Law Commission

Consultation Paper No 209

CONTEMPT OF COURT

Appendix A: Background to the Contempt of Court Act 1981

THE LAW COMMISSION

APPENDIX A: BACKGROUND TO THE CONTEMPT OF COURT ACT 1981

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GLOSSARY

This is a glossary of terms and abbreviations used in this consultation paper.

STATUTES

"the 1981 Act"	Contempt of Court Act 1981

REPORTS

The Phillimore report	Report of the Committee on Contempt of Court (1974) Cmnd 5794

BOOKS

Archbold	P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2012)
Blackstone's	Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2012)
Borrie and Lowe: The Law of Contempt	I Cram (ed), *Borrie and Lowe: The Law of Contempt* (4th ed 2010)
Arlidge, Eady and Smith on Contempt	D Eady and A T H Smith, *Arlidge, Eady and Smith on Contempt* (4th ed 2011)
Miller	C J Miller, *Contempt of Court* (3rd ed 2000)
Clayton and Tomlinson	R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009)

APPENDIX A
BACKGROUND TO THE CONTEMPT OF COURT ACT 1981

INTRODUCTION

A.1 In this Appendix we describe the events leading to the enactment of the Contempt of Court Act 1981 ("the 1981 Act"), including both reports published before the Bill and the passage of the Bill through Parliament.

A.2 For convenience we divide the account by theme, as follows.

(1) Contempt by publication, including:

(a) the meaning of "publication";

(b) the test of risk of prejudice to proceedings;

(c) the meaning of "impeding" proceedings; and

(d) the time when proceedings are "active", so that the strict liability rule applies.

(2) The power to make orders forbidding or postponing the disclosure of particular facts.

(3) The prohibition of jurors' disclosing jury deliberations.

(4) Contempt in the face of the court.

MEANING OF PUBLICATION

A.3 The definition of publication given in the 1981 Act is as follows.

> **2.**—(1) The strict liability rule applies only in relation to publications, and for this purpose "publication" includes any speech, writing, [programme included in a cable programme service][1] or other communication in whatever form, which is addressed to the public at large or any section of the public.

Means of communication

A.4 The Report of the Committee on Contempt of Court[2] pointed out that "publication" had different meanings in different legal contexts.[3] For the purposes of contempt , "publication" should be defined as anything intended to be distributed or addressed to the public at large rather than for private circulation.

1 Inserted by the Broadcasting Act 1990.

2 (1974) Cmnd 5794 ("Phillimore report").

3 Phillimore report para 80. For example, for the purposes of libel, both in 1981 and today, communication to one person can be publication: *Gatley on Libel and Slander* (ed by P Milmo and others, 11th ed 2010) para 6.1.

> Publication can take many forms. It may be printed, broadcast on radio or television, or a film, a tape-recording or a dramatic performance … or entertainment to which the public is invited, as well as to private meetings or functions to which the press is invited, but not an address to a private meeting to which the press is not invited.[4]

A.5 This wide description of publication does not appear to introduce any change to the pre-existing law. In *Attorney General v London Weekend Television*,[5] the court held that there was no rule that television transmission was too ephemeral a communication to be capable of amounting to contempt, though this could be taken into account in determining how much impact it is likely to have on potential jurors.[6]

A.6 Lord Hailsham, in introducing the Bill, explained that the strict liability rule would be limited to "strict publications". This was in contrast to other possibly prejudicial actions, such as paying witnesses, rather than to other means of communication.[7]

A.7 Sir Michael Havers, introducing the Bill in the Commons, explained that even at common law it was not certain whether the strict liability rule could apply to conduct other than publication, for example, paying witnesses.[8] Clause 2(1) of the Bill was there to put the matter beyond doubt and confine the rule to publications. There was no discussion in that debate of what "publication" means.

Size and nature of intended audience

A.8 The question here is what the 1981 Act means by a "section of the public". In the opening debate, Lord Gardiner objected to this phrase, saying that it had been introduced without explanation.[9] He argued that "a section of the public" was the exact opposite of "the public at large" and that, in every case where the Bill differed from Phillimore, the Bill was more restrictive of the right of free speech.

