollsoffice@judiciary.gsi.gov.uk](mailto:masteroftherollsoffice@judiciary.gsi.gov.uk).

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### (a) Background

3.14 Interim injunctions in the context of the present enquiry are generally sought in order to restrain dissemination and/or publication of private information. Such information can be in the hands of persons known or unknown to the applicant. They will have intimated to the applicant that they intend to disseminate it, usually through offering to forward it to the media or to a named media organisation. The most obvious such examples are where private information regarding a well-known individual or celebrity is offered to the press by someone who is unknown to the celebrity. In such cases, the ultimate object of the application will be to restrain media organisations from publishing details of that information.

3.15 In such a case, a media organisation could either be a party to the proceedings i.e., a respondent, or a non-party to the proceedings. If it is the former, the organisation would be bound directly by the terms of any injunction granted. If it is the latter, the organisation would, once they have been notified of the order, be indirectly bound by its terms under the *Spycatcher* principle. It is often the case that, where proceedings are brought against a person or persons unknown, media organisations are not joined as parties to the proceedings<sup>116</sup>.

3.16 Media organisations have raised concerns that it has become a matter of routine for applicants not to give them notice of such applications before they are made, and to then serve them with the Order once made, so as to bind them with it under the *Spycatcher* principle. Those concerns are raised both in respect of proceedings to which they are joined as parties and, more emphatically, in respect of proceedings to which they are not joined as parties. The routine absence of notice in such cases, it is said with justification, is inconsistent with the protection provided to the media by Parliament through HRA s12<sup>117</sup>.

3.17 The CMS Select Committee has understandably questioned whether it is appropriate for the court to permit such applications to be routinely dealt with on a without-notice basis. As the Select Committee put it,

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<sup>116</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [20].

<sup>117</sup> Jack Straw MP, Hansard, HC Debates, 02 July 1998, col 536.

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*'It is entirely understandable, as news and gossip spread fast, that parties bringing privacy (and confidence) cases may wish to bind the press in its entirety, not just a single enquiring publication. On the face of it, however, this appears contrary to the intention behind section 12, if the press has not been given proper notice and opportunity to contest an injunction.'*<sup>118</sup>,

It should, however, be noted that such injunctions do not generally bind the entire media. They are not *contra mundum* orders (ones against the world), which are only very rarely granted by way of a final, not an interim, injunction<sup>119</sup>. The interim injunctions considered in this report only bind those who are notified of them by the applicant. That caveat aside, the issue remains one of proper notice consistent with HRA s12.

### (b) Notice

3.18 Proper notice is a central aspect of the right to fair trial. This applies to all proceedings, including applications for interim injunctions which seek to protect alleged private information and which either directly or indirectly bind media organisations. Adequate notice to defendants or respondents is a prerequisite of the right to be heard. Derogations from this aspect of the right to fair trial can only be justified in limited circumstances. The general rule, applicable to all applications for interim injunctions, is set out in CPR 23.4<sup>120</sup>. Notice of the application must be given to each respondent<sup>121</sup>. An application can however be made without-notice to each respondent if permitted by a rule, practice direction or court order<sup>122</sup>. Applications for interim injunctive relief can specifically be made without-notice under CPR 25.3(1). However, an order can only be made on a without-notice basis where it appears to the court that there are good reasons for not giving notice<sup>123</sup>.

3.19 The CPR mention two circumstances which might justify not giving notice: the need for urgency or the need for secrecy, as in the case of a freezing injunction or search

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<sup>118</sup> CMS Report Vol. I at [39].

<sup>119</sup> See, for instance, *Venables v News Group Newspapers Ltd and Others* [2001] 1 All ER 908 at [98] – [100]; *OPQ v BJM* [2011] EWHC 1059 (QB).

<sup>120</sup> And see CPR 25.3 and 23.3.

<sup>121</sup> CPR 23.4(1).

<sup>122</sup> CPR 23.4(2)(a) – (c).

<sup>123</sup> CPR 25.3(1).

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order<sup>124</sup>; but even then HRA s12(2) needs to be considered (see paragraph 3.20 below). It is necessary however for evidence to be submitted in support of any such application explaining why notice has not been given<sup>125</sup>. And where formal notice cannot be given because the matter is urgent, the applicant is required to give informal notice unless ‘*the circumstances of the application require secrecy*’.<sup>126</sup>

3.20 Where HRA s12 is engaged regard must be had to further considerations. This section provides that where the court is ‘*considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression*’<sup>127</sup>, and ‘*the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—*

- (a) that the applicant has taken all practicable steps to notify the respondent; or*
- (b) that there are compelling reasons why the respondent should not be notified.*<sup>128</sup>

On the face of it, HRA s12 may appear only to apply to parties to proceedings. However, Eady J, at first instance, in *X & Y* concluded that its ambit extended to non-parties who in practice are likely to have their Article 10 right constrained by an injunction<sup>129</sup>. As such, its protection applies both to parties and non-parties who an applicant for an interim injunction, which seeks to restrain publication of information, intends to bring within the terms of the order under the *Spycatcher* principle (or arguably by analogy to non-parties subject to interim injunctions under that principle where the court considers making a *contra mundum* order in a final injunction).

3.21 HRA s12 does not simply go beyond the CPR in applying to both parties and non-parties. Sections 12(2) and (3) also set a higher threshold to be crossed before the court can grant injunctive relief which would restrain someone notified of the order exercising

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<sup>124</sup> Zuckerman (2006) at 351; *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16, [2009] 1 W.L.R. 1405 at [13].

<sup>125</sup> CPR 25.3(2) & (3).

<sup>126</sup> CPR PD 23A 4.2.

<sup>127</sup> HRA s12(1).

<sup>128</sup> HRA s12(2).

<sup>129</sup> *X & Y v Persons Unknown* [2007] EMLR 290 at [10] – [12].

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their Article 10 right. In particular, it bars the grant of such an order unless the court is satisfied that the requirements set out in HRA s12(2)(a) and (b) are satisfied.

3.22 Practice Guidance should ensure that it is clearly understood that the requirements of HRA s12 apply both to respondents and to non-parties whom the applicant intends, at the time the application is made, to bring within the terms of any order granted. The Guidance should state that, failure to give advance notice of the application may only be justifiable where, for instance, secrecy is strictly necessary as a means to ensure that the object of the injunction is not defeated prior to it being served<sup>130</sup>. This applies to media organisations, just as it applies to any other respondent or non-party whom it is intended to bring within the terms of the order<sup>131</sup>. In future therefore, the default position will be, consistently with HRA s12 and the CPR, one of advance notice to respondents and non-parties, including media organisations, whom the applicant intends to bring within the terms of the order. A failure to provide advance notice is only justifiable in exceptional circumstances.

### *(c) Post-application notice to non-parties*

3.23 There will continue to be rare cases where it will be necessary to conduct such applications on a without-notice basis. In such cases, it has become, it is said, commonplace for applicants to seek derogations from the obligation imposed by CPR PD 25A 9 to provide non-parties who are notified of the injunction with information about the hearing, including a note of the hearing<sup>132</sup>. The obligation to provide a note of the hearing arises in the absence of any request for information under CPR PD 25A 9<sup>133</sup>. The

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<sup>130</sup> E.g., *DFT v TFD* [2010] EWHC 2335 (QB).

<sup>131</sup> An applicant may intend to serve a media organisation because there is reason to believe it has an interest in the information: *Ibid* at [18]; *WER v REW* [2009] EMLR 17, [2009] EWHC 1029 (QB) at [18]; *TUV v Persons Unknown* [2010] EMLR 19 at [24].

<sup>132</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [16] & [20].

<sup>133</sup> *G & G v Wikimedia* [2009] EWHC 3148 (QB) at [30], ‘*So too, where an order relates to freedom of expression, or may have the effect of interfering with freedom of expression, those applying for interim relief at a hearing at which the respondent or defendant is not present should generally provide the respondent with a full note, whether or not the respondent asks for it.*’ And see, Lightman J in *Interoute Telecommunications (UK) Ltd. v Fashion Gossip Ltd. & Ors* (23 September 1999, unreported), *I should add a reminder to practitioners. It is the duty of counsel and solicitors, when they make an ex parte application for relief (and most particularly freezing injunctions) to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that ex parte application. This is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge. The*



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purpose of this rule is to enable non-parties to be in a position to mount, if they choose to do so, an effective challenge to the order<sup>134</sup>. The provision of such information is moreover an ‘*elementary principle of natural justice*<sup>135</sup>.’

3.24 Following implementation of the recommended Practice Guidance, the likelihood of this situation arising should decrease as non-attendance due to absence of notice will be confined to exceptional cases. It will also only arise in those cases where an applicant becomes aware following the grant of an order that a non-party has an interest in the information subject to the injunction, and at that point notifies the non-party of the order.

3.25 A derogation from the provision of information under CPR PD 25A 9, as with any other derogation from the principle of open justice, can only be justified on the grounds of strict necessity. The Committee believes that it will be a rare case when it is justified in future.

### *(d) Protection for applicants*

3.26 There is an obvious danger that in the securing the Article 6 and 10 rights of the respondents and of non-parties, an applicant’s Article 6 and 8 rights may be undermined. This is particularly acute where private information is concerned, as a procedural imbalance may produce a chilling effect on the willingness of applicants to come to court to vindicate their rights. This problem is particularly acute where private and/or confidential information is concerned. This is the case because of the *Buffham* problem<sup>136</sup>. As noted in **Part Two** of this report, interim injunctions only bind non-parties while they are in force: the *Spycatcher* principle only applies to interim injunctions.

3.27 This raises the risk for applicants that, if they provide non-parties with details of the protected information through notifying them of an interim injunction after it has been obtained, they may provide them with more information than they had before they were

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*sooner that obligation is widely understood and complied with, the sooner the risk of injustice on ex parte applications will be alleviated.’*

<sup>134</sup> [2006] EWHC 2783 (QB) at [11].

<sup>135</sup> *Kelly v BBC* [2001] Fam. 59 at 94 – 95.

<sup>136</sup> See paragraph 2.33. The *Buffham* problem is compounded by the limitation on protection regarding subsequent use of documents disclosed in proceedings set out in CPR 31.22: *TUV v Persons Unknown* [2010] EMLR 19 at [9] – [16]; and, generally regarding the scope of CPR 31.22, see *Lily Icos Ltd v Pfizer* [2001] EWCA Civ 2 at [5].

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notified of the order. Applicants may even provide non-parties who knew none of the details (but whom nevertheless the applicant understood to be interested in the material) with those details. Because final injunctions do not bind non-parties, as a consequence of *Buffham*, as soon as one is obtained and the interim injunction ceases to be in force any non-party subject to the previously extant interim injunction would be free to use the information.

3.28 Except in those extremely rare situations where a final injunction against the world is justified, or where media non-parties can properly be joined as parties to the proceedings, this leaves applicants in a worse position than that in which they would have been if they had chosen not to bring proceedings to vindicate their rights. It would further render the court's adjudication on the issue of whether there were rights to protect, and the subsequent final injunction, devoid of value. It would therefore have the perverse effect of rendering ineffective a judgment and order of the court properly granted to vindicate rights.

3.29 This provides a clear incentive to applicants not to pursue proceedings to their proper conclusion even though they may properly want to ensure that their claim is expeditiously determined at trial. It also provides a clear incentive to applicants to provide as little information concerning the proceedings as possible to third parties, especially to media organisations, and to routinely seek derogations from PD 25A 9. This has been one of the reasons for the prevalence of extensive derogations being sought from the principle of open justice and from notice requirements.

3.30 The Committee has therefore discussed what procedural steps can be taken to protect information provided by applicants to non-parties at the interlocutory stage following final judgment. If such steps cannot be identified and taken, there is a real risk that Article 6 and 8 rights will not be protected, and the courts will be unable to fulfil their constitutional role as courts of justice.

3.31 Having considered a variety of options, the Committee **considers** that, while there is no perfect solution, the best way of achieving an appropriate level of protection for such information is for the Practice Guidance to make it clear, and the Model Order to include

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a requirement, that before non-parties are provided with the relevant information, either they or their legal representatives on their behalf must give a written irrevocable undertaking to the court to use the documents and information, and any information or material derived from such documents and information, solely for the purpose of the proceedings subject to provisos set out in the undertaking.

3.32 This problem does not only arise in respect of information provided to non-parties after orders are granted. It also arises in respect of information provided to non-parties who are given advance notice of applications. Where an applicant provides a non-party with advance notice of an application for an injunction aimed at protecting private information, there is nothing at present to protect that information from disclosure until an injunction is actually made by the court. A non-party given advance notice of the application and supporting material could, during this period, publish the information and frustrate the court process.

3.33 In order to deal with this anomaly, the Committee also **recommends** that the Practice Guidance and Model Order make it clear that, before formal notice or information needs to be given by the applicant to non-parties in advance of a hearing, the non-parties must give an irrevocable written undertaking to the court that they will use the documents and information provided solely and exclusively for the purpose of the proceedings subject to provisos set out in the undertaking. This undertaking will endure beyond the conclusion of the proceedings.

3.34 The court would have the power, on the same basis as set out in CPR 31.22, to release such a non-party from the undertaking. The written undertaking should follow the wording of that provided by the CPR in respect of parties to proceedings.

### **(3) The Appeal Process**

3.35 Two proposals are considered here: i) the introduction of a fast track appeals process; and ii) the introduction of a compulsory appeals process. Both are rejected.

#### *(a) A Fast Track Appeal Process*

3.36 As noted earlier it is often the case that, where an interim injunction is obtained in order to protect private information, that restraint will also prohibit a media organisation

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from publishing the information. This will, in some cases, occur where publication was imminent. The prohibition on publication may therefore have a significant impact on the media. In those, and other, circumstances the media organisation may well challenge the grant of the injunction on appeal, although, as recognised by Lord Steyn in *Re S*, contesting injunctions can be a ‘*costly matter*’<sup>137</sup>.

