Title:	Impact Assessment (IA)
Contempt by publication **IA No:** LAWCOM0024	**Date:** 17/10/2012
Lead department or agency: Law Commission	**Stage:** Consultation
Other departments or agencies: Ministry of Justice	**Source of intervention:** Domestic
	Type of measure: Primary legislation
	Contact for enquiries: Criminal law team: 020 3334 0200

Summary: Intervention and Options

RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£m	£m	£m	No	NA

What is the problem under consideration? Why is government intervention necessary?

Under the Contempt of Court Act 1981, a publication which occurs when proceedings are active which carries the substantial risk of seriously prejudicing or impeding proceedings is an offence irrespective of whether the publisher was aware of the risk. Government intervention is necessary to rectify a number of problems. It can be difficult for the media to find out when proceedings are active or when reporting restrictions are in place. There is doubt over the meaning of terms like "prejudicing or impeding". The procedure for contempt may be unfair and the range of possible sanctions is narrow. It can be unclear when the Attorney General will bring contempt proceedings.

What are the policy objectives and the intended effects?

The policy objectives are:

1. to clarify the law on contempt by publication;
2. to ensure that the law and procedures in this area are compliant with the European Convention on Human Rights (ECHR);
3. to ensure that the law in this area acts as an effective deterrent;
4. to increase public confidence in the criminal justice system.

The intended result of our reforms will be a set of laws and procedures on contempt by publication which are fair, efficient and future-proof.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0 - do nothing. In Option 1 we propose a number of separate reforms, which relate to different areas of the law or procedure and which can be implemented independently of one another. Policy 1: guidance should be issued to the police on the release of names of arrestees. Policy 2: the terms "prejudice" and "impediment" be clarified. Policy 3: the Attorney General should publish the criteria for prosecution. Policy 4: there should be an online list of cases which are subject to reporting restrictions, so that publishers can regulate their conduct. Policies 5 and 6: the possible sanctions should be widened to include community penalties and fines set as a percentage of the publisher's turnover. Policies 7A and 7B: alternative reforms to the procedure for dealing with contempt committed by publication (with no preference expressed between them). Policy 8: the Divisional Court be given the power to impose wasted costs orders. Our preferred outcome is that all policies be implemented, to ensure effective reform of law and procedure.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes/No	**< 20** Yes/No	**Small** Yes/No	**Medium** Yes/No	**Large** Yes/No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**		**Non-traded:**

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: ..... Date: .....

Summary: Analysis & Evidence

Policy Option 1

Description: Reform of the law and procedure on contempt by publication

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	**Optional**
High	Optional	Optional	**Optional**
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

No costs that can be monetised.

Other key non-monetised costs by 'main affected groups'

Training costs (Judicial College, Her Majesty's Courts & Tribunals Service (HMCTS)) – these are expected to be minimal (possible training costs for the Attorney General's office). Possible spike in appeals, with associated costs (for HMCTS, Legal Services Commission (LSC), Attorney General). Cost (to Association of Chief Police Officers (ACPO) and Attorney General) of producing and circulating guidance. Cost of setting up and running an online list of section 4(2) orders – minimal. Costs of running community penalty schemes – minimal.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	**Optional**
High	Optional	Optional	**Optional**
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

No benefits that can be monetised.

Other key non-monetised benefits by 'main affected groups'

Possible costs savings if law is clarified: less time wasted on legal argument. Possible savings if contempt is tried on indictment. Consistent protection for defendants (entitled to a fair trial under article 6 ECHR) and publishers (entitled to freedom of expression, under article 10 ECHR). Greater clarity and certainty in the law: associated reduction in the risk that individuals will be punished for breaking laws which were unclear. Greater flexibility for the courts when sentencing contemnors. Possible deterrent effect of new sanctions.

Key assumptions/sensitivities/risks **Discount rate (%)**

We have assumed that most training costs will be small or negligible. We outline in the evidence base where we have made assumptions or where there are risks in relation to specific proposals.

A summary of the potential costs and benefits of each proposal is given at page 19.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	No	NA

EVIDENCE BASE

Introduction

Background

1. This document forms part of a suite of four impact assessments relating to the Law Commission's Consultation Paper No 209, Contempt of Court. The four separate areas are as follows:

(1) contempt by publication;

(2) publication, publishers and the new media;

(3) contempt by jurors;

(4) contempt in the face of the court.

2. Although the different areas of the consultation paper (and of the impact assessments) do not all overlap, there are some common themes throughout our proposals which indicate the need for reform. First, many areas of the law or procedure on contempt are unclear and this can result in a risk of unnecessary challenges and litigation, with associated cost to the criminal justice system. In addition, there is a risk of reputational loss to the justice system, and of unfairness to publishers, jurors, defendants, court staff and others. There is an additional risk of financial wastage (for example, if the law on contempt is ineffective in preventing juries having to be discharged, there is a consequent cost of retrials). Second, reform is necessary to ensure that the laws and procedures on contempt are ECHR compliant. Reform will ensure that the rights of defendants, jurors, publishers and court staff are protected, and that the risk of appeals on human rights grounds (with the consequent costs they entail) is reduced. Finally, reform is necessary in order to ensure that the contempt laws can deal effectively with modern media and can take account of developments in technology, such as easy access to online material. In this way, our reforms will future proof the law on contempt.