A.9 Lord Hailsham explained that the law should be concerned not only with the national press but also with "some small local paper" and "some scurrilous 'rag' put out with a view to encouraging demonstrations outside a magistrates' court".[10]

A.10 An amendment was moved in the Lords to omit the words "or a section of the public" from the Bill; Lord Gardiner again argued that the effect of those words was to narrow freedom of speech and widen the scope of contempt by publication beyond what was envisaged in the Phillimore report.[11] He was not convinced by Lord Hailsham's example of the local newspaper, as though it is

4 Phillimore report para 80.

5 [1973] 1 WLR 202, 208 to 209.

6 R Dhavan, "Contempt of Court and the Phillimore Committee Report" (1976) 5 *Anglo-American Law Review* 186, 228.

7 *Hansard* (HL), 9 Dec 1980, vol 415, col 660.

8 *Hansard* (HC), 2 Mar 1981, vol 1000, cols 29 to 30.

9 *Hansard* (HL), 9 Dec 1980, vol 415, col 691.

10 *Hansard* (HL), 9 Dec 1980, vol 415, col 695.

11 *Hansard* (HL), 15 Jan 1981, vol 416, cols 179 to 180.

mainly bought by those in the locality it is not limited to them, and therefore falls within the "public" without the need for the "section". It was doubtful whether, for example, a trade union branch meeting amounted to a "section of the public".

A.11 Lord Simon of Glaisdale said that the words "section of the public" had given difficulty in two branches of the law, namely race relations and charity law, but were now reasonably clear. Leaving this phrase out, as proposed by the amendment, would lessen the protection given by the clause.[12]

A.12 Lord Mackay of Clashfern explained that the purpose of the phrase was to include meetings and functions to which the public are invited, in accordance with the Phillimore report. The draft was therefore designed to implement the Phillimore report, not to go beyond it. Lord Gardiner, with some reluctance, withdrew the amendment.

A.13 There is a natural limit on liability for communication to a section of the public. In some cases, the section to which the communication is made is so local, narrow or specialised that the chance of the information reaching anyone likely to be engaged in the proceedings in question is remote. For example, at another point in the same debate, Lord Wigoder, discussing the meaning of "serious risk", gives an example where a local radio station in Doncaster comments on cases before a magistrates' court in the Isle of Wight.[13] In these cases, the test of "publication" is met, but the test of "substantial risk" is not.

RISK OF PREJUDICE TO THE COURSE OF JUSTICE

A.14 Section 2(2) of the 1981 Act provides that:

> The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

This replaces the common law test, which is that the rule applies if the publication is "calculated" to interfere with the proceedings.

A.15 The following points arose in the debates and the academic literature.

(1) What is the need for this requirement?

(2) What are the consequences of the restriction to publications risking prejudice to the particular proceedings that are active at the time?

(3) Is there a need for the two-hurdle approach, both that the risk is "substantial" and that the impediment or prejudice is "serious"?

[12] *Hansard* (HL), 15 Jan 1981, vol 416, col 180.

[13] *Hansard* (HL), 15 Jan 1981, vol 416, cols 183 to 184.

(4) Is this requirement sufficient to satisfy the human rights test as set out in the judgment of the European Court of Human Rights ("ECtHR") in the *Sunday Times* case[14] or should there be a stricter test of "necessity": for example, that the rule applies only if the publication makes a fair trial impossible?

Origin of the requirement

A.16 The members of the House of Lords in the *Sunday Times* case were well aware of the importance of freedom of speech, and of the need to balance it with the requirements of justice. However, they held that there was a general rule against prejudgment by the press, without the need to show the danger of prejudice to the interests of justice on each individual occasion. Lord Reid, for example, held that the true mischief of "trial by newspaper" was not the risk of prejudice to the particular proceedings but the creation of a climate of disrespect for the legal process generally.[15] Lord Simon observed that:

> To attempt to strike anew in each case the balance between the two public interests involved in the instant appeal — in freedom of discussion and in due administration of justice — would not be satisfactory. The law would then be giving too uncertain a guidance in a matter of daily concern, and its application would tend to vary with the length of the particular judge's foot. The law must lay down some general guide lines.[16]

A.17 The Phillimore report[17] observed that, before the *Sunday Times* case, the test applied was usually whether the publication was "calculated" to impede the course of justice,[18] or created a serious risk that it may be interfered with.[19] The "prejudgment" test appears to be original with the House of Lords.[20] The Phillimore report believed that this test, though understandable as an attempt to create certainty, was too wide and that the test proposed by the Divisional Court was preferable. Within that test, they proposed to substitute "will" for "may" and "seriously impeded or prejudiced" for "interfered with".[21]

A.18 The Green Paper recorded this recommendation but contained no discussion of its merits, as most of its discussion of the strict liability rule concerned the question of timing.[22]

A.19 Both the Phillimore report and the Green Paper appeared before the judgment of the ECtHR in the *Sunday Times* case, and Phillimore did not explicitly base this

[14] *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) ("*Sunday Times* case").