3.37 Where publication of the information was imminent prior to the injunction being granted, the resolution of any appeal may be particularly time-sensitive. Information is perishable and media stories often lose their value with the passage of time. It may also be a matter of urgent public importance for the information subject to the injunction to be made public as early as possible, if it is information that can lawfully be placed in the public domain. In such cases, it is not simply the rights of a particular person or organisation which rest on the timely resolution of any appeal; it is also a matter of the public’s Article 10 right to receive information.

3.38 The CMS Select Committee received evidence to the effect that appeals from decisions to grant injunctions restraining publication were not being resolved as quickly as was warranted<sup>138</sup>. It referred, for instance, to the case of *Napier v Pressdram*<sup>139</sup>. In that case an injunction was obtained to stop publication of a media story in January 2009. An appeal from that decision was heard in March 2009. The judgment was delivered in May 2009. The evidence to the Select Committee was that the delay (and cost of the appeal process) was so great that, in effect, it amounted to ‘*censorship by judicial process*’<sup>140</sup>.

3.39 In light of this evidence the CMS Select Committee recommended that the MoJ should develop a fast-track appeal system for interim injunctions. Such a system, it stated, would ‘*minimise the impact of delay on the media and the costs of a case, while at the same time taking account of the entitlement of the individual claimant seeking the protection of the courts.*’<sup>141</sup> The MoJ, in its response, rejected that recommendation, on

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<sup>137</sup> [2005] 1 A.C. 593 at [35].

<sup>138</sup> CMS Report Vol. I. at 18.

<sup>139</sup> [2009] EMLR 21.

<sup>140</sup> CMS Report Vol I. at [30]. Also see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.

<sup>141</sup> CMS Report Vol I. at [18] – [19].

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the ground that it is already possible for appeals to be expedited<sup>142</sup>. This Committee agrees with that conclusion.

3.40 Guidance has been in place since 1995 setting out the principles which the court will apply when considering whether an appeal needs to be expedited in order to do justice to the parties<sup>143</sup>; in other words a fast track appeal process already exists and is applied on a case-by-case basis. Such guidance is, as a matter of course, applied by the court consistently with the overriding objective of dealing with cases justly. In appropriate cases where urgent resolution is a genuine consideration, appeals from interim injunction decisions can be, and are, expedited and the decision given at the end of the hearing with a reasoned judgment to follow later.

3.41 Whether or not expedition is necessary depends very much on the particular facts and circumstances of each case. In some cases, where for instance, publication will have been imminent and an appeal would become futile if it was not expedited or if there would be serious detriment to good public administration or the interests of members of the public, expedition is likely to be necessary. In such a case delay is a denial of justice. In others, expedition will not be necessary to do justice, and it would be unfair on other litigants if the appeal was expedited.

3.42 In light of this the Committee does not consider that there is currently any basis for introducing a bespoke fast-track appeal system for interim injunctions which prohibit the publication of private information pending trial. There is, however, superficial attraction in the proposal that the present system be modified to introduce a rebuttable presumption favouring expedition of such appeals. Such a system would however do little more than replicate the present system. Introducing a system would also give rise to unnecessary cost and delay, both insofar as the court system and litigants are concerned. It would require the court to consider in all such cases whether expedition was necessary. It would also require parties who did not desire expedition to take active steps to inform the court of that fact; and where they did not do so, for the court to request such information in order for it to carry out a proper assessment. In contrast, the present system only requires those parties who desire expedition to take steps to persuade the court it is necessary.

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<sup>142</sup> The Government's Response to the CMS Report at [22] – [23].

<sup>143</sup> *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243 at 246 – 247.

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Equally, it only requires the court to consider the necessity of expedition in such cases. The present system therefore presents a more economical, efficient and proportionate method, as between the parties, of dealing with expedition. Moreover it is more economical, efficient and fair, so far as other litigants are concerned.

3.43 The Committee therefore does **not recommend** the introduction of a new fast-track appeal system or one which provides a rebuttable presumption in favour of expedition.

3.44 It does however **recommend** that:

- (i) As the present guidance on expedition was formulated in 1995, the CPRC (a) review whether, and to what extent, it needs to be updated generally; and (b) consider whether to amend it in order to make it clear that it applies to appeals from decisions where Article 10 is engaged. While the Committee considers that these matters are largely covered in the present guidance, it ought to properly be set out<sup>144</sup>. Amended guidance should then be issued as a Practice Direction;
- (ii) In order to draw proper attention to the present guidance, and in due course to the new Practice Direction, reference to it and its importance in relation to appeals from decisions which constrain freedom of expression, should be incorporated into the proposed Practice Guidance on Interim Non-Disclosure Orders.

### *(b) A Compulsory Appeals Process*

3.45 Professor Zuckerman has raised the question whether a compulsory appeal procedure should be introduced in respect of super-injunctions. He suggests that such an appeal process should apply where an applicant seeks a super-injunction for more than a limited duration and that the cost of such a process should always fall on the applicant. Such orders, as is clear from **Part Two** of this report, have been rare. In future they will be rarer still. The rationale behind this suggestion is that such a process will: i) counteract

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<sup>144</sup> For instance, [1995] 1 WLR 243 at 246 – 247 sets out that expedition may be granted in ‘. . . cases in which publication of allegedly unlawful material is imminent; . . . [those where it] would be serious detriment to good public administration or to the interests of members of the public not concerned in the instant appeal.’

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the tendency that such orders are, as Professor Zuckerman puts it, ‘*never revealed and [are] in practice beyond appellate control.*’; and ii) will enable the Court of Appeal to ‘*review the exercise of the power to grant such orders and build up a coherent and transparent body of principle*’<sup>145</sup>.

3.46 The Committee **rejects** the notion that a compulsory appeal procedure should be introduced. It does so for the following reasons.

3.47 First, the claim that such injunctions are not subject to an appropriate level of publicity and appellate review, even if it were the case in 2009, no longer holds good, as the summary of the recent first instance and appellate authorities set out earlier in this report demonstrates<sup>146</sup>.

3.48 Secondly, the introduction of compulsory appellate review at the applicant’s expense is a disproportionate infringement of the right of a party to autonomy in the conduct of proceedings. Parties decide if they wish to challenge decisions, just as they decide whether they wish to litigate and, if they do, what issues they wish to dispute. To require parties to undergo a compulsory appeal procedure infringes this basic feature of our common law system.

3.49 Finally, the approach endorsed in this report, involving the provision of clear guidance, which will include the information that expedited appeals can be made in this area in an appropriate case, coupled with developments in the recent case law regarding the grant of super-injunctions and anonymised injunctions, should achieve the same end as a compulsory appeal scheme. It should ensure that: i) there is effective scrutiny of applications for such injunctions; ii) that their duration is no longer than necessary; and iii) sufficient details of the application and injunction are made public. In the Committee’s view, scrutiny and publicity is the cure, rather than the imposition of a costly and time-consuming appellate process on all parties in all cases where a super-injunction is obtained.

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<sup>145</sup> Zuckerman (2010) at 138.

<sup>146</sup> See paragraph 2.27.

## (4) Specialist or Non-specialist Judges

### (i) Introduction

3.50 Concerns have been raised regarding who should hear and determine applications for super and anonymised injunctions which seek to protect private information, not least where such injunctions engage HRA s12. Such concerns were raised by both the CMS Select Committee and the MoJ's Libel Working Party<sup>147</sup>.

3.51 The focus of those concerns was that injunctions, often granted on a without-notice basis, were being issued by vacation or weekend duty judges, who had no particular expertise in the field of privacy and/or did not have any sufficient understanding or appreciation of HRA s12. As a consequence, it was suggested, a practice had developed, contrary to Parliament's intention in introducing HRA s12<sup>148</sup>, of granting such injunctions almost automatically in order to maintain the status quo pending an (often delayed) on-notice hearing<sup>149</sup> rather than subjecting such applications, in the first instance, to the proper degree of scrutiny required by, HRA s12<sup>150</sup>. The approach to applications to which HRA s12 applies, as explained by Lord Nicholls in the House of Lords in *Cream Holdings Ltd v Banerjee*<sup>151</sup>, was often not being followed. In that decision, Lord Nicholls clearly set out that the correct approach:

*'[22] In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction 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*

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<sup>147</sup> CMS Report Vol I. at [33] – [39]; MoJ Libel Working Party Report at 42.

<sup>148</sup> Jack Straw MP, Hansard, HC Debates, 02 July 1998, col. 536, 'we believe that the courts should consider the merits of an application when it is made and should not grant an interim injunction simply to preserve the status quo ante between the parties.'

<sup>149</sup> CMS Report Vol I. at [34]. By the time the on-notice hearing has taken place, if the injunction is lifted, from the respondent's perspective the damage may already have been done insofar as the effective exercise of their Article 10 right is concerned.

<sup>150</sup> CMS Report Vol. II at Ev 222.

<sup>151</sup> [2005] 1 A.C. 253 at [22] – [23].



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*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, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.*

*[23] This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant.'*

Insofar as the 'lesser degree of likelihood' test is concerned, the Court of Appeal has emphasised recently that it would only apply in an exceptional case<sup>152</sup>.

3.52 Whether or not on-notice applications are heard, as they ought to be, at the earliest opportunity following the out-of-hours hearing, it is not satisfactory for the courts to operate on the basis that the law will be properly applied subsequently at an on-notice hearing. Litigants should not be placed in the position where they need to rely on on-notice hearings to rectify otherwise avoidable defects in practice at without-notice hearings. The approach to applications which engage HRA s12 set out in *Cream Holdings Ltd v Banerjee* must be applied at all hearings.

3.53 In addition to these concerns, questions have also been raised regarding the degree of scrutiny that judges, particularly duty judges, have given to applications for derogations from the principle of open justice. It is of paramount importance that such applications are properly scrutinised<sup>153</sup>.

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<sup>152</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [36] – [38].

<sup>153</sup> See paragraph 1.28.

3.54 Neither the CMS Select Committee nor the MoJ Libel Working Party recommended that only specialist judges should hear such applications. The latter rightly recognised that deployment was a matter for the Lord Chief Justice<sup>154</sup>. There are two ways in which these perceived problems could be dealt with: first, by prescribing that only a small number of specialist judges hear such applications; or, secondly, maintaining the present position where any non-specialist judge can hear such applications, subject to the introduction of certain safeguards.

### (ii) Discussion

3.55 The use of specialist judges is a superficially attractive option. It is a well-established, and beneficial, practice in a number of discrete, specialist areas e.g., family, commercial, construction disputes and intellectual property matters<sup>155</sup>. Specialisation is called for because of the particular nature of those proceedings. It improves the quality of justice and public confidence in the courts through the application of expert knowledge and judicial efficiency. Such a rationale lies behind the present use of specialist judges to hear defamation proceedings. An extension of the use of specialist judges to encompass all procedural, pre-trial, applications where Article 10 and HRA s12 are engaged would, on the face of it, appear to be a sensible extension of the use of specialisation. However, for a number of reasons, the Committee does **not recommend** that only specialist judges should hear such matters.

3.56 First, the rationale for using specialist judges is that, as noted above, they are best able, in the context of specialist proceedings which require specialist knowledge, to secure justice and to maintain public confidence in the courts. The key point is the specialist nature of proceedings. Applications for interim injunctions are only very rarely, if at all, specialist proceedings. They are proceedings with which all High Court judges are familiar. The general procedural law governing them is well-known and long established and can arise in respect of a wide range of proceedings.

3.57 Equally, knowledge of the requirements of the HRA and the Convention is not specialist. It is something with which all High Court judges are properly familiar, not

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<sup>154</sup> Constitutional Reform Act 2005 s7(2)(c).

<sup>155</sup> See Lord Steyn (2010), for a discussion.

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least because HRA s6 places specific obligations on the court, and therefore all judges, to give effect to Convention rights, and HRA s12 must be taken into account when Article 10 is or might be engaged. These obligations are not of a specialist nature; Convention rights can arise in a very wide-range of cases in any of the High Court's Divisions. Equally, all judges ought properly to be familiar with the law relating to the principle of open justice. *Scott v Scott* has been authoritative for almost 100 years. The provisions of CPR 39.2 and Article 6 are equally accessible.

3.58 It might however, reasonably be said, that some types of substantive proceedings, in support of which interim injunctions are sought, are specialist. Privacy and defamation are such specialist proceedings. It might be said therefore that procedural applications in the context of such specialist proceedings should be restricted to those specialist judges who deal with the substantive proceedings. This would only apply however to such substantive proceedings brought in the Queen's Bench Division. Where proceedings which engage Article 10 and HRA s12 arise in the Chancery Division, for instance where trade or commercial secrets are in issue, applications involving anonymisation or anti-tipping-off provisions will not necessarily be dealt with solely by a small number of designated judges; although they may arise in connection with specialist substantive law, such as patent law. Equally, anonymised orders can also be made in support of personal injury claims, or claims concerning children, heard in the Queen's Bench Division, the Family Division or the County Courts, or matters before the Administrative Court. Such matters are not heard by a limited number of specialist judges.

3.59 While it might be possible to limit almost all on-notice applications, or applications made during normal court opening hours, to those Queen's Bench Division judges who deal with privacy and defamation proceedings, this would be likely to introduce unacceptable delay, with its attendant costs. Delay in matters such as these is often of greater adverse effect than is ordinarily the case, given the time-sensitivity of the information that is often at the heart of such proceedings. Sometimes, no specialist judge is available to hear an urgent application for injunctive relief during court hours. More significantly, it is not clear that it would be possible to ensure that only specialist judges dealt with all out-of-hours applications, as this would effectively require a small number of Queen's Bench Division judges to be permanently available as out-of-hours duty

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judges. Moreover, such a restriction might give an unwarranted mystique to injunction applications for privacy, confidentiality and defamation.