3. This impact assessment considers the law on contempt by publication both under the Contempt of Court Act 1981 and at common law.

Problem under consideration

4. In brief, by statute, a publication which occurs when proceedings are "active" which carries the substantial risk of seriously prejudicing or impeding proceedings is an offence, irrespective of whether the publisher was aware of the risk. This is "strict liability contempt". At common law, it is also an offence to publish material intending to impede or prejudice proceedings even if they are not then active.

5. The rationale for an offence of contempt by publication arises from the need to protect the right to a fair trial, now enshrined in article 6 of the ECHR. On the other hand, it is also necessary to protect the right to freedom of expression, especially because reporting on matters in court serves an important public interest. Freedom of expression is protected by article 10 of the ECHR.

Table 1: Current law and the associated problems

Current law	Key features and associated problems
Strict liability contempt can only be committed when the proceedings are "active" within the meaning of Schedule 1 to the 1981 Act. In general, criminal proceedings are active from the point of arrest without a warrant, issue of a warrant for arrest or of a summons, service of an indictment, or oral charge, whichever occurs first. Proceedings remain active until sentence has been passed.	Stakeholders from the media have told us that it is often difficult for them to determine whether proceedings are active, as police forces do not adopt a consistent approach to the release of names of arrestees. It has also been questioned whether it is necessary for proceedings to remain active after the verdict has been given, until sentence has been passed.
Under section 2(2) of the 1981 Act, strict liability contempt only applies to publications which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.	Stakeholders have suggested that the meaning of "impede" and "prejudice", and the relationship between the two terms, is unclear. In *Attorney General v MGN Ltd*, the issue of whether the publications created a substantial risk of serious impediment appears to have emerged mainly at the hearing, with the respondents having previously proceeded on the basis that they were being accused of creating a substantial risk of serious prejudice. This meant it may have been harder for those media organisations to understand the case against them.
Proceedings under the strict liability rule can only be brought with the consent of the Attorney General or by the court on its own motion, although the latter is unusual. The Attorney has discretion as to whether to bring proceedings, and the refusal to do so is not judicially reviewable.	Some stakeholders have expressed concerns that the factors the Attorney General takes into account when deciding whether to bring proceedings are not transparent for the media or the wider public.
Proceedings for contempt by publication are generally brought before the Divisional Court (which is part of the High Court). This is a hybrid criminal and civil procedure. The civil rules of evidence apply (for example, evidence is served by affidavit), but the proceedings are deemed to be criminal proceedings for the purposes of article 6.	Although proceedings are deemed criminal for the purposes of article 6, the Divisional Court procedure lacks the safeguards associated with criminal investigative and trial processes (such as police powers of arrest and evidence, bail and the criminal rules of evidence).
Where it is necessary to avoid a risk of prejudice to the administration of justice in court proceedings, section 4(2) of the 1981 Act allows the court to order that reports of the proceedings be postponed. Section 11 of the	Media organisations can struggle to obtain information about whether an order is in existence, and if so, what its terms are, because there is no formal system for notifying the media of their existence. This may give rise

Act also gives judges the power to give directions prohibiting the publication of a name or other matter.	to a lack of compatibility with article 7 and article 10 of the ECHR if the media cannot comply with their legal obligations because they cannot find out what they are.
The maximum penalty for contempt (either intentional, under section 2(2), under section 4(2) or under section 11) is two years' imprisonment or an unlimited fine. A court can also order a journalist or publisher to pay the costs incurred in the prejudiced/impeded criminal proceedings (a "third party costs order").	It seems illogical that sanctions for contempt by publication are restricted to a fine or imprisonment, especially given that the latter has not been used for over 60 years. Some stakeholders said that the penalties currently available do not have a sufficient deterrent effect on publishers (although the deterrent effect of criminal offences is difficult to quantify, so this point should be treated with caution). Furthermore, the rise of citizen journalism makes it more likely that individuals, and not publishing companies, will be found in contempt – there is a concern that the courts do not have the appropriate powers to deal with all types of contemnor. Finally, third party costs orders appear never to have been made in the case of contempt by publication, perhaps because the jurisdiction to make them is limited to the magistrates' courts, Crown Court and Court of Appeal, whereas proceedings for contempt by publication are generally brought in the Divisional Court.

Rationale for intervention

6. The conventional economic approach to government intervention, to resolve a problem, is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing interventions (for example, waste generated by misdirected rules). In both cases the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributional reasons (for example, to reallocate goods and services to more needy groups in society).