[15] *A-G v Times Newspapers Ltd* [1974] AC 273, 300.

[16] *A-G v Times Newspapers Ltd* [1974] AC 273, 319.

[17] Paras 103 to 105.

[18] *Robson v Dodds* (1869) 20 LT 941.

[19] *Sunday Times* case, in the Divisional Court [1973] QB 710, 724 to 725.

[20] Phillimore report paras 106 to 108.

[21] Paras 112 to 113.

[22] Contempt of Court: a Discussion Paper (1978) Cmnd 7145 para 10.

recommendation on human rights grounds. There is, however, a resemblance in the reasoning. The Phillimore test is that liability only exists if there is a serious risk that the publication will interfere with the course of justice. The ECtHR requires that the restriction be "necessary" in the particular case.[23] Both views envisage tests to be applied case by case, as opposed to a blanket rule against all comment on the proceedings in case some of it should be prejudicial.

A.20 The Phillimore recommendation was accordingly implemented by section 2(2) of the 1981 Act. As explained by Lord Hailsham, the Lord Chancellor, while introducing the Bill:

> It [clause 2(2)] follows exactly the words of the Phillimore report, and for my part I can think of no better to express the purpose. It puts an end, of course, to the prejudgment criterion which was adopted by your Lordships' House in the *Sunday Times* case.[24]

Prejudice to particular proceedings

A.21 The definition of "the strict liability rule" in section 1 of the 1981 Act is narrowly focused. Its scope is only such conduct as tends to interfere with the course of justice "in particular legal proceedings". Section 2 then confines the operation of that rule to a publication taking place when "the proceedings in question" are active, creating the risk of impediment or prejudice to "the proceedings in question".

A.22 There are therefore at least three exclusions from the rule, though the effect of the exclusion is not the same in all cases.

(1) Conduct tending to interfere with the justice system in general but not with any particular proceedings is outside the ambit of section 1.[25]

(2) Conduct during and related to one set of proceedings but likely to prejudice or impede a future set of proceedings is not caught. (They may fall within the common law liability for intentional prejudice, or within an order under section 4(2).)

(3) A publication might not in itself be likely to cause "serious" prejudice but may form part of a wave of publicity which has that cumulative effect. Section 2(2) would seem to exclude such a publication from liability.

The double hurdle

A.23 Section 2(2) contains a double hurdle: the possible impediment or prejudice must be "serious", and the risk of its occurring must be "substantial". The second condition did not form part of the original Bill, and was first proposed as an

[23] See para A.33 below.

[24] *Hansard* (HL), 9 Dec 1980, vol 415, col 660.

[25] Where this conduct takes the form of a publication impugning the courts or a judge, it is known as scandalising the court: see Contempt of Court: Scandalising the Court (2012) Law Commission Consultation Paper No 207.

amendment in the Lords.[26] This amendment was withdrawn, but reintroduced and accepted at a later stage.[27]

A.24 The Phillimore report said:

> … the law should aim at preventing serious prejudice, not serious risks. It has been emphasised many times by the courts that trivial cases ought not to be brought before the courts, and the triviality relates to the degree of prejudice. On the other hand, the creation of a risk of serious prejudice should always be prohibited unless the risk is so slight as to fall within the ordinary *de minimis* rule.[28]

This was a deliberate departure from the formula used by the Divisional Court in the *Sunday Times* case, which spoke of a "serious risk that the course of justice may be interfered with".

A.25 According to Dhavan:

> The committee tried to resolve these questions by providing a more certain definition of the meaning of contempt. The definition proferred [sic] was as follows:
>
> > The test of contempt is whether the publication complained of creates a risk that the cause [sic][29] of justice will be seriously impeded or prejudiced.[30]
>
> The wording is such that it comments on the gravity of the risk rather than the gravity of the effect.[31] A comment in a local Dundee newspaper may be of a kind that is capable of really vitiating a trial being staged in London. But it may be conclusively shown that in actual fact no copies of that paper were in fact sold in London or even crossed the border into England. It is true that the Report suggests that the rest [sic] enunciated "must be applied in the light of all the surrounding circumstances existing at the time of publication"[32] but that might not help the publisher because contempt is seen as a crime of strict liability.[33]

However, the thrust of Dhavan's argument was not that a reference to the gravity of the risk should be added to or substituted for the reference to the gravity of the effect, but that liability should not be strict at all.