3.60 Rather than restricting the number of High Court judges who can hear such applications, with the attendant problems of principle and practice, it appears more practical and proportionate for the following remedial measures to be taken, as the Committee **recommends**:

- (i) First, the parties and the legal profession should ensure that they comply with their obligation, on every without-notice injunction application, to provide full and frank disclosure of all material matters of fact or law<sup>156</sup>. That duty is well-known to be a high one, and one which places a '*particular duty [on] the advocate to see the correct legal procedures and forms are used . . .*<sup>157</sup>'. It is not enough to simply say that the duty is a high one. The Court of Appeal in *Beese & Others v Woodhouse & Others* [1970] 1 W.L.R. 586 specifically drew attention to the fact that, on a without-notice application, the

*'party applying for it [a without notice interim injunction] should show the utmost good faith in making the application, and that the doctrine of uberrimae fidei in effect applies.*<sup>158</sup>

On without-notice applications, as Mummery LJ emphasised in *Memory Corporation v Sidhu*, that duty includes drawing to the court's attention '*the applicable law [and] the formalities and procedure to be observed.*<sup>159</sup> It is imperative, if parties and their advocates are to discharge their obligations, that they ensure that all relevant matters regarding Article 10 and HRA s12 are properly brought to the court's attention; and, where derogations from the principle of open justice are sought, evidence<sup>160</sup> in the form of witness statements and the relevant principles in the authorities such as *JIH* are properly brought to the court's attention. Where it becomes evident in the

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<sup>156</sup> See *Memory Corporation Plc v Sidhu* [2000] 1 W.L.R. 1433 at 1459; *Gray v UVW* [2010] EWHC 2367 (QB) at [65] – [66].

<sup>157</sup> *Ibid.*

<sup>158</sup> [1970] 1 W.L.R. 586 at 590.

<sup>159</sup> [2000] 1 W.L.R. 1433 at 1459.

<sup>160</sup> *Terry v Persons Unknown* [2010] 1 FCR 659 at [25].

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course of proceedings that this aspect of the duty has been breached, the court should take a robust approach to deal with that breach robustly and effectively;

- (ii) Secondly, those High Court judges who are likely to hear relevant applications for injunctive relief, whether during court hours or whilst acting as a vacation or out-of-hours duty judge, should continue to be given training by experienced members of the judiciary; and
- (iii) Thirdly, the Practice Guidance and Model Order should assist both the courts and litigants in ensuring that all relevant matters are before the court when injunctive relief and/or derogations from the principle of open justice are sought.

3.61 The effective implementation of these recommendations will, it is hoped, cure the problems said to have arisen through the use of non-specialist judges to hear such applications.

## Four – Data Collection

### (1) Introduction

4.1 There are two areas of concern as to the availability of evidence about interim injunctions representing exceptions to the principle of open justice and binding the media. The first, highlighted by the CMS Report, concerns the relationship between interim injunctions and HRA s12. The second concerns the number of super-injunctions, and anonymised injunctions, which are being applied for and granted.

4.2 The CMS Report recommended that steps be taken to ensure that information be collated about interim injunctions, which are within the scope of HRA s12. At present, there are records of only a limited number of cases; specific records are not at present kept in respect of such matters<sup>161</sup>. The CMS Select Committee recommendation was based on the proposition that, without such data, it was not in a position to come to '*definitive conclusions about the operation of [HRA s12]*'<sup>162</sup>. It was particularly concerned about the operation of HRA s12 in light of anecdotal evidence which it had received, to the effect that the courts were not properly applying it<sup>163</sup>. In its response, the government recorded its understanding of the argument in favour of collecting additional data, but noted that it would need to consider the recommendation further, not least in respect of any additional costs data collection would generate<sup>164</sup>.

4.3 The CMS Report did not make any specific recommendations regarding data collection super-injunctions and anonymised injunctions. However, applications for such orders normally engage HRA s12, as they have a potential impact on the exercise of the right to freedom of expression of any respondent or third party, as well as the Article 10 rights of the public at large<sup>165</sup>. There is another reason justifying the collection of data concerning super-injunctions: the widespread belief that super-injunctions, and other injunctions containing publicity restrictions, have become increasingly commonplace<sup>166</sup>.

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<sup>161</sup> Lord Clarke MR, Supplementary memorandum, in CMS Report Vol. II at Ev 223.

<sup>162</sup> CMS Report Vol. I at [37].

<sup>163</sup> CMS Report Vol. I at [21] – [39].

<sup>164</sup> The Government's Response to the CMS Report at [2.6].

<sup>165</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21].

<sup>166</sup> See Leigh (2009); Rozenberg (2009); Robinson (2009); Woods (2009); Glover (2009); and Gibb (2011).

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4.4 The current absence of any data renders it impossible to verify whether and to what extent super-injunctions and anonymised injunctions are being granted by the courts. Equally, it renders it impossible to verify whether claims of the existence of as many as 200 – 300 such orders refer to super-injunctions, anonymised injunctions, a combination of the two, is based on double counting orders made first at a without-notice hearing and then continued at a with-notice notice hearing, or is simply an exaggeration<sup>167</sup>. Given the lack of a uniform definition of the term super-injunction, this is a particularly acute concern, not least because recent reports assert that 30 super-injunctions are thought to have been issued in the last three years, when it is clear that many of those orders referred to are in fact anonymised injunctions and not super-injunctions<sup>168</sup>.

4.5 Both of these issues are matters of concern. The absence of evidence has encouraged a view that an entirely secret process has developed in the civil courts, and that this is improper in principle, risks neutering press freedom to report matters of public interest and undermines the public's right to be informed of court proceedings. This view not only undermines public confidence in the proper administration of justice, but equally it undermines public confidence in a free press being able to report responsibly on matters of public import. As such, it stands to undermine the rule of law and our open democracy.

### **(2) Recommendations**

4.6 The Committee supports the introduction of a data recording system to enable public, Parliamentary, and judicial scrutiny of the frequency with which super-injunctions, and injunctions containing publicity restrictions, are applied for and granted. Two caveats must however be made.

4.7 First, insofar as the proper operation of HRA s12 is concerned, the collection of data will only go so far to demonstrate whether it is being applied as Parliament intended. The collection of such data will not, of itself, demonstrate whether the courts are properly applying HRA s12. The grant of an interim injunction containing provisions restricting publicity may in the circumstances of any particular case be justified. That may well be true even if the claimant's case ultimately fails at trial, and the information which had

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<sup>167</sup> Zuckerman (2010) at 131; Sanderson (2010); and evidence submitted by *Private Eye* in CMS Report Vol. II at Ev 198 – 199.

<sup>168</sup> Gibb (2011).

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been subject to the interim injunction then becomes publicly available. An order restricting publicity may be unimpeachable, applying the criteria set out in HRA s12, even if the claim ultimately failed.

4.8 Once collected, data will therefore have to be treated with caution and will have to be scrutinised in the wider context of the nature of the substantive law and the claims involved. However, data collection, in tandem with the recommendation in *JIH v News Group Newspapers* that judgments and orders containing derogations from the principle of open justice are made publicly available<sup>169</sup>, will be able to demonstrate the general trend, and show whether, and to what extent, such orders are sought, and are granted. It should also be able to show whether, and the extent to which, such orders are sought and granted without-notice, and how often prior opportunity to contest the application is being given to media organisations whom the applicant intends to serve with the order. As such it will facilitate the assessment, recommended by the CMS Report, of whether HRA s12 is operating as Parliament intended<sup>170</sup>.

4.9 This should promote open justice, by making the court process more transparent, and by enabling Parliament, the judiciary, and the public to ascertain whether and to what extent orders, which ought properly to be exceptional, are in danger of becoming routine. It should also help to promote public confidence in the justice system through demonstrating the true extent to which super-injunctions are applied for and are granted, either by consent following judicial scrutiny, or following a contested hearing.

4.10 Secondly, the Committee appreciates that any data collection system will have cost implications. There will be the additional costs in terms of judicial time to note the data following hearings, Her Majesty's Courts and Tribunals Service (HMCTS) staff time to collect the data; and MoJ time as they will collate and publish it. Any system will therefore need to be as cost-effective as possible, and compliant with any relevant data protection requirements.

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<sup>169</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 at [21(9)] & [35].

<sup>170</sup> CMS Report Vol. I at [37] – [38] and fn 39.



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4.11 The Committee accordingly **recommends** that the MoJ's Chief Statistician examines, with HMCTS, the feasibility and cost-effectiveness of introducing such a data collection system. Subject to that, the Committee **recommends**:

- (i) The MoJ's Chief Statistician should collect and publish annually the following data: i) the number of applications made in the High Court for interim injunctive relief, which a) engage HRA s12; and b) contain any derogations from the principle of open justice; ii) whether they were made with or without notice to the persons who are to be affected by any order granted; iii) the outcome of any such application (including any appeal to the Court of Appeal), and, if granted, the nature of those derogations and the reasons for them; and iv) the outcome of the substantive proceedings in which those interim applications are made i.e., trial or appeal;
- (ii) To further facilitate accurate recording, a standard form should be created and used by HMCTS in the High Court and Court of Appeal to record details of such interim applications, and to record the final disposition of the substantive proceedings. Alternatively, standard forms currently used to record hearing data should be adapted. If this latter proposal could be introduced effectively, the cost associated with data collection could well be minimised;
- (iii) The standard form should either be completed by the judge hearing the application, or by a relevant member of HMCTS under the judge's direction, at the end of any hearing. A copy of the data should then be forwarded to the MoJ Chief Statistician for collation;
- (iv) Provision should be made either in the CPR or via Practice Direction to authorise the transmission of such data to the MoJ Chief Statistician by HMCTS and the subsequent publication of the collated information, notwithstanding any prohibition contained in specific orders regarding the dissemination of information concerning the proceedings or order; and

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- (v) A draft standard form, based on those currently used in the Queen's Bench Division, which could be used throughout the High Court and the Court of Appeal is set out in **Annex C** to this report.

## Five – Communication between the Courts and Parliament

### (1) The House *sub judice* rules

5.1 It is a long-established practice of both Houses of Parliament that where an issue is awaiting determination by the courts, that issue should not be discussed in the House in any motion, debate or question. This practice, set out in the *sub judice* rules of each House<sup>171</sup>, is not absolute. The Chair of proceedings of the House of Commons (i.e., the Speaker or the Chairman of a Committee), for instance, may, at his or her absolute discretion, permit such matters to be discussed<sup>172</sup>. Furthermore, the *sub judice* rules do not affect the right of the House to legislate on any matter or to discuss any delegated legislation, or where a Ministerial decision is in issue.

5.2 The description of procedures and analysis that follow focus upon the House of Commons, for a number of reasons: the greater degree of political contention in that House means that it is more likely that *sub judice* issues will be raised there; the representative role of MPs means that issues affecting their constituents may be raised; the Table Office, dealing with some 70,000 Parliamentary Questions and 2,500 Early Day Motions a year, has a central role which differs from equivalent arrangements in the House of Lords; and the role of the Speaker of the House of Commons in controlling proceedings is wholly different from that of the Lord Speaker.

5.3 The *sub judice* rules of each House exist, as the 1999 Joint Committee on Parliamentary Privilege (the 1999 Joint Committee) explained, in order ‘*to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases.*<sup>173</sup>’ It went on to explain that the rules strike the balance between Parliament’s constitutional duty and role and the constitutional role of the courts.

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<sup>171</sup> See Erskine May at 436 – 438 & 525 – 526. Standing Orders of the House of Commons, Public Business, HC 700, Session 2010 – 12, 181 and 182; Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010, 73, 74.

<sup>172</sup> However, where it is known in advance that there may be an attempt to raise a matter *sub judice* in Committee, the Speaker’s view will normally be sought, particularly in order to avoid a reference allowed in Committee being ruled out of order in the House.

<sup>173</sup> 1999 Joint Committee report at [191].

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*'The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.'*<sup>174</sup>

5.4 The *sub judice* rules are a particular instance by which Parliament and the courts are properly sensitive to ensure they each refrain from trespassing on the other's province<sup>175</sup>. They are an instance of the proper separation of powers and support the rule of law through ensuring that Parliament does not undermine the efficacy of court judgments, which enforce and vindicate legal rights - not least rights provided by Parliament. It is of particular concern to all therefore that the *sub judice* rules are neither inadvertently nor deliberately subverted. Those rules exist to uphold the constitutional balance between Parliament and the courts and to secure the rule of law, and breaches of those rules risk undermining the fabric of our constitution and our commitment to the rule of law.

5.5 Where a Member deliberately chooses to raise an issue that is, or might be, properly subject to the *sub judice* rules of either House matters will come into the public domain which should not properly do so at that time. Such conduct may undermine the efficacy of court orders, may prejudice a citizen's right to receive a fair trial, and may effectively deny a citizen their right to fair trial. It is of course entirely a matter for the Speaker to consider how best to enforce the *sub judice* rules of the House of Commons<sup>176</sup>. It is a matter of some considerable constitutional concern, to echo the words of the 1999 Joint Committee report, if the *sub judice* rules are not abided by and enforced.

5.6 In the ordinary course, it is the Table Office which will first become aware of the possibility of a Member wishing to raise a matter which is *sub judice*, through seeking to

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<sup>174</sup> *Ibid* at 192.

<sup>175</sup> 1999 Joint Committee report at [226].

<sup>176</sup> The courts cannot, amongst other things, investigate an MP's motivation in respect of what is said in the House: *Church of Scientology of California -v- Johnson-Smith* [1972] 1 QB 522.