7. There is a tension between the law on contempt by publication (and the associated law on the right to a fair trial, enshrined in article 6 of the ECHR) and the right to freedom of expression. There are concerns that the lack of clarity, in law and in practice, may lead to unfairness for publishers who may be unable to determine when a publication is acceptable. In addition, the current procedure for dealing with alleged contemnors may not be consistent with their article 6 rights. Finally, unfairness or a lack of clarity in the law potentially incurs avoidable legal costs through unnecessary legal arguments and appeals.

Policy objectives

8. The policy objectives are:

(1) to clarify the law on contempt by publication;

(2) to ensure that the law in this area is ECHR compliant;

(3) to ensure that the law in this area acts as an effective deterrent;

(4) to increase public confidence in the criminal justice system.

Scale and context

9. The Attorney General deals with a number of allegations of prejudicial reporting every year. The Attorney has brought contempt proceedings in three cases over the previous two years. Some of these cases (such as the contempt proceedings surrounding the murder of Joanna Yeates, and the trial of Levi Bellfield) are high profile.

10. On 18 July 2012, the publishers of the Daily Mirror and the Daily Mail were found guilty of contempt of court due to their coverage of the prosecution of Levi Bellfield for abduction. On 16 October 2012, the publishers were fined £10,000 each, and were ordered to pay costs of £25,000 each.

11. On 29 July 2011, the Daily Mirror and The Sun were found guilty of contempt after they published prejudicial details about a suspect in the investigation into the murder of Joanna Yeates. The Daily Mirror was fined £50,000, and The Sun was fined £18,000. The newspapers were also required to pay the Attorney General's costs.

12. Also in July 2011, the publishers of the Daily Mail and The Sun websites were fined after they had been found guilty of contempt by publication. The newspapers published photographs of the defendant in a murder trial holding a gun. Both newspapers were fined £15,000. The publishers were also required to pay the Attorney General's costs of £28,117.

13. Reliable empirical research in England and Wales about the impact of publicity on jury and judicial decision-making is relatively scarce. One exception is research led by Professor Cheryl Thomas.[1] Professor Thomas' study was conducted in courts in Nottingham, Winchester and London and included 62 cases and 668 jurors. The sample included standard cases which attracted little media attention and lasted less than two weeks, as well as lengthier, more high-profile cases.

14. Professor Thomas' research found that, of those jurors questioned who were sitting in high-profile cases, over one-third recalled some of the pre-trial media coverage. One-fifth of jurors in high profile cases who recalled media reports of their case said they had found it hard to put such coverage out of their minds.

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

Main groups affected by the proposed reforms

15. The main affected groups are:

(1) defendants in criminal trials;

(2) publishers and journalists;

(3) users of modern media;

(4) jurors;

(5) Her Majesty's Courts and Tribunals Service;

(6) the Attorney General's Office;

(7) the judiciary;

(8) Her Majesty's Prison Service;

(9) The Probation Service.

Description of options

Option 0: Do nothing (base case)

16. This option would retain the existing law and procedures for dealing with publication committed by contempt. The key features and problems with the current law are summarised above, in Table 1.

Option 1: Reform proposals

17. We make a number of separate reform proposals.[2] Each proposal relates to one of the different areas of law outlined above. Our preferred outcome is that all our proposals are adopted. However, readers should note that, as the policy proposals do not overlap, each proposal could stand alone, and the different policy proposals could be implemented independently of one another.

18. Policies 7A and 7B are alternative proposals. We do not express a preference between them at this stage.

[2] In the consultation paper we make some recommendations which will only have a very minor impact or which would simply maintain the present law, and which we have, therefore, not included in this impact assessment. We recommend that the current triggers of "active" proceedings should remain. We recommend that the tests for contempt and for breach of prejudice should remain distinct. We recommend that section 5 of the 1981 Act should be retained in its current form. We recommend that the period of active proceedings should be redefined so that it ends at the verdict, rather than at sentence. This would bring the law in line with current practice – several reputable publishers treat the verdict as the end of the active proceedings, and we are not aware of any cases where contempt proceedings have been brought for publications post-verdict.

Policy 1: Active proceedings – guidance to the police on releasing the names of arrestees

19. This proposal is that guidance be issued to ACPO, for dissemination to police forces, which could encourage the police to routinely release information about arrestees, wherever possible.

20. We consider that appropriate safeguards would need to be put in place to ensure that some names were withheld from the public, for example, where it would lead to the unlawful identification of a complainant, where the arrestee is a youth or where an ongoing investigation may be hampered. We consider that such safeguards should be widely defined given that once a name is released it may not be possible to retract it.

Policy 2: Section 2(2) – clarifying the law on "prejudice" and "impediment"

21. This proposal would clarify what is meant by "prejudice" and "impediment", and would split these two forms of contempt into two separate provisions.

22. Currently, courts often refer to "prejudice" and "impediment" in the same sentence, without differentiating between the two. This makes it harder for media organisations to understand the case against them. We consider that clarifying the meaning of the two terms, and splitting them into two separate provisions, will help to avoid the risk that media organisations may be disadvantaged by the confusion between the two tests.