[26] *Hansard* (HL), 15 Jan 1981, vol 416, col 182.

[27] *Hansard* (HL), 10 Feb 1981, vol 417, col 142.

[28] Para 113.

[29] The Phillimore report has "course".

[30] Phillimore report para 113.

[31] Presumably the intended meaning was the opposite.

[32] Phillimore report para 113.

[33] R Dhavan, "Contempt of Court and the Phillimore Committee Report" (1976) 5 *Anglo-American Law Review* 186, 248.

A.26 The first mention of this issue in the Parliamentary debates was by Lord Elwyn-Jones, at the second reading of the Bill in the House of Lords.[34] The Bill as it stood changed the law by restricting liability to cases where a publication creates a risk that the course of justice in the proceedings in question will be *seriously* impeded or prejudiced. It should be improved further by requiring that the risk, too, should be serious. (Lord Wigoder, in the same debate,[35] preferred "substantial" to "serious" risk.) Lord Mishcon, in the same debate, pointed out that the "serious risk" test was the one preferred by the Divisional Court and the Court of Appeal in the *Sunday Times* case.[36]

A.27 The amendment was first moved by Lord Elwyn-Jones in committee.

> We acknowledge the importance of the change in the strict liability rule which the Bill accomplishes by adding "seriously" before "impeded", as it does in line 18. However, we think that the risk itself, that the course of justice in the proceedings in question should be a serious one, ought to be underlined in this new statutory provision. It is not enough that the risk should be merely trivial, or minimal, or marginal. It should be substantial.[37]

Lord Hailsham replied that "we are talking here about the number of angels that exist upon the point of a needle and that it is quite impossible to consider a case in which a risk of substantial prejudice would not itself be a substantial risk".[38] He further quoted the Phillimore report in saying that "the law should aim at preventing serious prejudice, not serious risks".[39]

A.28 Lord Wigoder explained the distinction further.

> A serious risk is something rather different from a remote and fanciful risk. It has been put to me, for example, that if a local radio station in Doncaster cared to comment upon proceedings that were taking place before a magistrates' court in the Isle of Wight it might be said that that was creating a risk of serious prejudice. That would not be the same as creating a serious risk of serious prejudice, because of the extreme improbability that any of the magistrates who sit in the Isle of Wight would happen to be holidaying in Doncaster at the time of the particular broadcast.[40]

In particular, this restriction was necessary in order to comply with the ECtHR's decision in the *Sunday Times* case. The court ruled that there should be interference with freedom of expression only if it were "absolutely certain" that the authority of the judiciary might be tampered with or impaired. That clearly implied that the risk must be substantial and serious.

[34] *Hansard* (HL), 9 Dec 1980, vol 415, cols 665 to 666.

[35] *Hansard* (HL), 9 Dec 1980, vol 415, col 670.

[36] *Hansard* (HL), 9 Dec 1980, vol 415, col 675.

[37] *Hansard* (HL), 15 Jan 1981, vol 416, col 182.

[38] *Hansard* (HL), 15 Jan 1981, vol 416, col 183.

[39] See para A.24 above.

[40] *Hansard* (HL), 15 Jan 1981, vol 416, col 184.

A.29 The amendment was re-introduced in the House of Lords on 10 February 1981, and passed without opposition, though Lord Hailsham still took the view that the question was one of angels on needles.[41] One reason given was that, under the Bill as it then stood, the strict liability rule was going to apply to many tribunals as well as the ordinary courts: in these cases, as well as that where proceedings are technically "active" but not likely to take place in the near future, it was important for the press to evaluate the actual likelihood of prejudice.

A.30 At the second reading in the House of Commons, Michael Havers, the Attorney General, explained the change as follows.