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table a Parliamentary Question or an Early Day Motion, or in the selection of a topic for an adjournment debate in the House of Commons or in Westminster Hall. If the Table Office suspects that there may be relevant active proceedings, it contacts the MoJ's Parliamentary branch, or other departmental Parliamentary branches. The relevant Parliamentary branch, which is usually that of the MoJ, then makes enquiries of HMCTS, to ascertain whether there are such proceedings. Once provided with information from HMCTS, the Table Office is able to advise the Speaker, who can then determine whether the *sub judice* rule is engaged, and, if it is, whether nonetheless to permit the issue to be raised.

5.7 A similar process may be undertaken, but much more rapidly, if during the course of a debate in the House, the Clerks at the Table become aware of the possibility of a breach of the *sub judice* rule occurring and need to advise the Chair. Equally, the process may be more leisurely: a Member may be conscientiously concerned about whether a matter might raise *sub judice* issues and seek advice before taking any action.

5.8 Problems can potentially arise where it is not possible for HMCTS to answer a Table Office query. An obvious example is where proceedings have been anonymised, or where they are subject to a super-injunction. If the proceedings have been anonymised a search of HMCTS's case databases will not reveal the names of the parties because data regarding the proceedings are stored under the anonymised title. If proceedings are subject to a super-injunction, it is impossible to extract data from HMCTS's database; as such proceedings are invariably anonymised, and, in addition, communication of the fact of such proceedings by HMCTS would, arguably, amount to a contempt of court.

5.9 Similar problems do not arise where anonymised orders are in place in wardship proceedings involving children as, generally, in such cases the matter to be raised in Parliament will also refer to the case reference number, which is easily identifiable by HMCTS. If the Table Office were informed of the case reference number where an anonymised order was in place in, for instance, proceedings concerning privacy or confidential matters, HMCTS could equally identify the proceedings. The real difficulty in confirming whether a matter to be raised in Parliament may come within the ambit of

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the *sub judice* rules was demonstrated by the *Trafigura* case and relates to super-injunctions.

5.10 The facts of that case were as follows: on 11 September 2009 Maddison J granted an injunction against The Guardian newspaper and a person or persons unknown. The basis of the injunction was not personal privacy, but rather related to a confidential document which was subject to legal privilege. The applicants' names were anonymised as RJW and SJW and a prohibition on reporting the fact of the proceedings was included in the order. The order was subsequently extended by Sweeney J on 18 September 2009 who also ordered that an application by the claimants be heard on a date to be fixed in the week commencing 12 October 2009. On 12 October 2009, at a time when the injunction was still in force (and when the application was due to be heard), Paul Farrelly MP tabled the following question in Parliament,

*'To ask the Secretary of State for Justice, what assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in the Ivory Coast, commissioned by Trafigura.'*<sup>177</sup>

5.11 *Trafigura* was the party identified as RJW in Maddison J's order. Following the usual procedure the Table Office, via the MoJ's Parliamentary branch was unable to ascertain from HMCS (as it then was) whether there were ongoing proceedings regarding *Trafigura*. Due to the terms of the order, and the fact of anonymisation, a search of HMCS's database for *Trafigura* was unable to identify the fact of proceedings or the injunction, or the order by Sweeney J<sup>178</sup>. Its internal database simply recorded the applicants as RJW and SJW. No reference to *Trafigura* could be detected in a search of the relevant database. There was therefore no adequate mechanism to ascertain whether there were proceedings, such as the imminent hearing of an application, which might then be determined by the Speaker to be active for the purpose of the sub judice rule. As a consequence of this, the draft question was tabled in the House of Commons and the

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<sup>177</sup> Paul Farrelly MP (19 October 2009).

<sup>178</sup> Paul Farrelly MP (21 October 2009) *'I was aware of the injunction but not of the full anonymous title. My question only named Trafigura and Carter-Ruck and not The Guardian. I assume that the Table Office Clerks doing their usual rigorous sub judice checks simply could not find the injunction and, therefore, the question was accepted.'*

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Speaker responded to a point of order on 13 October 2009 stating that the matter was not *sub judice* according to the rules of the House<sup>179</sup>. The question was subsequently the source of concerns regarding media reporting of Parliament<sup>180</sup>. One consequence of this episode was that concerns were raised on behalf of the Clerk to the Speaker of the House of Commons with the MoJ.

5.12 The Committee has considered what steps might be taken in future to ensure that there is a mechanism to enable the *sub judice* rules to work effectively in circumstances where the Table Office becomes aware of an issue and needs to be able to properly advise the Speaker. We consider that there are two possible solutions.

5.13 First, it could be left to the party who has obtained an anonymised injunction or a super-injunction to inform the Speaker and Lord Speaker of that fact, and of the status of the proceedings. The relevant Table Office could then verify matters with the MoJ and HMCTS by reference to the claim or application number, or (at least in theory) by referring to the anonymised title of the proceedings.

5.14 This course is superficially attractive as it places responsibility for informing the House of the fact that proceedings are active in the hands of the party who has obtained the injunction. It thus respects party autonomy. However, it would appear to involve the House being informed of virtually every such case. This would place a disproportionate burden both on parties and on the House authorities. The House would have to keep a database of all such proceedings, and it would still have to query via the MoJ whether those proceedings were still active if they were to be raised in Parliament. The Committee does not therefore recommend this course.

5.15 Another possibility is that a system is devised and operated by HMCTS where proceedings subject to such orders could be identified by HMCTS following an enquiry through the MoJ by the Table Office on the Speaker's, or by officials on the Lord Speaker's, behalf. Such an alternative would require either HMCTS or the Judicial Office for England and Wales (the Judicial Office) to establish a secure database, searchable by party name, which contains details of all relevant anonymised injunctions and/or super-

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<sup>179</sup> The Speaker (13 October 2009).

<sup>180</sup> See **Part Six**.

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injunctions<sup>181</sup>. Such orders should be recorded on the database following judicial direction contained in the relevant order. The database would need to contain a cross reference to the claim or application number and the parties' representatives' details. In light of the information contained on it, access to the database would have to be restricted to a senior member of either HMCTS or Judicial Office staff and could only be released to a nominated member of MoJ Parliamentary branch following a relevant enquiry.

5.16 This second option is a more sensible and practical proposal. First, it simply expands the present system so that it operates in a way which covers all possible enquiries. Secondly, it does not require the House of Commons to establish and maintain a database of such orders and then to have to cross-check them with HMCTS. Thirdly, it ensures that the House and the judicial branch of the State are kept properly informed of each other's proceedings without having to rely on action being taken by litigants who act before the courts.

5.17 The second option should be considered on the basis that the secure database should be maintained by HMCTS and should only be accessible by a specific senior member of HMCTS.<sup>182</sup> Consideration should also be given to reducing the number of steps which the Officers of either House have to go through to enquire whether there are active proceedings, both generally and in respect of anonymised injunctions and super-injunctions.

5.18 Consideration should also be given by the Table Office, HMCTS and government departments to streamlining the system for answering *sub judice* queries generally so that they are made to HMCTS direct, rather than through the MoJ or other departmental, Parliamentary branches. If such an approach is adopted, which would require the information to be held or to be accessible by an easily contactable (including out-of-hours) and sufficiently senior member of HMCTS, it would ensure that the transfer of

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<sup>181</sup> This report only deals with England and Wales, separate consideration may well be needed in respect of Scotland and Northern Ireland.

<sup>182</sup> Given the sensitive nature of the information to be placed on the database there is a pressing need to ensure that the simplest possible system should be devised. The creation of a database held by the Judicial Office would require information to be provided by HMCTS to the Judicial Office. It would also require two enquiries to be made, to two separate bodies, to ascertain if there are active proceedings. Such a system would duplicate work and would increase the possibility that information could go astray, as it is transferred from HMCTS to the Judicial Office, and then to the MoJ and subsequently the Table Office.



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information from one branch of the State to another passes through the smallest number of individuals possible, which is clearly sensible.

5.19 In order to ensure that the transfer of information from HMCTS to the Table Office does not itself breach the terms of any injunction, it is further **recommended** that the CPR should be amended either via rule change or Practice Direction (which should not impermissibly purport to regulate Parliamentary procedure) to clarify that the transmission of information by members of HMCTS (and departmental Parliamentary branches) in this way is permitted but that the transmission must be on a confidential basis and is solely for use in determining the application of the House *sub judice* rules.

5.20 We limit our recommendation to consideration, rather than adoption, of this course, because it has two drawbacks. First, by ensuring that the Table Office is made aware of the existence of proceedings in which a super-injunction or anonymised injunction is in place, there is a risk that it would alert an MP who wished to table a question to the fact that an order was actually in place. It is hoped that the Table Office can ensure that this risk is kept to a minimum. It is a risk which is mitigated by the operation of the *sub judice* rule regarding active proceedings, by the ambit of Parliamentary privilege, and by the operation of the law of contempt of court.

5.21 The second and main drawback is the cost implication. The proposal would require the establishment of a new, secure database, and it would involve ongoing staff costs in maintaining the database. These costs would have to be a balanced against the utility which would be derived from the database. The *Trafigura* case has been the only instance in recent years where a Table Office query has produced a false negative from HMCTS. However, in the future such instances should seldom occur if the other recommendations in this report are properly implemented. It may well be that the cost of implementing such a database would be disproportionate<sup>183</sup>.

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<sup>183</sup> As noted earlier the paragraphs above deal with the House of Commons. The House of Lords, as a more self-regulating Chamber, affords less unfettered authority to the Lord Speaker. She may be appealed to to waive the *sub judice* rule in relation to proceedings in the Chamber, but the Lords Companion makes clear that the Lords Table Office has no authority to withhold a Member's question from the Order Paper, in the way the House of Commons Table Office does, acting under the authority of the Speaker of the House of Commons.

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5.22 In the premises, the Committee **considers** that the Speaker may wish to examine what steps might properly be taken to ensure compliance with the House *sub judice* rule and it **invites** the MoJ, HMCTS and the relevant authorities in the House of Lords and the House of Commons to consider the feasibility, cost-effectiveness and proportionality of adopting the course discussed in the paragraphs above. If it is not implemented in its entirety, consideration should still be given to streamlining the present system to render it more efficient through, for instance, identifying a single point of contact for the House authorities to contact where queries arise.

### Six –Reporting Parliamentary Proceedings, Article 9 and Injunctions

#### (1) Introduction

6.1 In some quarters, the *Trafigura* case was said to raise a fundamental question regarding the scope of injunctive relief, namely whether a super-injunction could inhibit Parliamentary debate. It should be said at once that it plainly cannot. The *Trafigura* case did, however, raise a second, and rather more difficult, question, which was often confused with the first question: could a super-injunction, or for that matter any injunction, prohibit the reporting of what was said in Parliament: more specifically, could the injunction prohibit the reporting outside the House of Commons of the question tabled by Paul Farrelly MP<sup>184</sup>.

6.2 Both *Trafigura* and *The Guardian's* legal advisors agreed that the injunction would have prevented the media reporting Paul Farrelly MP's question<sup>185</sup>; such reports would, it was said, breach the injunction, and would therefore have been a contempt of court. Thus, *The Guardian* stated that it had been 'gagged from reporting Parliament'<sup>186</sup>, and that its 'legal advice was that it could do no more than publish a front-page story saying it had been prevented from publishing the proceedings of parliament – a sacrosanct right since the 18th-century.'<sup>187</sup>

6.3 The supposed scope of the *Trafigura* order therefore, unsurprisingly, raised considerable disquiet amongst a wide range of organisations, the media, MPs, the government and the public<sup>188</sup>. The issue was debated in Parliament. Questions were raised whether and to what extent the order breached Article 9 of the Bill of Rights 1689 and the ability of the press to freely report Parliamentary proceedings. Further questions were raised regarding

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<sup>184</sup> See paragraph 5.10.

<sup>185</sup> Paul Farrelly MP (21 October 2009), 'What is really important here is that last Monday legal advice on both sides, *The Guardian's* counsel and Carter-Ruck for *Trafigura*, agreed that the scope of the injunction would have prevented the media from reporting the question as part of the proceedings of this Parliament. That was an extraordinary state of affairs-that this conclusion could be reached notwithstanding common and statute law that enshrine qualified privilege for the media reporting of Parliament in a free society. Equally extraordinary is the statement by Carter-Ruck in its letter to Mr. Speaker last week, which said that "when the order was made (and endorsed by the High Court) none of the parties or the court had in contemplation the possibility of this matter being raised in the UK parliament. If they had, the Order may well have been formulated in such a way as to allow for such reporting.'" ; *Trafigura* (16 October 2009).

<sup>186</sup> Leigh (2009).

<sup>187</sup> *The Guardian* (16 October 2009).

<sup>188</sup> Rozenberg (2009); Robinson (2009); Ponsford (2009); Woods (2009); and Glover (2009).

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the Parliamentary Papers Act 1840, whether it was still in force, and whether it was applicable<sup>189</sup>. Questions were raised about the separation of powers<sup>190</sup>.

6.4 In answer to a question raised at a press conference, Lord Judge CJ explained that, in his personal view, it would not be constitutionally proper or possible for a court to enjoin Parliament<sup>191</sup>. He was not asked whether reporting Parliamentary proceedings could, in any circumstances, be a contempt of court. The Lord Chancellor, subsequently, discussed the issue with the media, and through his officials, raised their concerns with the senior judiciary<sup>192</sup>.

6.5 These concerns, and the two questions, were not tested in the courts as the injunction in *Trafigura* was amended by consent to make it clear that it did not prevent the publication or reporting of proceedings of Parliament<sup>193</sup>. Nor have they been tested since. In the absence of court determination following considered argument, the Committee comments as follows.