Policy 3: The Attorney General's decision to bring proceedings

23. This question asks consultees if they agree that a list of the factors considered by the Attorney General when deciding whether to bring proceedings should be published.

24. Different individuals hold the office over time. In addition, a decision of the Attorney General is not judicially reviewable. These factors have created concern that there is a lack of clarity as to when the Attorney General will bring contempt proceedings against publishers.

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

Policy 4: An online list of section 4(2) orders

26. This question asks consultees if they agree that a scheme for notifying publishers about the existence of section 4(2) orders should be created.

27. Many media organisations told us they struggle to obtain information about whether an order is in existence, and if so, what its terms are, because there is no formal system for notifying the media of their existence.

28. The proposed scheme could be modelled on the system which is currently in place in Scotland. There, an electronic standard form is completed providing the terms of the order by the court. A copy is then emailed to an office at the High Court of Justiciary where the case is entered onto an online list. The list provides limited details about the case (for example, an entry would read: HMA v John Smith, Sherriff Court, Glasgow, 3 August 2012). Those who want more information about the terms of the order can telephone the office. Alternatively, members of the media sign up to an email list to be notified each time a new order is entered onto the list, and to be sent a copy of the order. When the case is completed or the order discharged, the court will email the office to have the entry removed from the list on the website.

29. We consider that a similar system could be developed for England and Wales. We consider that, if such a list proves successful, there may be merit over time in expanding it to cover orders made under section 82 of the Criminal Justice Act 2003 (restricting publicity where there is to be a retrial of a previously acquitted person), and orders made under section 39 of the Children and Young Persons Act 1933 (providing anonymity to youths appearing in court).

Policy 5: Sanctions (including community penalties) for contempt by publication

30. This question asks consultees if they believe that the current sanction options (a fine and up to two years of imprisonment) for contempt by publication are appropriate. It also asks if they consider that community penalties should be available.

31. Since the advent of the modern media, every citizen is a potential publisher. In consequence, in the future it may become more common for proceedings to be brought against individuals who are not journalists attached to media organisations. It is obviously important that the courts have the appropriate powers to deal with each of these types of contemnor.

32. In some cases, it may be appropriate to have the power to impose a community sentence.

33. A penalty of imprisonment may appear draconian, particularly in light of the requirement for proportionality under article 10 of the ECHR. Furthermore, the power to imprison in this context has not been used for over 60 years. However, in the case of intentional contempt by publication and breach of section 4(2) and section 11 orders, the argument for limiting the penalty to fines or community sentences may be diminished, because each type of contempt requires some form of intention to interfere with the course or administration of justice. It may, therefore, be appropriate to retain the power to imprison in order to deal with the most extreme cases. A penalty of imprisonment is always a serious sanction, and would need to be justified on the facts of the case in order to be article 10 compliant.

Policy 6: The courts' power to impose fines as a percentage of the publisher's turnover

34. This proposal would amend the courts' powers so that, when imposing a fine, the court can set the fine at a percentage of the turnover of the publisher.

35. In respect of proceedings against media organisations rather than individual publishers, we consider that current powers of the courts to deal with contempt by publication may be inadequate given the disparity between the financial resources of different media organisations and the importance of ensuring a deterrent effect.

36. We consider that, if such a system were introduced, the Sentencing Council could provide guidance to the judiciary in order to ensure that the penalties imposed are consistent. This would also provide greater clarity for media organisations.

Policy 7A: The procedure for dealing with contempt by publication (trial by jury on indictment)

37. This question asks consultees if they believe that contempt by publication (both at common law and under section 2(2)) should be tried on indictment by a judge and a jury.

38. As noted above, proceedings for contempt of court are currently brought in the Divisional Court in most cases. This proposal would treat contempt by publication as an ordinary criminal offence. It would be tried subject to the procedural safeguards associated with a trial on indictment, such as police powers of arrest, detention, investigation and charge, bail under the Bail Act 1976, the procedure for sending cases from the magistrates' to the Crown Court under section 51 of the Crime and Disorder Act 1998, the disclosure regime, and the criminal rules of evidence.

39. There is obvious merit in those processes applying when an allegation can lead to criminal conviction and imprisonment. With the rise of citizen journalism, it is more likely that individual bloggers and tweeters will be subject to contempt proceedings. We consider that there may be merit in treating contempt by publication as an ordinary criminal offence, in the same way that other offences which may involve media defendants are tried in the criminal courts. This would also guarantee that defendants' ECHR rights are fully respected.

40. If this proposal is adopted, we also propose that the common law offence of intentional contempt should be defined in statute. This is because the offence needs to be defined clearly before it can be classified as an indictable offence.

Policy 7B: The procedure for dealing with contempt by publication (trial by judge alone as if on indictment)

41. This question asks consultees if they believe that contempt by publication (both at common law and under section 2(2)) should be tried as if on indictment, but by a judge sitting alone. The consultation paper also asks consultees' views on which type of judge should try these cases.