> Secondly, the Bill adopts the test of strict liability contempt recommended in paragraph 113, but with the important modification that the word "risk" is qualified by the adjective "substantial". This test reverts, though with tighter wording, to the sort of test which was being formulated by the courts until 1973.[42]

A.31 In the same debate, it was argued that the change was insubstantial, and that it had been allowed in a spirit of concession rather than because a convincing case had been made for it.[43]

The human rights test

A.32 The "prejudgment" test was one of the main issues discussed in judgment of the ECtHR in the *Sunday Times* case. The main thrust of that judgment was that it is not sufficient to weigh the interests of free speech against the interests of justice in general terms in order to arrive at a defensible rule. The Convention, in Article 10, provides a right to freedom of expression that may only be curbed if the restriction is "prescribed by law and … necessary in a democratic society … for maintaining the authority and impartiality of the judiciary". "Necessary" in this context need not mean "absolutely indispensable", but means more than reasonable or defensible: the correct level is that of a pressing social need.[44]

A.33 According to the Court, it follows from this that it is not only the law imposing the restriction in general terms that needs to be "necessary": the restriction must also be "necessary" in each individual case.[45] In other words, the law itself needs to incorporate a test of factual necessity, and must not take the form of a blanket rule.

A.34 Lord Wigoder, in the passage quoted above,[46] indicated that the amendment requiring a "substantial" risk "is perhaps more consistent than the Government draft with the ECtHR's decision in the *Sunday Times* thalidomide case". It is arguable that even that amendment does not go far enough, and that to be fully consistent with the *Sunday Times* case the test should be one not of risk but of

[41] *Hansard* (HL), 10 Feb 1981, vol 417, col 142 and following.

[42] *Hansard* (HC), 2 Mar 1981, vol 1000, col 30.

[43] *Hansard* (HC), 2 Mar 1981, vol 1000, col 74, Donald Anderson.

[44] *Sunday Times v UK* (1979-80) 2 EHRR 245 (App No 6538/74) at [59].

[45] *Sunday Times v UK* (1979-80) 2 EHRR 245 (App No 6538/74) at [65].

[46] See para A.28 above.

absolute certainty, as otherwise one cannot be sure that the restraint is *necessary* for the safeguarding of the judicial process. On the other hand, one could interpret the relevant passage in the judgment as meaning that there must be certainty as to the existence of the risk.

A.35 David Mellor raised this point at the second reading in the House of Commons.

> One school of thought believes that what that court was requiring of our legislation was that there should be an absolute certainty that the fair conduct of a trial would be prejudiced before proceedings for contempt were taken. If that view is right, the formulation does not go far enough.[47]

The Attorney General answered briefly that the Bill met the only live issue in the *Sunday Times* case, by removing the "prejudgment" test.

A.36 Later in the debate Mr Mellor made the same point at greater length, emphasising that the test laid down by the ECtHR was that any restriction must be "*necessary* in a democratic society for maintaining the authority of the judiciary".[48] In other words, even with the addition of the word "substantial", the test in clause 2 might not go far enough.

A.37 Nicholas Fairbairn, the Solicitor General for Scotland, answered that the restraint existed to protect "not the authority of the judiciary but the individual in a position of accusation or dispute".[49]

A.38 Young argues as follows.

> Closer reading of the European Court's judgment suggests an interpretation which has broader implications for British contempt law. The crucial part is the European Court's emphasis of the difference between its approach and that of the English courts:
>
> > The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.[50]
>
> The Act does nothing to bring about a change in the approach of the courts; and there is little evidence to suggest that the courts do adopt this approach. The key to such a change is not to be found in slight semantic adjustments to formulations of the contempt principle, but in the way in which the judges apply it.[51]

[47] *Hansard* (HC), 2 Mar 1981, vol 1000, col 30.

[48] *Hansard* (HC), 2 Mar 1981, vol 1000, col 69.

[49] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 101 to 102.

[50] *Sunday Times v UK* (1979-80) 2 EHRR 245 (App No 6538/74) at [65].

[51] J Young, "The Contempt of Court Act 1981" (1981) 8 *British Journal of Law and Society* 243, 246.

A.39 As against this, Bailey argues that there is no fundamental inconsistency between the approaches of the ECtHR and of the House of Lords in the *Sunday Times* case (and, therefore, between the approach of the ECtHR and the position under the 1981 Act), except for the question of whether the restraint was in fact necessary.[52]

IMPEDING PROCEEDINGS

Introduction

A.40 The principal focus of the 1981 Act is on publications which may have an adverse effect on legal proceedings. Different verbs are used to describe this effect. The relevant provisions are as follows (with emphasis on the verbs added).