### **(2) Injunctions and Article 9 of the Bill of Rights 1689**

6.6 The first question, whether an injunction granted by the courts can extend to Parliament is most easily answered by reference to Article 9 of the Bill of Rights 1689. Article 9 is declaratory of a longstanding privilege of Parliament: freedom of speech in debate<sup>194</sup>. It provides the ‘final legal, recognition<sup>195</sup>’ of the constitutional principle,

*‘That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.’*

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<sup>189</sup> Hansard (13 October 2009) and (21 October 2009).

<sup>190</sup> David Davis MP (13 October 2009).

<sup>191</sup> Lord Judge (2009), ‘*I am speaking entirely personally but I should need some very powerful persuasion indeed - and that, I suppose, is close to saying I simply cannot envisage - that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament. Or that any judge would intentionally formulate an injunction which would purport to have that effect. We use the words "fundamental principle" very frequently, but this is a fundamental principle.*’

<sup>192</sup> Jack Straw MP LC (28 October 2009); Bridget Prentice MP (21 October 2009).

<sup>193</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/rjw-guardian-order-13102009.pdf>.

<sup>194</sup> Erskine May at 78 – 82.

<sup>195</sup> Ibid at 95.

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This provides an absolute privilege; the exact scope of which has never been fully tested<sup>196</sup>. Its principal purpose was, however, stated clearly by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at 638,

*‘ . . . the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to discuss.’*

6.7 Article 9 thus ensured that neither the Crown nor the courts could interfere with the business of Parliament. It is, again as Lord Browne-Wilkinson put it, *‘a provision of the highest constitutional importance’*. It is of such importance because, within our uncodified and unwritten constitution, it sets an express constitutional boundary between Parliament and the other branches of the State, and, in particular for present purposes, the courts. It is thus a longstanding instance of the separation of powers between these two arms of the state. It sets the constitutional limits of the jurisdiction of the courts (as well as that of the Executive) in relation to Parliament. An attempt by the courts to go beyond the constitutional boundary delimited by Article 9, as interpreted by the courts<sup>197</sup>, would be unconstitutional.

6.8 There is therefore no question that a super-injunction, or for that matter any court order, could extend to Parliament, or restrict, or prohibit Parliamentary debate or proceedings. As the 1999 Joint Committee put it, *‘in the case of court injunctions restraining publicity: these bind the media but not either House’*<sup>198</sup>. That is not to say however that Parliament may not voluntarily choose, consistently with its *sub judice* rules, to limit its scope of debate. Indeed, as Lord Judge said, Parliament may well think it right to do so, in order to *‘avoid any possible interference with the administration of justice’*. As he explained, if Parliament took that course, it would not be because *‘a court has sought to order it, but because Parliament has chosen in the public interest not to insist on its privileges’*<sup>199</sup>. The Committee therefore believes it to be quite clear that court orders, however framed, cannot interfere with, or inhibit, Parliamentary speech, debate or proceedings.

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<sup>196</sup> See *R v Chaytor & Others* [2010] 3 WLR 1707.

<sup>197</sup> *Ibid* at [15], *Pepper v Hart* [1993] A.C. 593 at 624 D.

<sup>198</sup> 1999 Joint Committee report at [204].

<sup>199</sup> Lord Judge (2009).

6.9 There has recently been renewed speculation, not least in the Westminster Hall debate of 17 March 2011, concerning the relationship between the courts and Parliament. This speculation has arisen in respect of so-called hyper-injunctions, which, it has been suggested, represent a new, more powerful, variant of the super-injunction. This form of injunction is said to include the novelty of prohibiting an individual who is subject to the injunction from disclosing the fact of the proceedings, or discussing the proceedings with an MP. The Committee has a number of observations on this important matter.

6.10 First, court orders which prohibit individuals from discussing legal proceedings with third parties do not need to specify those third parties. A prohibition on discussing the proceedings is a general prohibition, so there is rarely any need to identify specific individuals or classes of individual to whom the prohibition applies. A prohibition on discussing the proceedings with third parties would therefore include, without any specific reference being necessary, a prohibition on discussing the proceedings with an MP. The reference to a named MP in a so-called hyper-injunction is therefore unnecessary as a matter of law. The only novelty of a hyper-injunction is therefore the fact that it actually refers to a specific MP.

6.11 Secondly, and more broadly, the recent focus of publicity on so-called hyper-injunctions raises a difficult and important point on the interrelationship of an injunction which restrains the dissemination of information and Parliamentary privilege, which, as already mentioned, provides an absolute exemption from the ordinary law for what is said in Parliament by MPs by preventing any questioning or impeaching of proceedings in Parliament in any court or place outside Parliament.

6.12 To a degree, and in some circumstances, it appears that communications between MPs and their constituents are subject to Parliamentary privilege. However, and as Erskine May explains, this privilege is not as wide as the absolute immunity afforded to MPs speaking in the House. As Erskine May puts it:

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### *‘PETITIONERS, ETC*

*Those having business before either House or its committees, as petitioners, counsel, agents and solicitors, are considered as under the protection of the High Court of Parliament, and obstruction of, or interference with such persons in the exercise of their rights or the discharge of their duties, or conduct calculated to deter them or persons from preferring or prosecuting petitions or bills or from discharging their duties may be treated as contempt.*

*Instances of this kind of contempt include causing the arrest of persons soliciting business before the House, knowing them to be such, within the period of freedom from arrest . . .; assaulting or threatening them within the precincts or by reason of their approach to the House; insulting them, or challenging them to a fight; bringing an action for a libel alleged to have been contained in a petition to the House; or libelling them in respect of professional conduct before a committee.*

### *CONSTITUENTS AND OTHERS*

*Similar protection is not afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide to Members information that has no connection with proceedings in Parliament. The special position of a person providing information to a Member for the exercise of his parliamentary duties has however been regarded by the courts as enjoying qualified privilege at law.<sup>200</sup>*

6.13 When referring to this protection, Erskine May may only have had defamation in mind, but it seems possible that the same privilege would be extended to a person who wished to communicate to an MP information which was otherwise precluded from dissemination by an injunction. However, Erskine May appears to suggest that such a communication would only be protected if it was connected with proceedings in Parliament and was not communicated by the constituent in a personal capacity.

6.14 It is right to add that Erskine May cites *Rivlin v Bilainkin* [1953] 1 Q.B. 485, a decision of a High Court Judge made nearly sixty years ago, as authority for the proposition that the communication between an MP and a constituent must be connected with proceedings in Parliament to fall within the limited protection afforded to individuals providing information to a Member for the exercise of his or her parliamentary duties. All that case decided was that the publication in question, which was in breach of an injunction not to repeat a libel, was not removed from the jurisdiction of the courts

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<sup>200</sup> Erskine May at 152 – 153.

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because it was in no way connected with any proceedings in the House. The point does not appear to have been considered subsequently by the Court of Appeal or the Law Lords. Commenting on that case, the editors of *Gatley on Libel & Slander* submit that ‘*it is not possible for an outsider to manufacture Parliamentary privilege by the artifice of sending [a] document to an MP*’<sup>201</sup>.

6.15 Erskine May also makes clear in the extract cited that the limited protection for a person providing information to a Member for the exercise of his or her Parliamentary duties is a qualified privilege at common law. As such it does not apply, for instance, where the communication is motivated by malice.

6.16 Quite apart from this, it is not apparent that the cases referred to during the Westminster Hall debate are evidence of a novel or widespread practice in civil proceedings to protect private or confidential information. The matters discussed in the Westminster Hall debate on 17 March 2011 may well however not set out the entire account, for instance because of the House *sub judice* rule<sup>202</sup>.

6.17 What is apparent from the account given though is that the only known examples involve a single Member of Parliament; there are only three such orders. Of those three orders, it seems that one arose in proceedings under the Mental Capacity Act 2005, another in Family proceedings, and the third in proceedings concerning shipping. Only one of the orders (the shipping order) therefore falls within the ambit of this report. The other two, which arose in Mental Capacity Act 2005 proceedings and Family proceedings, were made against a background of privacy; where protection of party privacy is the default position as a consequence of statutory provisions and long-established practice<sup>203</sup>. Of those two orders, one of them did not apparently contain the provision said to render the injunction a hyper-injunction. It did not because the prohibition on discussing matters with the MP was not contained in the order itself, but merely reflected a commitment to that effect given by one of the parties. In other words of the three orders, the so-called hyper-injunction provision was only contained in two of them. It is difficult to see therefore how these can properly be seen as comparable to the

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<sup>201</sup> *Gatley on Libel and Slander* (11<sup>th</sup> ed) (2008) at 13.30, fn 258.

<sup>202</sup> Official Report 17 March 2011, col. 139 WH ff

(<http://publications.parliament.uk/pa/cm201011/cmhansrd/cm110317/halltext/110317h001.htm>).

<sup>203</sup> See paragraph 1.22.



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development of the use of anonymised and super-injunctions, in the context of civil proceedings to protect privacy and confidentiality.

6.18 Most significantly however, in respect of all three orders, it is not clear from what was said in the Westminster Hall debate how the protection afforded to constituents, and described in Erskine May, was or might have been engaged. It is not clear, for instance, how the matters communicated were related to proceedings in Parliament, nor is it clear, whether the communications were made by the constituents in '*their personal capacity*' or otherwise.

6.19 Furthermore there is no available evidence that, in any of the three cases, the court was seeking to limit the application of the protection afforded to constituents, as it is described in Erskine May. There is nothing, from what has been said in Parliament regarding these three orders, which suggests that they contained any wording which expressly stated that the prohibition on discussing the proceedings contained in the orders was intended to oust the protection described in Erskine May. Without such an express statement, it seems to the Committee very difficult to argue that an order could purport to deprive a constituent of that protection.

6.20 In light of this, the three orders in question do not seem to have done beyond the ordinary law insofar as injunctive relief is concerned. It also does not appear that they were an impermissible attempt to prohibit an individual from discussing court proceedings with an MP for the purpose of Parliamentary proceedings. Only if it were demonstrated that the orders did purport to prohibit otherwise protected communications could it be said that the three orders, or other such orders, could amount to an impermissible infringement of the protection afforded to '*persons having business before either House or its committees*'. There is nothing to suggest that these orders purport to do so, nor is there any evidence that a court has ever made such an order.

6.21 It does not appear therefore that there has been any injunction or order made in civil proceedings between private parties relating to private or confidential information where a party has been specifically enjoined from communicating with an MP contrary to the protection described in Erskine May.

6.22 It should be apparent however, as noted in paragraph 6.8 above, that just as with super-injunctions, no so-called hyper-injunction could restrict, or prohibit, Parliamentary debate or proceedings.

### **(3) Press Reporting of Parliamentary Proceedings and Contempt of Court**

6.23 The second question raises the issue whether a media organisation would be in contempt of court if, having had notice of a super-injunction or any other form of injunction, it published matters subject to that order by means of a report of Parliamentary proceedings.

6.24 Since the 19<sup>th</sup> century, there has been a clear right to publish parliamentary papers. That right was established by the Parliamentary Papers Act 1840 (the 1840 Act) in order to reverse the effect of *Stockdale v Hansard* (1839) 112 E.R. 1160 and the *Sheriff of Middlesex's Case* (1840) 11 Ad & E 273. The Act grants absolute privilege in respect of any civil or criminal proceedings for i) any individual who publishes parliamentary papers, reports, votes or proceedings by order of Parliament<sup>204</sup>; and ii) any individual who publishes any copy of matters referred to in section 1<sup>205</sup>. Parliament has only extended the absolute privilege to Hansard (under section 1) and any individual who publishes a copy of Hansard (under section 2).

6.25 The 1840 Act also grants qualified privilege or immunity to individuals in civil or criminal proceedings who publish ‘any extract from or abstract of’<sup>206</sup> such matters referred to in section 1, namely of material published in Hansard. In order to obtain the benefit of the immunity from civil or criminal proceedings under section 3, the individual must prove, before a jury, that the relevant material was published in good faith and without malice. It is an open question whether publication of any extract from or abstract of Hansard which had the effect of frustrating a court order and was deliberately intended to do so would be held to be in good faith and without malice<sup>207</sup>.

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<sup>204</sup> 1840 Act s1.

<sup>205</sup> 1840 Act s2.

<sup>206</sup> For comment see: the 1999 Joint Committee report at [342].

<sup>207</sup> H. K. Woolf, Advice, Re: Colonel B – Contempt of Court (26 May 1978), Second Report from the Committee of Privileges 1978 (HC 222) (1978 – 1979), Annex, at xi at (3) (Woolf (1978)).

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- 6.26 In general, media reporting of the proceedings of Parliament would not appear to fall under the protection of the 1840 Act. It will not because such media publications (as Mr Woolf, as he then was, recognised in advice given to the Committee of Privileges in 1978), ‘*will not be printed by order of Parliament, nor would [they be] a copy or extract of such a publication.*’<sup>208</sup>
- 6.27 The majority of media reporting thus seems unlikely to come within the ambit of the 1840 Act’s protection. Where it is not protected, the question is whether and to what extent it is protected from proceedings for contempt of court if such a publication was in breach of reporting restrictions contained in a court order. In his advice to the Committee of Privileges in 1978, Mr Woolf examined this issue. His conclusions are instructive, as is the view expressed by the 1999 Joint Committee<sup>209</sup>.
- 6.28 Where media reports go beyond, or fall outside, the ambit of protection provided by the 1840 Act, it is the common law which determines whether there is any protection from contempt proceedings for breach of court orders. Mr Woolf noted that while *Wason v Walter* (1868) 4 QB 73 established a limited common law protection in defamation proceedings for honest, fair and accurate reporting of Parliamentary proceedings, there was ‘*no reported case which authoritatively decides the extent of protection against proceedings for contempt available in respect of fair and accurate reports of proceedings of Parliament.*’<sup>210</sup> That remains the case today.
- 6.29 Mr Woolf went on to examine how the common law might approach the question of protection against proceedings for contempt. In his opinion, the court’s likely approach was suggested in *Wason v Walter* (1868) 4 QB 73, by Cockburn CJ, who said that, given the ‘*paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public, . . . to us it seems clear that the principles on which the publication of reports of proceedings of Courts of Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in every respect complete.*’<sup>211</sup> In light of this, and the existence of the same public interest in providing protection from defamation

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<sup>208</sup> Woolf (1978) at ix.