42. This would be a novel and unique step. Although a small number of criminal trials have gone ahead without a jury, currently no other criminal offences are automatically tried as if on indictment without a jury.

43. If this proposal is adopted, we also propose that the common law offence of intentional contempt should be defined in statute.

Policy 8: The Divisional Court's power to impose wasted costs orders

44. This question asks consultees if they agree that the Divisional Court should have the power to make an order for wasted costs from the criminal proceedings prejudiced, impeded or intentionally affected by a contempt by publication. This is presented as a separate policy because it only applies if the procedure for trial on indictment, which is outlined in policies 7A and 7B, is not implemented.

45. As noted above, no wasted costs orders ever seem to have been made in the context of contempt by publication. This is perhaps because the jurisdiction to make these orders is limited to the magistrates' courts, Crown Court and the Court of Appeal, whereas contempt proceedings are generally heard in the Divisional Court. This proposal would remedy this anomaly and would ensure that, if contempt proceedings continue to be dealt with in the Divisional Court, the court has the most appropriate range of sentencing options available to it.

Cost and benefit analysis

46. This impact assessment identifies both financial and non-financial impacts on individuals and the State. The costs and benefits of each option are compared to the "do nothing" option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms of any potential reforms. However, there are important aspects that cannot sensibly be monetised. This is particularly so for the criminal law, which can have a profound impact on both the individual and society. As a result, financial benefits are analysed alongside non-financial benefits (relating to, for example, human rights concerns and public perception of the justice system).

47. Where possible, we have spoken to stakeholders to inform our view of the likely impact of our proposals and have used this as the basis for our calculations. Where it has not been possible to obtain a rough indication of numbers in this way, we have had to make a realistic estimate. In such cases, we have taken a conservative approach and have tended to use figures that we consider likely to under-estimate benefits and over-estimate costs.

48. When calculating any Net Present Values for the impact assessment, a time frame of 10 years is generally used. We assume that the transitional costs and benefits occur in the current year (2012), except where we state otherwise, and ongoing costs and benefits accrue in years 1 to 10. A discount rate of 3.5% is used in all cases in accordance with Treasury guidance.

Option 0: Do nothing (base case)

Costs

49. We explained the problems in the existing law above, in Table 1. These problems may lead to unfairness for alleged contemnors, who may struggle to determine when their publications will be in contempt. The high-profile cases referred to above, and Professor Thomas' research, suggest that the current powers in relation to contempt by publication are not acting as a sufficient deterrent on publishers. This can lead to unfairness for defendants, who may not receive a fair trial. It can also lead to unfairness to victims of crimes, who may have to give evidence at both a trial and a subsequent retrial. It can also lead to wasted court, prosecution and legal aid costs, as trials are abandoned and retrials are held.

Benefits

50. Doing nothing would avoid the costs of reform.

51. Because the do-nothing option is the starting point for the cost and benefit analysis of all other proposals, its Net Present Value is zero.

Option 1: Reform proposals

52. We put forward a number of separate reform policies, which were outlined above. This part of the impact assessment considers the costs and benefits of each of them in turn. All costs are ongoing costs, unless otherwise identified. Before we do this, however, we note that some of the transitional costs are relevant to all or most of our proposals. We outline those costs first, then we go on to consider the costs and benefits of each individual proposal.

Costs of the reform common to all proposals

53. For several of these proposal areas it may be necessary to provide judges and legal practitioners with some training on the new legislation or procedure.

54. Judges may require appropriate training and guidance about the new legal regime. Information provided by the Judicial College outlines the training requirements for judges. Judges are sent newsletters advising them of updates to law or procedure. Judges also attend a training day every year. If there is a significant new law or procedure, judges may be required to attend special training course specifically on those reforms. Officials at the Judicial College confirmed that any extra training as a result of our proposals would be incorporated into existing programmes and publications and that little or no extra cost would therefore arise.

55. With regards to training legal professionals, we would assume that training in this area would not add significant cost or time to the training required by the Solicitors Regulation Authority and the Bar Standards Board in order for barristers and solicitors to maintain their practising certificates. Any minimal costs would be borne by the practitioners (or their employers) if they choose to undertake training to assist their work.

Policy 1: Active proceedings – guidance to the police on releasing the names of arrestees

Costs

56. We propose that the Home Office request that ACPO, or the College of Policing if appropriate, issue the guidance. The appropriate body would need to consider the issue, prepare a policy and consult with stakeholders (and this could incur some one-off costs).

57. The police, through ACPO, would need to ensure that the guidance is consistently enforced.

Benefits

58. Consistent practice by police when deciding whether or not to release the names of arrestees will provide publishers with greater certainty.

59. The proposal would also ensure consistent protection for both defendants and victims, for example, where the arrestee is a youth or where the investigation could be hampered or the complainant identified by the release of names.

Assumptions and risks

60. We are assuming that the new practice of releasing names would be implemented consistently across the country. We are also assuming that the practice will be drafted in a way which will not have a negative impact on victims or on vulnerable defendants.

