Title:

Contempt of court – Publication, Publishers and new media

IA No: LAWCOM0025

Lead department or agency:
Law Commission

Other departments or agencies:
Ministry of Justice

Impact Assessment (IA)

Date: 17/10/2012

Stage: Consultation

Source of intervention: Domestic

Type of measure: Primary legislation

Contact for enquiries:
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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	Yes/No	In/Out/zero net cost

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

The law on publications which prejudice or impede trials is found in common law and in the Contempt of Court Act 1981. Since 1981, there have been profound technological developments. The use of the internet means that publications can instantly reach a wide audience. In addition, publications may remain on websites for years after they are published, with the risk that articles which do not relate to active proceedings at the time of their publication may still be accessible to jurors once proceedings become active. This risks unfairness for defendants, who are the subjects of prejudicial material, and publishers, who may find that an article which was lawfully published has since become unlawful, through events which they did not control or know about.

What are the policy objectives and the intended effects?

The policy objectives are:

1. to clarify the law on contempt by publication and how this has been affected by modern media (such as social media, online news, twitter and the use of the internet generally);
2. to ensure that the courts have the necessary powers to deal with prejudicial material which is published online;
3. as with any legal reform, to ensure that the law and the reforms are compliant with our obligations under the European Convention on Human Rights (ECHR).

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

Option 0: do nothing.

Option 1: a new power for the courts to order the temporary removal of prejudicial publications (which were first published before proceedings were active) from websites once proceedings have become active. Such an order could be made against any person or entity who is a publisher or who has sufficient control over the material that they are able to remove it. As part of this option, we propose that "publication" should be defined as a single act, which occurs when the item is first published. This proposal strikes the correct balance between defendants' right to a fair trial under article 6 of the ECHR and publishers' right to freedom of expression under article 10 of the ECHR.

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: A new power for the courts to order the temporary removal of prejudicial publications

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 provided to judges on the exercise of the new power, and guidance provided by the Lord Chief Justice and the Judicial College – minimal. Cost of appeals to Her Majesty's Courts and Tribunals Service (HMCTS) (against granting of an order, decision not to grant an order, or a finding of contempt for breach of an order), both initially while the law is settled, and ongoing – not possible to quantify. Cost to HMCTS of hearings to consider the application for such an order.

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'

Less prejudicial material available to jurors: possible financial benefits (to HMCTS and Legal Services Comission (LSC)): fewer trials are abandoned/re-listed due to concerns over juror bias. Public confidence in the system may increase if it is seen to be fairer and more efficient. Potential financial saving for publishers, who would no longer have to spend time and resources ensuring that their internet archives were free of prejudicial material. Increased protection for both the defendant's right to a fair trial and the publisher's right to free expression.

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

We are assuming that the problem of prejudicial online material is one that will become more apparent now that the use of the internet is widespread (there has only been one section 2(2) contempt case regarding online publications so far). We have assumed that the burden which this new proposal would place on those who can apply for an order for material to be removed (defendants, the Crown Prosecution Service (CPS) and possible others) is reasonable.

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 publications;

(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 concerns our proposals relating to contempt by publication and modern media. Both this impact assessment and the preceding impact assessment (and the relevant chapters in the consultation paper) concern contempt and publications. Whereas the preceding impact assessment looks at the general problems with the law on contempt by publications, this impact assessment focuses instead on the specific problem of contempts committed using the modern media.

Problem under consideration

4. The manner in which people access and disclose information has changed radically over recent years. The Contempt of Court Act 1981 was, of course, drafted decades before the widespread use of the internet. The volume of material that can now be stored, the ease with which it can be communicated and redistributed, the size of the audience that can be reached, and the global accessibility of information brings many new challenges, including for the law of contempt. While prejudicial information may historically have faded with the newspaper print, as well as from our collective memory; as data it is now processed, archived and is retrievable for very much longer periods of time.

Table 1: Current law and the associated problems

Current law	Key features and associated problems
The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of the 1981 Act at the time of the publication. The courts have interpreted "publication" as a continuing act. This means that a publisher who puts a prejudicial article on a website when proceedings are not active may be in contempt if the proceedings subsequently become active and the article is still available online.	We cannot be confident that this approach to the time of publication will be followed by an appellate court in England and Wales. In addition, it risks imposing a disproportionate burden on publishers, who may be required to continuously monitor their internet archives to ensure that events referred to in articles have not become the subject of active proceedings since first publication. If we are correct that "time of publication" should be defined as a single act, this leads to another problem. An article may be extremely prejudicial to a defendant's criminal trial, but, because it was published before the proceedings became active, the trial is not protected by contempt law.