> **The strict liability rule**
>
> **1.** In this Act "the strict liability rule" means the rule of law whereby conduct may be treated as a contempt of court as tending to *interfere* with the course of justice in particular legal proceedings regardless of intent to do so.
>
> **Limitation of scope of strict liability**
>
> **2.**—(1) ...
>
> (2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously *impeded or prejudiced*.
>
> **Contemporary reports of proceedings**
>
> **4.**—(1) ...
>
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of *prejudice* to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.
>
> **Discussion of public affairs**
>
> **5**. A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of *impediment or prejudice* to particular legal proceedings is merely incidental to the discussion.
>
> **Savings**

[52] S H Bailey, "The Contempt of Court Act 1981" (1982) 45 *Modern Law Review* 301, 303 to 304.

6. Nothing in the foregoing provisions of this Act—

(a) …

(b) …

(c) restricts liability for contempt of court in respect of conduct intended to *impede or prejudice* the administration of justice.

A.41 The meaning of "impeding" was discussed in *Attorney General v MGN Ltd and News Group International Ltd*:[53]

> The issue of impeding the course of justice outside the trial processes has been less well trodden. However, as Oliver LJ observed in *Attorney General v Times Newspapers Limited*,[54] cited by Simon Brown LJ in *Attorney General v Unger*:[55]
>
> > The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law, including the freedom of a person accused of a crime to elect, so far as the law permits him to do so, the mode of trial which he prefers and to conduct his defence in the way which seems best to him and to his advisers. Any extraneous factor or external pressure which impedes or restricts that election or that conduct, or which impels a person so accused to adopt the course in the conduct of his own defence which he does not wish to adopt, deprives him to an extent of the freedom of choice which the law confers upon him and is, in my judgment, not only a prejudice but a serious prejudice.
>
> Although Oliver LJ, at the end of this passage, referred to prejudice, these are examples, but not a comprehensive list, of occasions when the course of justice would be impeded. Another such risk may well be found in a well justified submission that the trial should be stayed on the basis of the contents of the article in question, or the trial moved (see for example, *Attorney General v British Broadcasting Corporation*[56] and *Attorney General v Birmingham Post and Mail Ltd*[57]).

A.42 "Impeding" also seems to include influence on parties, which distorts the conduct or result of the proceedings rather than preventing them from happening: it is distinguished from "prejudice" because the distortion does not take the form of influencing the judge or jury.

[53] [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [29].

[54] *The Times*, 12 Feb 1983.

[55] [1998] 1 Cr App R 308, 315.

[56] [1992] Crown Office Digest 254 (also reported *The Independent*, 3 Jan 1992: *our note*).

[57] [1999] 1 WLR 361.

> In our judgment, as a matter of principle, the vilification of a suspect under arrest readily falls within the protective ambit of s 2(2) of the 1981 Act as a potential impediment to the course of justice. At the simplest level, publication of such material may deter or discourage witnesses from coming forward and providing information helpful to the suspect, which may, (depending on the circumstances) help immediately to clear him of suspicion or enable his defence to be fully developed at trial. This may arise, for example, because witnesses may be reluctant to be associated with or perceived to be a supporter of the suspect, or, again, because they may begin to doubt whether information apparently favourable to the suspect could possibly be correct. Adverse publicity may impede the course of justice in a variety of different ways, but in the context we are now considering, it is not an answer that on the evidence actually available, the combination of the directions of the judge and the integrity of the jury would ensure a fair trial. The problem is that the evidence at trial may be incomplete just because its existence may never be known, or indeed may only come to light after conviction.[58]

This sort of "impeding" is connected with the "pressure principle" discussed in the *Sunday Times* case.[59]

A.43 We have found nothing in the debates directly relevant to the meaning of "impeding", or to the distinction between impeding and prejudicing.

A.44 The debates about when the "active" period should run, discussed below,[60] contain some discussion of the effect of publicity between the time of the arrest warrant and the time of charge. Those in favour of the earlier date pointed out the prejudicial effect of publicity during this period. Those against pointed out that the right sort of publicity could assist in the suspect being found. But neither devoted much, if any, attention to the possible effect of publicity in enabling the suspect to escape, which would be a form of "impeding".

A.45 The distinction between "impeding" and "prejudicing" has some, but not a complete, correlation to two other distinctions.