Policy 2: Section 2(2) – clarifying the law on "prejudice" and "impediment"

Costs

61. We are not currently proposing specific definitions for the terms "prejudice" and "impediment".

62. It is possible that any reform, if undertaken, could result in more litigation in the immediate aftermath as the jurisprudence develops to clarify the law. This would entail some transitional costs for the courts system and the legal aid budget.

Benefits

63. Greater clarity in the law will mean that publishers can know the case against them if they are made the subject of contempt proceedings. This ensures compliance with article 10 of the ECHR, as well as article 7, which requires states to make their laws clear, accessible and intelligible.

Assumptions and risks

64. None identified.

Policy 3: The Attorney General's decision to bring proceedings

Costs

65. The Attorney General would have to consider the issue, prepare a policy and consult on it (and this could entail some transitional costs for the Attorney General's Office).

Benefits

66. A list of factors considered by the Attorney General when deciding whether to bring contempt proceedings would provide publishers with certainty, and would allow them to regulate their own conduct more effectively.

Assumptions and risks

67. None identified.

Policy 4: An online list of section 4(2) orders

Costs

68. The costs of developing an online list of section 4(2) (and other) orders are difficult to determine, as there is no information on how many such orders are made.

69. The order in question would need to be written down. This should already happen, so we do not anticipate any additional costs for this. The order would then need to be emailed to the relevant office. We anticipate that any costs incurred here would be minimal. The relevant office would need to take responsibility for receiving orders, updating the online list, emailing them to a mailing list and removing expired orders. These steps would have some cost implications.

70. Information provided by officials in the Scottish Court Service indicates that the set-up and running costs for an online list of section 4(2) orders would be minimal. The Scottish list of section 4(2) orders is displayed on a page of the website of the Scottish Court Service so there are no website set-up costs – a similar page could be incorporated into, for example, the HMCTS section of the Ministry of Justice's website. The officials in the Scottish Court Service estimated that the Scottish system took four hours to set up, and that the system takes on average two hours per week to run. Given that the population of England and Wales is much larger than that of Scotland, it is possible that the number of section 4(2) orders made in England and Wales is higher. This would lead to an increase in the time taken to maintain the online database.

Benefits

71. An online list of section 4(2) orders would allow publishers to be certain that their publications will not be in breach of such an order. This, in turn, would ensure that the law is compliant with article 10 of the ECHR (because the restriction on publication would be no more than is necessary) and with article 7 of the ECHR (because publishers would be able to regulate their conduct in accordance with the law).

Assumptions and risks

72. We are assuming that the existing computer and internet networks are sufficient to deal with the transfer and publication of section 4(2) orders, and that anyone responsible for sending, receiving and uploading them will already be using emails and the internet as part of their work.

73. We are assuming that the number of section 4(2) orders is not extremely large, and that the administrative burden involved with recording and uploading them would be manageable.

Policy 5 Sanctions (including community penalties) for contempt by publication

Costs

74. Information provided by the Ministry of Justice indicates that the average unit costs for probation and community sentences are £2,700 per year.[3]

Benefits

75. As noted above, the rise of "citizen journalism" means that more individual bloggers and "tweeters" could be found in contempt as a result of their publications. This means that the courts may be faced with a wider range of contemnors than has previously been the case. With this in mind, the courts may benefit from having a wider range of sentencing options available to them. Community penalties may be a valuable addition to the courts' sentencing powers when faced with individual contemnors.

Assumptions and risks

76. We have assumed that the increase in the number of individuals who can reach a wide audience through the use of online media means that the courts will be faced with more individual contemnors. There is a risk that this assumption is incorrect, and that the power to impose community sentences is redundant. We consider this to be a low risk.

Policy 6: The courts' power to impose fines as a percentage of the publisher's turnover

Costs

77. This proposal could lead to more litigation in the immediate aftermath of its introduction, as the law is developed (and this would lead to transitional costs for HMCTS and possibly the legal aid budget). As the standard penalty imposed on publishers is a fine, we expect that this new power would become an important feature of the courts' approach to contempt by publication. As a result, it is possible that the first uses of this power may result in an appeal against it.

Benefits

78. Some stakeholders have expressed concerns that the current low level of fines means that the law lacks a deterrent effect, especially given the potential financial and reputational benefits which go with the publication of high-profile stories. If the new fines imposed under this power were higher, this may have a greater deterrent effect on publishers.

Assumptions and risks

79. Courts would need to ensure that the penalties they impose would be compliant with article 10 of the ECHR. The fines must be proportionate to the contempt.

[3] The costs are based on the 2008/09 cost in the Ministry of Justice Cost Benefit Framework, inflated using Her Majesty's Treasury data to get 2010/11 nominals. These are converted into real figures in 2010/11 prices and the SR real efficiencies from 2010/11 are applied on top. Note that this figure also includes costs other than community penalties – for example, the probation costs for individuals released on license. As such, they are only a general estimation of the costs of community penalties. The Howard League has also produced some estimates of the costs of community penalties: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Community_sentences_factsheet.pdf (last visited 1 Nov 2012), at p 3.