Rationale for intervention

5. 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).

6. In the case of modern media, the uncertainties in the current law risk unfair treatment of both the users of modern media (who may be unable to determine how the law applies to their conduct, and who may, therefore, be unable to regulate their conduct) and defendants in trials (who may suffer prejudice and impediments to their trials if the law on contempt is unable to deal with modern media). This, in turn, risks costly appeals.

7. Clarity in the law is necessary to avoid breaches of the ECHR. The law must protect the publisher's right to free expression, which is guaranteed by article 10 of the ECHR, but it must also guarantee the defendant's right to a fair trial, which is guaranteed by article 6.

Policy objectives

8. The policy objectives are:

(1) to clarify how the existing law on contempt relates to modern media;

(2) to identify any areas where the law on contempt fails to deal with the challenges posed by modern media;

(3) to ensure that the courts have sufficient powers to prevent prejudice to trials through the use or misuse of modern media; and

(4) to ensure that the law, and any reforms, are ECHR compliant.

Scale and context

9. So far, the law of contempt has not had to deal extensively with the modern media. There appears to have been only one contempt by publication case involving the new media, where an incriminating photograph on a newspaper's website was held to amount to a contempt. Because of the lack of cases on this issue, there are significant ambiguities about how the law of contempt relates to the modern media.

10. In 2012, the Office of National Statistics reported that some 84% of adults in the UK have used the internet at some time. According to Ofcom, 80% of UK households have internet access, while 39% of households access the internet through a mobile phone. The most popular websites in the UK are Google, Facebook and YouTube, enabling millions to find, share and consume information. UK users of Facebook alone are estimated at over 30 million, while Twitter has 10 million active users.

11. In light of the impact of the internet on daily life, we anticipate that this is a topic which is likely to be of increasing significance in the future. It is therefore important that the 1981 Act is adequate to meet the needs of a digital age.

Main groups affected by the proposed reforms

12. The main groups affected are:

(1) the media;

(2) users of modern media;

(3) internet service providers, website hosts and others with control over online publications;

(4) defendants in criminal trials;

(5) jurors;

(6) the judiciary;

(7) the Crown Prosecution Service;

(8) the Legal Services Commission

(9) Her Majesty's Courts and Tribunals Service.

Description of options

Option 0: Do nothing (base case)

13. This option would retain the existing law and procedures on contempt in the face of the court. The key features of and problems with the current law are summarised above in Table 1.

Option 1: A new power for the courts to order the removal of prejudicial publications

14. We propose that section 2(3) be amended to confirm that "time of the publication" is to be interpreted as "time of first publication".

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

16. Such an order shall be capable of being made against a publisher or against any person who has sufficient control over the accessibility of the material that they are able temporarily to remove it. We consider that "control" in this context can be left to be interpreted by the courts on a case-by-case basis. The question will be whether, in respect of material that is available to the public or section of the public, the person has the capability to prevent that material from being available. Those with control will not necessarily be "publishers" within section 2. For example, an internet access provider or domain name registrar might well be in "control" of material but not be a publisher.

17. This power would apply to the Crown Court. It could be extended to magistrates' courts if necessary, although it is difficult to envisage such circumstances.

18. We propose that the application for such an order to be made should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General.

19. Failure to comply with such an order without reasonable excuse shall be a contempt of court.

Cost and benefit analysis

20. 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 0. 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).

21. 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

22. We explained the problems with the existing law above, in Table 1. The current law risks placing a disproportionate burden on publishers, who may be required continually to monitor their websites and reports of live court cases to identify active proceedings to which they may relate. It also risks breaching their rights under article 10 of the ECHR (which guarantees the right to freedom of expression), as holding them in contempt for publications first published before the relevant proceedings become active may be a disproportionate interference with the right to freedom of expression.

Benefits

23. Doing nothing would avoid the costs of reform.

24. Because the do-nothing option is compared against itself, its Net Present Value is zero.

Option 1: A new power for the courts to order the removal of prejudicial publications

Costs

Transitional costs

25. The proposal grants a new power to judges. As a result, it may incur training costs. However, officials at the Judicial College have confirmed that training arising out of our proposals could be included within existing events and publications, and that little or no extra cost would arise. We anticipate that guidance from the Lord Chief Justice and the Judicial College might be necessary to ensure that Crown Court judges adopt a consistent approach to such orders.