<sup>209</sup> 1999 Joint Committee report.

<sup>210</sup> Woolf (1978) at [3].

<sup>211</sup> (1868) 4 QB 73 at 89, cited in Woolf *ibid.*

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proceedings, Mr Woolf concluded that ‘*there was no reason for distinguishing reports of proceedings in Parliament*<sup>212</sup>, from reports of court proceedings.

6.30 If, as Mr Woolf suggested, the common law does adopt this position, it would follow that in some circumstances media reports of parliamentary proceedings in breach of a court order will amount to a contempt of court, in others they will not. In assessing whether a contempt had been committed the court would ‘*weigh up the respective public interests as was advocated by the House of Lords in the Attorney General v Times Newspapers [1974] AC 273 and decide on the facts of the particular case before the Court whether or not it amounted to contempt. This has the advantage that the right balance should be struck in each individual case.*<sup>213</sup>’ As he went on to note however, ‘*The disadvantage is that it is impossible to know in advance with certainty until there has been an exact precedent whether or not a particular publication will amount to contempt or not. There will of course be the safeguard that the Attorney General will not himself bring proceedings or allege contempt unless he is satisfied that the circumstances justify it.*’

6.31 Mr Woolf’s conclusion can be contrasted with the views expressed by Lord Denning MR in *Attorney General v Times Newspapers Ltd* [1973] QB 710 and the conclusion reached by the 1999 Joint Committee. Lord Denning MR concluded, as Mr Woolf noted without reference to any authority and by way of comment, that parliamentary proceedings can be published in the media without fear of libel proceedings or contempt. For Lord Denning MR the principle established in *Wason v Walter* applied to contempt proceedings as much as it did to defamation proceedings.

6.32 The 1999 Joint Committee concluded that, ‘*in such circumstances [i.e., where an injunction barring publicity is in force] reporting a matter divulged in parliamentary proceedings is strictly a contempt of court.*<sup>214</sup>’ It went on to conclude,

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<sup>212</sup> Woolf (1978) at [3] – [4].

<sup>213</sup> Woolf (1978) at [6].

<sup>214</sup> 1999 Joint Committee report at [204]. It went on to note that in such circumstances, ‘*the courts are in practice reluctant to proceed against a report of what was said in Parliament.*’ It should be noted that the 1999 Joint Committee did not, here, consider the effect of s3 of the 1840 Act.

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*‘The common law affords protection against claims for defamation. It is doubtful whether the common law affords protection against a contempt of court claim, or against prosecution for a breach of the official secrets legislation, when a newspaper carries a report of statements made in Parliament in breach of a court ‘no-publicity’ injunction or in breach of the Official Secrets Act.*

*In practice such claims are unlikely, but if there is to be legislation the position should sensibly be clarified, in favour of the press. As the Clerks of the two Houses put it: why expose the media to criminal liability for publishing the same speech that the public can read in Hansard.’<sup>215</sup>*

6.33 It therefore appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by the 1840 Act. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.

#### **(4) Conclusion**

6.34 It is a matter of substantive policy whether Parliament wishes to clarify the law in this area, and it may well do so in the Defamation Bill, of which a draft is currently being considered by a Parliamentary Joint Committee, or in the proposed Parliamentary Privilege Draft Bill<sup>216</sup>. It may be that the law will be clarified by the courts in due course. All this Committee can do is to say that, on the first question identified in paragraph 6.1 above, the law is quite clear, and, on the second question, it is not.

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<sup>215</sup> 1999 Joint Committee report at [364] – [365]. Again, this conclusion was predicated on the assumption that s3 of the 1840 Act did not apply e.g., the publication in question was assumed to be outside the scope of the 1840 Act and therefore only protected, if at all, by the common law.

<sup>216</sup> See The Queen’s Speech, 25 May 2010 (<http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-parliamentary-privilege-draft-bill-50652>).

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## ANNEX A: Draft Practice Guidance for Interim Non-Disclosure Orders

### (1) GUIDANCE

1. This Guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order. Such applications may be founded on rights guaranteed by the European Convention on Human Rights (the Convention), or on grounds of privacy or confidentiality. They may also be made in respect of a threatened contempt of court, a threatened libel or malicious falsehood, harassment, or a Norwich Pharmacal application in support of such actions. All such orders will seek to restrict the exercise of the Article 10 Convention right of freedom of expression through prohibiting the disclosure of information.
2. It also provides guidance concerning the proper approach to the general principle of open justice in respect of such applications and explains the proper approach to the model interim non-disclosure order a copy of which is attached to this Guidance.
3. The law set out in this Guidance is correct as at [ . . . 2011].

### Statutory Provisions

4. Applications which seek to restrain publication of information engage Article 10 of the Convention and s12 of the Human Rights Act 1998 (HRA). In some, but not all, cases they will also engage Article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *Re S (a child)* [2004] UKHL 47, [2005] 1 AC 593 at [17].
5. HRA s12 applies whenever the court is considering whether to grant relief which might affect the exercise of the Article 10 Convention right. HRA s12(2) requires advance notice to be given to persons against whom the application is made, except in the exceptional circumstances set out in HRA s12(2)(a) and (b).
6. HRA s12(3) requires the applicant to satisfy the court that they are likely to establish, at trial, that publication should not be allowed. Guidance on the application of s12(3) is set out in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [22] – [23].
7. HRA s12(4) requires that court to have particular regard to the fundamental importance of the Article 10 Convention right of freedom of expression, where proceedings relate to material which a respondent claims, or which appears to the court, to be journalistic, literary or artistic material, or conduct connected with such material, the extent to which the material has or is about to become available to the public, or it is or would be in the public interest for it to be published. It also requires the court to have regard to any relevant privacy code. The code of the Press Complaints Commission is one such code.

### Civil Procedure Rules

8. CPR 25.3 and CPR PD25A (1) – (5) apply to all interim injunction applications, including those for interim non-disclosure orders.

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### Open Justice

9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders, are public: see Article 6(1) of the Convention, CPR 39.2 and *Scott v Scott* [1913] AC 417. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (17056/06) [2009] ECHR 1571 at [75]ff; *Ntuli v Donald* [2010] EWCA Civ 1276 (*Ntuli*) at [50].
10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] Q.B. 227 at 235; *Nutuli* at [52] – [53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *AMM v HXW* [2010] EWHC 2457 (QB) at [34].
12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EWCA Civ 409 at [50] – [54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417 at 438 – 439, 463 and 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103 at [2] – [3]; *Secretary of State for Home Department v AP (No2)* [2010] 1 WLR 1652 at [7]; *Gray v UVW* [2010] EWHC 2367 at [6] – [8]; and *JIH v News Group Newspapers* [2011] EWCA Civ 42 (*JIH*) at [21].
14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled. The proper approach is set out in *JIH*.
15. It will only be in the rarest cases that an interim non-disclosure order containing a prohibition on reporting the fact of proceedings (a super-injunction) will be justified on grounds of strict necessity, i.e., anti-tipping-off situations, where short-term secrecy is required to ensure the applicant can notify the respondent that the order is made: *DFT v TFD* [2010] EWHC 2335 (*DFT*). It is then only in truly exceptional circumstances that such an order should be granted for a longer period: *Terry v Persons Unknown* [2010] 1 FCR 659 (*Terry*) at [141].

### Consent Orders

16. Interim non-disclosure orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public. The court's approach is set out in *JIH* at [21].

### Application

17. The applicant should prepare (a) the application/claim form; (b) a witness statement or statements justifying the need for an order; (c) legal submissions; (d) a draft order; and (e) an Explanatory Note (see paragraph 33 below). In the rare or urgent case where it is not possible to prepare such documentation prior to the hearing, the applicant should file a statement at the earliest practicable opportunity, setting out the information placed orally before the court.

### Notice of Application

18. Applicants must comply with the requirements set out in HRA s12(2), CPR 25.3(2) and (3), and CPR PD 25A 4.3(3).
19. HRA s12(2) applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction (*X & Y v Persons Unknown* [2007] EMLR 290 at [10] – [12]). Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a copy of the Application Notice and any supporting documentation before that hearing.
20. Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of HRA s12(2) are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties.
21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (*RST v UVW* [2009] EWHC 24 at [7] and [13]), for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant (*ASG v GSA* [2009] EWCA Civ 1574 at [3]; *DFT* at [7]).
22. Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat the purpose of an interim non-disclosure order. Different considerations may however arise where a respondent or non-party is an internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail.



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23. Where notice of the application is to be given to a media organisation it should be effected on the organisation's legal adviser, where it has one. The court will bear in mind that such legal advisers are: (i) used to participating in hearings at short notice where necessary; and ii) able to differentiate between information provided for legal purposes and information for editorial use.

### **Notice and Undertakings to the Court – Non-Parties**

24. In order to provide effective protection of private and/or confidential information and information contained in private and/or confidential documents provided by applicants to non-parties:

- (i) where an applicant is to provide advance notice of an application to a non-party;  
or
- (ii) where an applicant notifies a non-party of an order,

material supplied to the non-party by the applicant shall be supplied upon the applicant receiving an irrevocable written undertaking to the court that the material and the information contained within it, or derived from such material or information, will only be used for the purpose of the proceedings. A standard form of wording for the undertaking is set out in the notes to clause 13 of the Model Order, contained in the Model Order guidelines.

25. Where an applicant is to provide advance notice of an application to a non-party they should first provide the non-party with a copy of the Explanatory Note, which may where strictly necessary refer to the applicant and/or respondent by three anonymised initials. If, the non-party is willing to provide the irrevocable written undertaking, the applicant should then supply the materials, including the applicant's and respondent's names, to the non-party upon receipt of the undertaking. Where the non-party is unwilling to provide the undertaking, no further information need be supplied by the applicant. (Information concerning when and where the application is to be heard should be set out in the Explanatory Note.)
26. Where an applicant notifies a non-party of an order, which should contain the provision set out in clause 13 of the Model Order, provision of material to a non-party shall be effected promptly by the applicant upon request, and upon receipt of the irrevocable written undertaking. Prior to notifying the non-party of the order and where urgency does not preclude it, the applicant should ascertain whether the non-party will require a copy of any materials referred to in clause 13 of the Model Order. Where the non-party indicates it will do so, it should at that stage provide the applicant with the written irrevocable undertaking. The applicant will then be in a position to, and should, serve a copy of the order and the relevant materials together. Where the non-party is unwilling to give the undertaking in advance of service of the order, the applicant will not be required to supply any relevant materials to the non-party until such time as the undertaking is given or further order of the court.
27. The undertaking should be provided on behalf of the non-party by its legal adviser where it has one. It should be provided by the non-party itself where it has no legal adviser. Breach of the undertaking may be held to be a contempt of court, which would render the non-party liable to imprisonment, a fine or having their assets seized.

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28. For the purpose of paragraph 24, material includes: the application and any supporting documentation; and a copy of any materials specified under CPR PD 25A 9.

### **Hearing – Scrutiny of Application**

29. The onus is on the applicant to satisfy the court that an interim non-disclosure order is justified. Where the applicant seeks derogations from open justice reference should be made to paragraphs 8 – 13 of this Guidance.
30. Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without-notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order.
31. Applications, especially those which seek derogations from open justice, must be supported with clear and cogent evidence which demonstrates that without the specific exception, justice could not be done.
32. Each application shall be subject to intense scrutiny. The need for intense scrutiny is particularly acute on without-notice applications, or where non-parties are or have been served with orders containing restrictions on access to documents, because, for instance, the order contains derogations from CPR PD 25A 9.

### **Explanatory Notes**

33. It is helpful if applications and orders are accompanied by an Explanatory Note, from which persons served can (a) readily understand the nature of the case, (b) ascertain whether they wish to attend the application hearing, and/or be legally represented at it, or, (c) where the application was heard without-notice, whether they wish to challenge the order.
34. Where an interim non-disclosure order contains restrictions on access to documents it must be accompanied by an Explanatory Note when served on any non-party who was not present at the hearing of the application.
35. An example of an Explanatory Note is attached to this Guidance.

### **Applicant's Continuing Duty**

36. Where an interim non-disclosure order is granted applicants are required to keep any respondent or non-party subject to the order, informed of any developments in the progress of proceedings which affect the status of the order. They are required to do so in order to satisfy the court that there has been compliance with the obligation imposed by CPR 1.3 and any requirements specified in any order or directions given by the court. Applicants are particularly required to inform any non-parties whom they have served with the order when it ceases to have effect.

### Active Case Management

37. Interim non-disclosure orders, as they restrict the exercise of the Article 10 Convention right and, whether or not they contain any derogation from the principle of open justice, require the court to take particular care to provide active case management.
38. Active case management requires the court to ensure that a return date is specified in such orders and that, as a general rule, the return date is kept. The applicant is required to inform the court at the return date which, if any, non-parties have been served with any interim non-disclosure order granted at an earlier, without-notice, hearing.
39. It will not always be necessary for any parties to attend court on the return date: the hearing could be dealt with by the court on the papers, provided that sufficient material is before the court to enable scrutiny and effective case management to take place: see *BCD v Goldsmith* [2011] EWHC 674 (QB) at [60] – [62]. Any order should however be given in public and be publicly available.
40. A return date is particularly important where an order contains derogations from the principle of open justice. It is the means by which the court ensures that those derogations are in place for no longer than strictly necessary. It is also the means by which the court ensures that the interim non-disclosure order does not become a substitute for a full and fair adjudication (*X & Y v Persons Unknown* [2007] EMLR 290 at [78]).
41. Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (*XJA v News Group Newspapers* [2010] EWHC 3174 (QB) at [13]; *Gray v UVW* [2010] EWHC 2367 (QB) at [37]; *Terry* at [134] – [136]).