Policy 7A: The procedure for dealing with contempt by publication (trial by jury on indictment)

Costs

80. This proposal would mean that contempt by publication would be treated like other criminal offences, and would be tried on indictment with a jury.

81. If this proposal was adopted, it would be beneficial to clarify through legislation, for the avoidance of doubt, that the jurisdiction of the Divisional Court to deal with strict liability and intentional contempt by publication had been ousted. We do not anticipate that this would incur significant costs.

82. There may be concerns about the use of trial by jury for addressing contempt by publication. There may be concerns about whether jurors would understand or be willing to accept restrictions on media coverage, particularly where it relates to those who are accused or convicted of notorious offences. Jurors are, after all, purchasers and readers of the very material which may be found in contempt. The content of the publications themselves may ensure that the juror has limited sympathy for the right to a fair trial of the individual concerned, given that, by their nature, such publications are likely to make allegations or disclosures about (further) unsavoury conduct by that individual. As Chapter 4 explains, there is already evidence that some jurors ignore the trial judge's warnings and actively seek prejudicial material on the internet or in the media about the defendant whom they are trying. Such jurors may be reluctant to convict in respect of publications which prejudice a fair trial, given that they themselves may be blind to the risk of becoming prejudiced.

83. If this procedure is adopted, appeals against a finding of contempt by publication will go to the Court of Appeal (rather than to the Supreme Court, as they currently do). The threshold test for appealing to the Court of Appeal is lower than for appealing to the Supreme Court, which only hears appeals on points of law of general public importance. Therefore, it is possible that if our procedural reforms are adopted, this will open up the possibility of increased numbers of appeals. However, it is not possible to predict the additional number of appeals. Since the number of prosecutions is likely to be low, the number of appeals is likely to be low.

Benefits

84. If contempt by publication was classified as a criminal offence and tried on indictment, that would automatically trigger the normal criminal investigative and trial processes. There is obvious merit in those processes applying when an allegation can lead to imprisonment. They would help to ensure that there is no breach of alleged contemnors' rights under articles 5 and 6 of the ECHR.

85. It is possible that this method of trial could lead to cost savings. Although trial by jury will probably take longer than trial in front of a judge alone, a trial on indictment may be cheaper per day than a Divisional Court hearing. We have not yet been able to predict the cost of these different approaches due to a lack of data on hearing costs. As the number of contempt hearings is relatively low, the financial benefits of this proposal would be correspondingly small.

Assumptions and risks

86. There is a risk that our assumptions about the costs of the different forms of procedure are incorrect and that the proposal will lead to increased costs. Given that the number of cases so far has been small, we consider that the impact – if this risk event occurs – would be small. This will be kept under review and new information will be taken into account when it is received.

Policy 7B: The procedure for dealing with contempt by publication (trial by judge alone as if on indictment)

Costs

87. This proposal would mean that contempt by publication would be treated as a criminal offence. It would be tried as if on indictment (with all the procedural and evidential safeguards associated with trial on indictment), but by a judge sitting alone, rather than by a jury.

88. If this proposal was adopted, it would be beneficial to clarify through legislation, for the avoidance of doubt, that the jurisdiction of the Divisional Court to deal with strict liability and intentional contempt by publication had been ousted. We do not anticipate that this would incur significant costs.

89. As noted above at paragraph 1.42, no other criminal offence is automatically tried in this way. Trial by jury is widely regarded as an important part of our legal system, and a move towards trials by judges sitting alone could lead to fears that defendants have not received fair trials. There is an associated risk that the public perception of the criminal justice system would be harmed.

90. If this procedure is adopted, appeals against a finding of contempt by publication will go to the Court of Appeal (rather than to the Supreme Court, as they currently do). The threshold test for appealing to the Court of Appeal is lower than for appealing to the Supreme Court, which only hears appeals on points of law of general public importance. Therefore, it is possible that if our procedural reforms are adopted, this will open up the possibility of increased numbers of appeals. However, it is not possible to predict the additional number of appeals. Since the number of prosecutions is likely to be low, the number of appeals is likely to be low.

Benefits

91. If contempt by publication was classified as a criminal offence and tried on indictment, that would automatically trigger the normal criminal investigative and trial processes. There is obvious merit in those processes applying when an allegation can lead to criminal convictions and imprisonment. They would help to ensure that there is no breach of alleged contemnors' rights under articles 5 and 6 of the ECHR.

92. We noted above that there may be concerns about whether jurors would be willing to return guilty verdicts for contempt by publication. This approach would remove those concerns. It would allow decisions on contempt to be made by judges who would have experience of the law and of the possible impact of adverse publicity.

93. We invite consultees' views on the appropriate judges for hearing such cases, without expressing a view.

94. It is possible that this method of trial would lead to cost savings. A trial on indictment may be cheaper per day than a Divisional Court hearing, and a trial with a judge alone is likely to take less time than a trial with a jury. We have not yet been able to predict the cost of these different approaches due to a lack of data on hearing costs. As the number of contempt hearings is relatively low, the financial savings of this proposal would be correspondingly small.