26. There may also be a small spike in appeals while practitioners and judges come to terms with the new law. As this is a new proposal, it is not possible to predict the number of appeals. There are two different potential reasons for an appeal.

(1) Appeals may be against a decision to make an order under the new proposal. Currently, appeals against the making of a section 4(2) or a section 11 order go to the Court of Appeal (section 159 of the Criminal Justice Act 1988). The same route of appeal would be available under our proposal.

(2) Appeals may also be against a finding of contempt for breach of such an order. Appeals against findings of contempt for breaches of other orders (for example, those made under section 4(2) or section 11 of the Act) currently go to the Supreme Court. There is a high admissibility threshold for appeals to the Supreme Court, and the number of appeals is minimal. In the other chapters of the consultation paper we propose that the procedure for dealing with contempt should be changed to trial on indictment. If a similar approach was taken with the new power, findings of contempt would be appealed to the Court of Appeal.

27. There is no data on the current cost of an appeal to the Court of Appeal. The estimated cost of a day's sitting for the Court of Appeal Criminal Division ("CACD") was £16,635. The estimated average cost to the legal aid budget for an appeal to the CACD was £5,000. The cost for a prosecuting authority is not known but could be similar. The total cost would be £26,635 in 2009-10 figures.[1] This equates to around £28,000 in 2011-12 figures. It includes legal aid costs and estimated costs to the prosecuting authority. It does not include any private costs to the defendant and thus might be an underestimate.

Ongoing costs

28. This proposal relates to a developing area of law. As we noted above, there has so far been only one finding of contempt relating to prejudicial publications in modern media. It is therefore difficult to predict how often the power would be used if enacted.

[1] The figure of £16,635 was supplied by Her Majesty's Courts Service Financial Management, 2009-10. The cost to the legal aid budget was also from HMCS.

29. We envisage that the courts will rarely need to make such orders because only rarely will the material available pose a substantial risk of serious prejudice. However, it is possible that parties will make large numbers of applications to have publications removed – especially in the time after the new power is enacted, when the practice of the court is becoming settled. This could entail additional court time and increased administrative costs for the courts service. Material provided by the Ministry of Justice indicates that the cost of a full day in the Crown Court is around £2,000.[2] We anticipate that applications for these orders will usually take place in the course of existing case management hearings, and that the costs in terms of court time and legal aid will, therefore, be minimal.

30. In addition to the spike in appeals during the transitional period, this proposal could lead to more appeals over a longer period, as it creates a new ground for appeal and the possibility of an appeal against a finding of contempt. We anticipate a small number of cases based on current practice.

31. This proposal shifts the burden away from publishers and on to defendants, regulators and the CPS, who would have to make checks on publications and then apply to the court to have them removed. However, we understand that in high profile cases prosecution and defence teams currently carry out checks similar to these.

Benefits

32. We believe this proposal strikes the correct balance between publishers' rights to freedom of expression and the defendant's right to a fair trial.

33. This proposal avoids placing an excessive burden on publishers, who will not be required to keep their previous publications under constant review. Liability will only arise for a failure of a person who has control of the material to comply with a court order to make such material as is specified in the order unavailable to the public for the specified period. There is no question of imposing liability on those who are unable, through no fault of their own, to comply with the terms of the order.

34. This proposal has many other advantages: it avoids any doubt or argument about whether a person was aware or ought to have been aware that proceedings had become active, and it avoids arguments about the steps that might reasonably be expected of a person to monitor or identify such material. In ensuring that prejudicial material can be removed from the internet, it also reduces the risk that jurors will see this prejudicial material, with a consequent reduction in the risk of trials being abandoned or verdicts appealed on the ground of prejudicial publicity. This has clear financial and non-monetary benefits.

35. It also ensures that the burden is proportionate. The offending material will be specified (for example, by its url address) in the court order so there is a limited burden in identifying it. The duration for which the material is made unavailable is also limited in a proportionate fashion. This ensures compliance with article 10 of the ECHR.

Assumptions and risks

36. We have assumed that the burden which this new proposal would place on those who can apply for an order for material to be removed (defendants, the CPS and suchlike) is reasonable. In particular, we are assuming that it is a more proportionate approach than the current law, which risks placing an excessive burden on publishers.

[2] These costs are 2010/11 direct court and judicial near cash costs.