### Hearing Notes and Judgments

42. The court's approach to judgments and hearing notes is set out in: *Terry* at [4]; *JIH* at [21(9)] & [35].
43. It is of particular importance that a full and accurate note of the hearing is taken of a without-notice hearing: *G & G v Wikimedia* [2010] EMLR 14 at [28] – [32]. It is the duty of counsel and solicitors to ensure that such a note is taken during the hearing, or, if that is not possible, to prepare such a note after the hearing is over. The note should be drafted so that anyone supplied with a copy of it is properly informed of: what documents were put before the court at the hearing; which legal authorities were relied on by the applicant; and what the court was told in the course of the hearing.
44. Where, and to the extent strictly necessary hearing notes may be redacted, if they are to be supplied under CPR PD 25A 9.2, to a non-party who is served with an order but who is unwilling or unable to provide a written irrevocable undertaking.
45. The court should wherever possible give a reasoned, necessarily redacted, judgment. Where a judgment of the type given in *Terry* or *JIH* would be disproportionate in terms of

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time or cost a short note or judgment should be given setting out any points of general interest, the reason why those points were raised and brief reasons for the decision: see *POI v The Person known as 'Lina'* [2011] EWHC 25 (QB).

### **Appeals**

46. Any appeal from an interim non-disclosure order may be expedited: *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243 at 246 - 247. It will depend on the circumstances of each case whether, and to what extent, expedition is necessary.

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## (2) MODEL ORDER – GUIDELINES

The following guidelines should be read in conjunction with the model interim non-disclosure order.

### **Penal Notice**

The penal notice should make clear that where the intended defendant or respondent is an individual they may be imprisoned as well as being liable to a fine or asset seizure. Where the intended defendant or respondent is a corporate defendant or respondent it should make clear that they can be fined or have their assets seized.

The penal notice should also make clear the effect it may have on non-parties who know of the order under the *Spycatcher* principle. The order will only bind non-parties who are notified of it while it is in force: *Jockey Club v Buffham* [2003] QB 462.

### **Clause 2(b)**

Reference should be made to paragraphs 18 – 28 of the Practice Guidance.

### **Clause 3 (Anonymity)**

This clause is **optional**. Reference should be made to paragraphs 9 – 14 of the Practice Guidance. Anonymity is an exception to the principle of open justice. It can only be ordered where it is strictly necessary. Guidance is set out in *JIH* at [21].

### **Clause 4(a)(ii) (Access to documents)**

The court may need to decide which documents, e.g., statements of case, should not be available for public inspection. This decision may be prospective since there may be little if any opportunity to apply to court before some documents are served. While it may be the case that the claim form could be made anodyne by reference to a confidential schedule (subject to anonymity), subsequent statements of case or other documents in a case are unlikely to be dealt with so easily given that the purpose of the action, amongst other things, will be to seek a permanent injunction relating to the material protected on an interim basis under the order, and will involve a specific explanation of the material, how it is said to engage the applicant's Article 8 Convention rights and the effect such threatened disclosure would have if it is not so restrained (*Terry* at [23]; *G & G v Wikimedia* [2010] EMLR 14 at [14], [17] and [20]; *ABC Ltd v Y* [2010] EWHC 3176 (Ch) at [8] – [10].

*(In respect of any non-party notified or served with the order CPR PD 25A 9.2 applies: see clause 13 of the Model Order.)*

### **Clause 5(a) (Service of the claim form where defendant is not known or whereabouts unknown)**

Where the respondent or defendant's identity is not known, or their whereabouts are unknown, there may be considerable problems in locating them in order to serve the claim form. This may necessitate an extension of time for service beyond the four month period. The court, by way of active case management, is required to ensure that the action is pursued with expedition. Indefinite extensions of time for service cannot be granted: *Terry* at [143]. A long-stop date may be inserted instead.

### **Clause 6 (Injunction)**

CPR PD 25A 5 states that unless the court orders otherwise, the order must provide for a *return date* if the application was made without-notice. The need for, and importance of, a

return date as a means to ensure the court can monitor the claim's progress and ensure it progresses properly was considered *G & G v Wikimedia* [2010] EMLR 14 at [21] – [27]; and in *Terry* at [134] – [136]. Reference should be made to paragraphs 37 – 41 of the Practice Guidance.

While there may be considerable practical and costs reasons which might render a return date in a claim against persons unknown unnecessary, especially given the safeguard of the liberty to vary or discharge provisions (*X & Y v Persons Unknown* [2007] EMLR 290 at [73]), the court should ensure that the order contains provision for periodical review by the court to ensure that the claim progresses, for instance, to default judgment, summary judgment, or to a trial in the absence of the persons unknown.

### **Clause 6(b)**

This clause is **optional**. See clause 3 above. This provides a possible solution to the problem which arises from a jigsaw identification of the Claimant if the fact of the injunction is not prevented from being published: *DFT* at [36] – [39]. There should be a clear delineation in the order of what information can be released as to the fact of an order having been made.

### **Clause 7 (Reporting Restriction)**

This is the super-injunction element. It is an **optional** clause. It is only likely to be necessary for example to prevent the respondent or a third party being tipped-off before the order is served, possibly precipitating disclosure of the information or destruction of evidence: see *Terry* at [138]; *G & G v Wikimedia* [2010] EMLR 14 at [41].

If the proceedings are anonymised, and an injunction is granted restraining disclosure or publication of the private information, there is generally no reason in principle to prohibit in addition any report of the fact that an order has been made: *Ntuli*. Consideration should be given to the risk of jigsaw identification if no reporting restriction is imposed: *DFT*.

### **Clause 13 (Provision of documents and information to third parties)**

CPR PD 25A 9 requires any person served with the order not present at the application hearing to be provided with the order and supporting material read by the judge, and a note of the hearing.

This is the norm. Such notice is an elementary principle of natural justice:

*Kelly v BBC* [2001] Fam. 59 at 94 – 95, ‘. . . if one party wishes to place evidence or other persuasive material before the court the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an *ex parte*, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application.’;

*G & G v Wikimedia* [2009] EWHC 3148 (QB) at [30], ‘. . . where an order relates to freedom of expression, or may have the effect of interfering with freedom of expression, those applying for interim relief at a hearing at which the respondent or defendant is not present should generally provide the respondent with a full note, whether or not the respondent asks for it.’

Exceptions to the norm are exceptions to the principle of open justice, and natural justice, and are therefore only permissible where strictly necessary. If there is concern that information is

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particularly sensitive or confidential, it can be included in a separate witness statement which the court may agree should be specifically exempted from having to be provided under the CPR 25A PD 9, thus enabling as much information as possible to be provided to those, such as non-parties who request a hearing note under PD 9.2(2), not present at the application hearing.

### **Clause 13 Irrevocable written undertaking**

The following standard wording should be used by third parties in respect of the irrevocable undertaking to be given to the Court under paragraph 24 of the Practice Guidance and in respect of clause 13 of the Model Order. Breach of the undertaking may amount to contempt of court. The wording provides for a Claimant to agree to information and material subject to the undertaking provided by the third party to be supplied, by the third party, to other parties in order, for instance, to ensure that the prohibition on disclosure is not inadvertently breached by that other party.

### **Undertaking to the Claimant and to the Court**

**The title of action or intended action is .....**

*1. I, [insert name, occupation] [for and on behalf of ..... ] (hereinafter “the receiver”) promise that in consideration of the Claimant disclosing the material to the receiver, the receiver: will preserve the material in a secure place; use any material or information contained therein, or derived from such material or information, only for the purposes of the Proceedings except where:*

*(a) the information has been read to or by the court, or referred to, at a hearing which has been held in public;*

*(b) the court gives permission; or*

*(c) there is agreement in writing by the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded;*

*and will only copy, disclose or deliver the material, or information contained therein or derived from such material or information, to the receiver’s legal advisers, or as required by law, by order of the court or by agreement of the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded.*

*2. Save as provided in para 1, this undertaking is irrevocable, and shall continue in force both before and after the conclusion of the Proceedings.*

*3. The receiver will give to the court an undertaking in writing in the same terms as herein, as soon as a judge is available to receive that undertaking.*

*4. For the purpose of this undertaking,*

*“Material” refers to: i) any claim form or application notice or statement of case (whether in draft or final form); ii) any evidence, whether in the form of witness statements or otherwise, in support of the proceedings, and any exhibits thereto; iii) and the material specified in CPR PD 25A para 9.2;*

*“Claimant” includes an intended claimant;*

*“Proceedings” means the proceedings identified above.*

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5. For the avoidance of doubt this promise only applies to those parts of the Material which contain the information alleged by the Claimant to be private and does not preclude the receiver (or anyone else) from making lawful use of any information that was already known to them prior to it being disclosed to the receiver pursuant to this undertaking, or of any information which is, or shall have come into, the public domain.

### **Clause 14 (Hearing in private)**

This clause is **optional**. Reference should be made to paragraphs 9 - 14 of the Practice Guidance.

Private hearings can be reported without fear of contempt unless the material comes within the protection of the Administration of Justice Act 1960 s12. A specific order is required to prevent reporting under the Contempt of Court Act 1981 s11: *Clibbery v Allan* [2002] 2 WLR 151; *McKennitt v Ash* [2008] QB 73. Section 11 orders should only be made when strictly necessary.

This also incorporates the proviso, referred to in *JIH* at [42], regarding disclosure of material etc referred to in open court or in open judgments.

### **Clause 15 (Public Domain)**

Orders will not usually, but may sometimes in cases of private information, prohibit publication of material which is already in the public domain. See *Terry* at [50].

### **Confidential schedule 2, paragraph 2**

See the notes to **Clause 13 (Provision of documents and information to third parties)**.



## (3) MODEL EXPLANATORY NOTE

**Smith v Jones**

*or*

**AAA v BBB**<sup>217</sup>

### **Application for an Interim Non-Disclosure Order**

#### **EXPLANATORY NOTE**

1. The applicant is a well known professional sportsperson who has been in a long-term relationship with another person [XX]. A person [BBB/YY as appropriate] [or persons unknown] have threatened to take a story to the media about a relationship the applicant is alleged to have had with another person [YY], since the relationship with XX commenced.
2. An Interim Non-Disclosure Order has been [applied for/made] to protect the applicant's [right to privacy and/confidentiality] in respect of the information referred to in paragraph 1. This does not [will not] restrict publication of information which was in the public domain in England and Wales prior to this application being made or which is permitted by any order of the court to the extent permitted by the court
3. The [applicant applies for the application to be heard/the application was heard] in private. Judgment [will be/was] given in [public/private]. [The proceedings were anonymised.] [A private hearing/anonymity was applied for/granted on the grounds of strict necessity because . . .].
4. On [insert date] the application [will be heard by/was heard by] [Mr/Mrs Justice] in the High Court of Justice, [Queen's Bench Division/Chancery Division].

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<sup>217</sup> Where the application is made or is intended to be made in anonymised form, three initials should be used.

# Report of the Committee on Super-Injunctions

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## ANNEX B: Model Order

IN THE HIGH COURT OF JUSTICE  
[QUEEN'S BENCH/CHANCERY] DIVISION

Claim No: [            ]

BEFORE THE HONOURABLE [MR][MRS] JUSTICE [            ]  
Dated: [            ]

[ (IN PRIVATE) ]

**B E T W E E N :**

“AAA”

**Intended Claimant/Applicant**

- and -

(1) “BBB”

(2) [            ] NEWSPAPERS LIMITED

(3) THE PERSON OR PERSONS UNKNOWN

who has or have appropriated, obtained and/or offered or  
intend to offer for sale and/or publication the material  
referred to in Confidential Schedule 2 to this Order

**Intended Defendant(s)/Respondent(s)**

### PENAL NOTICE

**IF YOU THE RESPONDENT DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED (IN THE CASE OF THE FIRST AND THIRD DEFENDANTS) OR FINED OR HAVE YOUR ASSETS SEIZED.**

**ANY PERSON WHO KNOWS OF THIS ORDER AND DISOBEYS THIS ORDER OR DOES ANYTHING WHICH HELPS OR PERMITS ANY PERSON TO WHOM THIS ORDER APPLIES TO BREACH THE TERMS OF THIS ORDER MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

### NOTICE TO ANYONE WHO KNOWS OF THIS ORDER

**You should read the terms of the Order and the Practice Guidance on Interim Non-Disclosure Orders very carefully. You are advised to consult a solicitor as soon as possible. This Order prohibits you from doing the acts set out in Paragraphs 6 [ 7 ] and 10 of the Order and obliges you to do the acts set out in Paragraphs 8, 9, and 11 of the Order. You have the right to ask the Court to vary or discharge the Order. If you disobey this Order you may be found guilty of contempt of court and you may be sent to prison or fined or your assets may be seized.**

# Report of the Committee on Super-Injunctions

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## **THIS ORDER**

1. This is an Injunction, with other orders as set out below, made against the Defendants on [insert date] by the Judge identified above (the **Judge**) on the application (the **Application**) of the Claimant. The Judge:
  - (a) read the witness statements referred to in Schedule A at the end of this Order, as well as the witness statements referred to in Confidential Schedule 1 [or “was given information orally by Counsel on behalf of the Claimant”];
  - (b) accepted the undertakings set out in Schedule B at the end of this Order; and
  - (c) considered the provisions of the Human Rights Act 1998 (**HRA**), section 12.
2. *[This Order was made at a hearing without-notice to those affected by it, the Court having considered section 12(2) HRA and being satisfied:*
  - (a) *that the Claimant has taken all practicable steps to notify persons affected; and/or*
  - (b) *that there are compelling reasons for notice not being given, namely: [set out in full the Court’s reasons for making the order without-notice]. The Defendants (and anyone served with or notified of this Order) have a right to apply to the Court to vary or discharge the Order (or so much of it as affects them): see clause 17 below.]*

## **[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE ANONYMITY IS STRICTLY NECESSARY]**

### **ANONYMITY**

3. Pursuant to section 6 HRA, and/or CPR 39.2 the Judge, being satisfied that it is strictly necessary, ordered that:
  - (a) the Claimant be permitted to issue these proceedings naming the Claimant as “AAA” and giving an address c/o the Claimant’s solicitors;
  - (b) the Claimant be permitted to issue these proceedings naming the [First] Defendant as “BBB” [and the Third Defendant as “Person or Persons Unknown” and, once it is known to the Claimant, notifying the Defendant’s home address by filing the same in a sealed letter which must remain sealed and held with the Court office subject only to the further order of a Judge or the Senior Master of the Queen’s Bench Division/Chief Chancery Master];
  - (c) there be substituted for all purposes in these proceedings in place of references to the Claimant by name, and whether orally or in writing, references to the letters “AAA”; and
  - (d) if necessary, there be substituted for all purposes in these proceedings in place of references to the Defendant[s] by name once identified and whether orally or in writing, references to the letters “BBB” [and any subsequent letters of the alphabet].