Assumptions and risks

95. We are assuming that the normal procedures for trial on indictment would translate smoothly into the context of trial without a jury (and we do not anticipate that this will cause any difficulty). We have assumed that judges, with their experience and training, will not experience the same difficulties with impartiality which jurors could potentially suffer.

96. There is a risk that our assumptions about the costs of the different forms of procedure are incorrect and that the proposal will lead to increased costs. Given that the number of cases so far has been small, we consider that the impact – if this risk event occurs – would be small. This will be kept under review and new information will be taken into account when it is received.

Policy 8: The Divisional Court's power to impose wasted costs orders

Costs

97. This proposal (which is only relevant if contempt by publication continues to be tried in the Divisional Court) extends to the Divisional Court the power to impose an order for wasted costs for proceedings which were prejudiced or impeded by the publication. This power is already available in the magistrates' courts, Crown Court and the Court of Appeal. As the power already exists in other courts, the transitional costs associated with drafting and implementing the new provision are expected to be minimal.

Benefits

98. The possibility of having to pay the costs of a party to criminal proceedings may act as a deterrent on the actions of publishers, for both financial and reputational reasons.

Assumptions and Risks

99. Courts would need to ensure that the penalties they impose would be compliant with article 10. The fines must be proportionate to the contempt.

Summary of the costs and benefits of the individual proposals

Policy	Transitional costs	Ongoing costs	Benefits
1. Guidance to police in releasing the names of arrestees.	Some cost to ACPO or the College of Policing of preparing and distributing guidance.	ACPO would have to ensure that guidance is consistently enforced.	Greater certainty for publishers. Consistent protection for both defendants and victims, for example, where the arrestee is a youth or where the investigation could be hampered or the complainant identified by the release of names.
2. Clarifying the terms "prejudice" and "impediment".	Possible spike in appeals while the new definitions are tested. Minimal training costs for judges.	Not possible to quantify.	Greater certainty for publishers, who will know the case against them.
Policy	**Transitional costs**	**Ongoing costs**	**Benefits**
3. Factors in the Attorney General's decision to bring proceedings.	The Attorney General would have to consider the issue, prepare a policy and consult on it.	The Attorney General would have to keep his or her policy under review.	Would provide publishers and the wider public with certainty.
4. An online list of section 4(2) orders.	Some costs incurred in designing and setting up the website which will host the list. Minimal training costs for judges.	Minimal administrative costs in running the website.	Publishers will be aware of reporting restrictions, and so will be able to ensure that they are not in contempt. Associated benefit of compliance with ECHR article 7 (law must be clear and accessible) and article 10 (freedom of expression).
5. Sanctions for contempt by publication.	Minimal training costs for judges.	Some costs in running community penalty schemes. These are expected to be minimal.	Greater flexibility for courts. Courts would have a more appropriate range of sentencing options, particularly in respect of individuals.
6. A power for courts to impose a fine set at a percentage of the publisher's turnover.	Minimal training costs for judges. Possible spike in appeals while the law is clarified.	None identified.	Possible increased deterrent effect on publishers.
7A. Contempt by publication to be tried on indictment by a jury.	Minimal training costs.	Risk that jurors may be unwilling to find publishers guilty of contempt in the light of the prejudicial information contained in the publication. Allowing appeals to the Court of Appeal (rather than the Supreme Court) could lead to more appeals against convictions for contempt, as the threshold for appeals would be lower, but only a small number of cases are anticipated.	The normal criminal investigative and trial processes would apply. This would bring contempt (which can result in a fine or custodial sentence) into line with the rest of the criminal law. It would also help to ensure compliance with the alleged contemnor's rights under articles 5 and 6 of the ECHR. Possible small cost savings when compared with the cost of a Divisional Court hearing.
7B. Contempt by publication to be tried as if on indictment by a judge sitting alone.	Minimal training costs.	Possible risk of reputational damage to the criminal justice system if trial by jury is not available for this offence. Allowing appeals to the Court of Appeal (rather than the Supreme Court)	The normal criminal investigative and trial processes would apply. This would bring contempt (which can result in a fine or custodial sentence) into line with the rest of the criminal law (with the exception of the jury element). It would also help to ensure

		could lead to more appeals against convictions for contempt, as the threshold for appeals would be lower. However, only a small number of cases are anticipated.	compliance with the alleged contemnor's rights under articles 5 and 6 of the ECHR. Possible small cost savings when compared to the cost of the current procedure (a Divisional Court hearing using the civil rules of procedure and evidence). Cost savings when compared to jury trial.
8. The Divisional Court's power to impose wasted costs orders.	Minimal training costs for judges. Minimal costs of drafting new provision.	None identified. Possible breach of Article 10 if the European Court of Human Rights holds an exercise of the power to be disproportionate.	Possible deterrent effect on publishers.