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### **[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A RESTRICTION ON ACCESS TO DOCUMENTS IS STRICTLY NECESSARY]**

#### **ACCESS TO DOCUMENTS**

4. Upon the Judge being satisfied that it is strictly necessary:

- (a) (i) no copies of the statements of case; and
- (ii) no copies of the witness statements and the applications,  
*will be provided to a non-party without further order of the Court.*
- (b) Any non-party other than a person notified or served with this Order seeking access to, or copies of the abovementioned documents, must make an application to the Court, proper notice of which must be given to the other parties.

### **SERVICE OF CLAIM FORM WHERE DEFENDANT NOT KNOWN OR WHEREABOUTS NOT KNOWN**

5.

- (a) The Claim Form should be served as soon as reasonably practicable and in any event by [ ] at the latest, save that there shall be liberty for the Claimant to apply to the Court in the event that an extension is necessary; and
- (b) Any such application referred to in 5(a) must be supported by a witness statement. Such application may be made by letter, the Court having dispensed with the need for an application notice.

### **INJUNCTION**

6. Until [ ] (the return date) / the trial of this claim or further Order of the Court, the Defendants must not:

- (a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the **Defendants' legal advisers**) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the the information referred to in Confidential Schedule 2 to this Order (the **Information**);
- (b) publish any information which is liable to or might identify the Claimant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material (including but not limited to the profession [or age or nationality of the Claimant]) which is liable to, or might lead to, the Claimant's identification in any such respect.

### **[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A REPORTING RESTRICTION IS STRICTLY NECESSARY]**

#### **REPORTING RESTRICTION/SUPER-INJUNCTION**

7. Until service of the Order/ the return date/ [ ] the Defendants must not use, publish or communicate or disclose to any other person the fact or existence of this Order or these proceedings and the Claimant's interest in them, other than:

- (a) by way of disclosure to the Defendants' legal advisers for the purpose of obtaining legal advice in relation to these proceedings; or
- (b) for the purpose of carrying this Order into effect.

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## INFORMATION TO BE DISCLOSED

8. The Defendants shall within [24] hours of service of this Order disclose to the Claimant's solicitors the following:
  - (a) the identity of each and every journalist, press or media organisation, press agent or publicist or any other third party with a view to publication in the press or media, to whom the Defendants have disclosed all or any part of the Information [since [insert date]]; and
  - (b) the date upon which such disclosure took place and the nature of the information disclosed.
9. The Defendants shall confirm the information supplied in paragraph 8 above in a witness statement containing a statement of truth within 7 days of complying with paragraph 8 and serve the same on the Claimant's solicitors and the other parties.

## PROTECTION OF HEARING PAPERS

10. The Defendants [, and any third party given advance notice of the Application,] must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied any witness statements and any exhibits thereto and information contained therein that are made, or may subsequently be made, in support of the Application or the Claimant's solicitors' notes of the hearing of the Application (the **Hearing Papers**), provided that the Defendants[, and any third party,] shall be permitted to copy, disclose and deliver the Hearing Papers to the Defendants' [and third party's/parties'] legal advisers for the purpose of these proceedings .
11. The Hearing Papers must be preserved in a secure place by the Defendants' [and third party's/parties'] legal advisers on the Defendants' [and third party's/parties'] behalf.
12. The Defendants [, and any third party given advance notice of the Application,] shall be permitted to use the Hearing Papers for the purpose of these proceedings provided that the Defendants' [third party's/parties'] legal advisers shall first inform anyone, to whom the said documents are disclosed, of the terms of this Order and, so far as is practicable, obtain their written confirmation that they understand and accept that they are bound by the same.

## PROVISION OF DOCUMENTS AND INFORMATION TO THIRD PARTIES

13. The Claimant shall be required to provide the legal advisers of any third party [where unrepresented, the third party] served with advance notice of the application, or a copy of this Order promptly upon request, and receipt of their written irrevocable undertaking to the Court to use those documents and the information contained in those documents only for the purpose of these proceedings:
  - (a) a copy of any material read by the Judge, including material read after the hearing at the direction of the Judge or in compliance with this Order [save for the witness statements referred to in Confidential Schedule 1 at the end of this Order] [the witness statements]; and/or
  - (b) a copy of the Hearing Papers.

## [ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE HEARING THE APPLICATION IN PRIVATE IS STRICTLY NECESSARY] HEARING IN PRIVATE

14. *The Judge considered that it was strictly necessary, pursuant to CPR 39.2(3)(a),(c) and (g), to order that the hearing of the Application be in private and there shall be no reporting of the same, provided that nothing in this Order shall prevent the publication, disclosure or*

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*communication of any information which is contained in [this Order other than in the Confidential Schedules] or in the public judgments of the Court in this action given on [insert date].*

### **PUBLIC DOMAIN**

15. For the avoidance of doubt, nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or any part thereof, as was already in, or that thereafter comes into, the public domain in England and Wales [as a result of publication in the national media] (other than as a result of breach of this Order [or a breach of confidence or privacy]).

### **COSTS**

16. The costs of and occasioned by the Application are reserved.

### **VARIATION OR DISCHARGE OF THIS ORDER**

17. The parties or anyone affected by any of the restrictions in this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first give written notice to the Claimant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Claimant's solicitors in advance. The Defendants may agree with the Claimant's solicitors and any other person who is, or may be bound by this Order, that this Order should be varied or discharged, but any agreement must be in writing.

### **INTERPRETATION OF THIS ORDER**

18. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
19. A Defendant which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

### ***[In the case of an Order the effect of which may extend outside the jurisdiction]***

#### **PERSONS OUTSIDE ENGLAND AND WALES**

20. (1) *Except as provided in paragraph (2) below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.*
- (2) *The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court –*
- (a) the Defendant or his officer or agent appointed by power of attorney;*
  - (b) any person who –*
    - (i) is subject to the jurisdiction of this Court;*
    - (ii) has been given written notice of this Order at his residence or place of business within the jurisdiction of this Court; and*
    - (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order; and*
  - (c) any other person, only to the extent that this Order is declared enforceable by or is enforced by a court in that country or state.*

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### **PARTIES OTHER THAN THE CLAIMANT AND THE DEFENDANT**

#### **21. Effect of this Order**

It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.

### **NAME AND ADDRESS OF THE CLAIMANT'S LEGAL REPRESENTATIVES**

#### **22. The Claimant's solicitors are -**

*[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail]*

### **COMMUNICATIONS WITH THE COURT**

#### **23. All communications to the Court about this Order should be sent to:**

Room WG08, Royal Courts of Justice, Strand, London, WC2A 2LL, quoting the case number. The telephone number is 020 7947 6010.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

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## **SCHEDULE A**

The Claimant relied on the following witness statements:

1. ....
2. ....

## **SCHEDULE B**

### **UNDERTAKINGS GIVEN TO THE COURT BY THE CLAIMANT**

(1) If the Court later finds that this Order has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Claimant will comply with any order the Court may make.

(2) If the Court later finds that this Order has caused loss to any person or company (other than the Defendants) to whom the Claimant has given notice of this Order, and decides that such person should be compensated for that loss, the Claimant will comply with any Order the Court may make.

[(3) By 4.30pm on [ ] the Claimant will (a) issue a Claim Form and an Application Notice claiming the appropriate relief [and (b) cause a witness statement or witness statements to be made and filed confirming the substance of what was said to the Court by the Claimant's Counsel and exhibiting a copy of the Hearing Papers].

[(4) The Claimant will use all reasonable endeavours to identify and serve the Defendants within four months of the date of this Order and in any event will do so by [ ] at the latest. Once identified the Claimant will serve upon the Defendant together with this Order copies of the documents provided to the Court on the making of the Application and as soon as practicable the documents referred to in (3) above.]

(5) On the return date the Claimant will inform the Court of the identity of all third parties that have been notified of this Order. The Claimant will use all reasonable endeavours to keep such third parties informed of the progress of the action [insofar as it may affect them], including, but not limited to, advance notice of any applications, the outcome of which may affect the status of the Order.

(6) If this Order ceases to have effect or is varied, the Claimant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this Order, or whom he has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect in this form.

## **SCHEDULE C**

This should contain details of who the Claimant has given advance notice of the application to, including how and when and by what means this was done.

## **SCHEDULE D**

The detail required by paragraph 20 of the Guidance Note should go in here.

## **SCHEDULE E**

The detail required by paragraph 38 of the Guidance Note should go in here.



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## **CONFIDENTIAL SCHEDULE 1**

The Claimant also relied on the following confidential witness statements:

1. ....
2. ....

## **CONFIDENTIAL SCHEDULE 2**

### **Information referred to in the Order**

Any information or purported information concerning:

- (1) [Set out the material sought to be protected]
- (2) [Any information liable to or which might lead to the identification of the Claimant (whether directly or indirectly) as the subject of the proceedings or the material referred to above, [the fact that he has commenced these proceedings or made the application herein].]

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## ANNEX C: Draft Standard Associate's In-Court Form

The minute sheet should be completed after each Court sitting-including pt-hd, CAV, ADJ etc. Where Section B is completed by the Judge or by the Associate on the Judge's instructions, it should be forwarded to the Ministry of Justice's Chief Statistician at: [insert address]

<b>CASE NO:</b>	<b>COURT:</b>
<b>JUDGE:</b>	<b>ASSOCIATE:</b>
<b>DATE:</b>	<b>TIME:</b>
<b>NATURE OF HEARING:</b>	

<b>CLAIMANT/APPLICANT</b>	<b>DEFENDANT/RESPONDENT</b>
<b>Ins. Sols: (Firm)</b>	<b>Ins. Sols: (Firm)</b>

### SECTION A: GENERAL - TITLE/LOG/CASE NOTE & ORDERS

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### SECTION B: DATA COLLECTION

To be completed at the hearings where an Order is sought in civil proceedings which seeks to restrain the publication of information and to which the Practice Guidance on Interim Non-Disclosure Orders applies. It should not be completed for any other proceedings i.e., family, immigration, asylum proceedings, proceedings which raise national security issues, or proceedings to which CPR 21 applies.

It should **only be completed** at hearings where HRA s12 is, or was, engaged for:

- with notice/without-notice applications for, or applications to extend or vary, interim injunctions;
- appeals from the grant of interim injunctions; or
- final judgments in proceedings in the course of which interim injunctions have been granted.

<b>The hearing was for an:</b>	interim injunction / appeal from an interim injunction / extension of an interim injunction / final injunction		
<b>In case number:</b>			
<b>Was the application/appeal:</b>	<b>Granted / Refused</b>		
<b>If the application was for an interim injunction:</b>			
(i) in respect of the defendant/respondent where they were known, was it:	On-Notice / Without-Notice		
(ii) in respect of third parties whom the applicant intended to serve with the order at the time the application was made, was it:	On-Notice / Without-Notice		
<b>Did the parties consent to the substantive Order:</b>	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
<b>Were derogations from the principle of open justice applied for:</b>	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
<b>IF YES, which derogations were applied for and which were granted:</b>	<b>APPLIED FOR</b>		<b>GRANTED</b>
(a) a private hearing	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
(b) party anonymity	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
(c) restrictions on access to documents (CPR PD 5.4(C) and the inherent jurisdiction)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
(d) restriction on provision of documents to third parties (CPR PD 25A 9.2)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
(e) a prohibition on disclosing the fact of proceedings or the order (a super-injunction clause)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
(f) other (please specify) .....	YES <input type="checkbox"/>	NO <input type="checkbox"/>	YES <input type="checkbox"/> NO <input type="checkbox"/>
<b>Where derogations to the principle of open justice were granted, did the parties consent to:</b>			
(a) a private hearing	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
(b) party anonymity	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
(c) restrictions on access to documents (CPR 5.4(C) and the inherent jurisdiction)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
(d) restriction on provision of documents to third parties (CPR PD 25A 9.2)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
(e) a prohibition on disclosing the fact of proceedings or the order (a super-injunction clause)	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
(f) other (please specify) .....	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
<b>If derogations were granted, renewed or varied, why were they granted, renewed or varied:</b>			

# Report of the Committee on Super-Injunctions

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## ANNEX D: Section 12 of the Human Rights Act 1998

### 12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) 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.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).

Reference should be made to the Parliamentary debates concerning this section in Hansard, 02 July 1998 cc 534 – 563<sup>218</sup>.

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<sup>218</sup> [http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980702/debtext/80702-09.htm#80702-09\\_head1](http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980702/debtext/80702-09.htm#80702-09_head1).

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