(1) The distinction between intentional contempt and contempt under the strict liability rule. "Impeding" is more likely to fall within intentional contempt, as it can take the form of pressure on courts, witnesses or parties other than by means of publication. As pointed out, however, the correlation is not absolute: the statutory description of each of the two forms of contempt speaks of "impeded *or* prejudiced",[61] so all four permutations are possible.

[58] [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [31].

[59] See para A.51 below.

[60] See para A.65 below.

[61] See para A.40 above (emphasis added).

(2) The distinction between the "pressure principle" and the "prejudgment principle" in the *Sunday Times* case. Pressure, whether or not by means of publication, is more likely to impede the proceedings. Prejudgment is generally a function of publications, and as the name implies, is generally feared as prejudicial.

Similarly, the two latter distinctions have some resemblance between themselves: pressure is more likely than prejudgment to be intentional.

A.46 For these reasons, the bulk of this section is devoted to the Parliamentary discussion of the pressure principle, as that is the type of "impeding" envisaged in *Attorney General v MGN Ltd and News Group International Ltd*.[62]

Before the Bill

A.47 A wide variety of actions have been held to constitute contempt because they are intended to impede or prejudice the administration of justice. A common theme is improper pressure, whether on the court itself, a witness or the parties to litigation.

A.48 An obvious example of improper pressure is the attempt to threaten or persuade witnesses not to give evidence, or to give their evidence in a particular way. This may equally be treated as contempt and as perverting the course of justice, and the test for the two offences appears to be the same.[63] The same principle applies to reprisals after the event, and in all these cases it appears that there must be a positive intention to influence or to punish as the case may be.[64]

A.49 Pressure on litigants (including defendants in criminal cases) is a comparatively recent concern, and the issues are less clear-cut, as a litigant is not under a public duty to pursue or cease litigation only for the correct reasons. In the case of pressure on the court or on witnesses, the danger is that the pressure may compromise impartiality or independence; in the case of pressure on litigants the danger is that the pressure impedes their freedom to conduct their case as they think best.

A.50 Pressure can be exerted either directly on the individuals concerned or by means of publication aiming to mobilise public opinion. Inflammatory publications intended to influence a jury or court, witnesses or parties can be either contempt or perverting the course of justice: the leading case is *Tibbits and Windust*.[65]

A.51 One of the two possible grounds of liability discussed in *AG v Times Newspapers Ltd*[66] ("the *Sunday Times* case") was that the publication of the articles amounted to undue pressure on Distillers to cease resisting the proceedings or to settle them on terms favourable to the claimants. (The other ground, the "prejudgment principle" that comment on matters which are the subject of pending proceedings

[62] [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408.

[63] *Webster v Bakewell Rural District Council* [1916] 1 Ch 300.

[64] *A-G v Butterworth* [1963] 1 QB 696.

[65] [1902] 1 KB 77.

[66] [1974] AC 273.

is contrary to public policy, is part of the "strict liability rule" and is discussed above.[67])

A.52 It was held in the *Sunday Times* case that pressure on litigants is not automatically improper: comment on a matter of public interest made "in a fair and temperate way and without any oblique motive"[68] is acceptable. There was some difference between the members of the House of Lords on where the boundary lay; for example, Lord Diplock distinguished between private and public means of persuasion,[69] but Lord Simon regarded both as equally impermissible.[70] This issue did not need to be resolved, as the majority of the House preferred to rest their conclusions on the prejudgment principle.

A.53 There was accordingly some reason to believe that pressure on litigants is only contempt when definitely improper means are used, such as threats or intimidation: public abuse qualifies because it is a threat to injure a person's reputation. The Phillimore report recommended that this test be stated explicitly in statute:

> We therefore recommend that conduct directed against a litigant in connection with the legal proceedings in which he is concerned, which amounts to intimidation or unlawful threats to person, property or reputation should be capable of being treated as a contempt of court; but that conduct falling short of that should not be a contempt.[71]

A.54 The Green Paper argued that this approach may be too narrow, and proposed an alternative approach distinguishing "between private influence and pressure on the one hand and public obloquy on the other".[72]

A.55 The ECtHR, in the *Sunday Times* case,[73] recognised the "pressure principle" referred to by the House of Lords, and held that it was sufficiently certain.

> The Court also considers that there can be no doubt that the 'pressure principle' was formulated with sufficient precision to enable the applicants to foresee to the appropriate degree the consequences which publication of the draft article might entail. In *Vine Products Ltd v Green*,[74] Mr Justice Buckley had formulated the law in this way:

[67] See para A.32 and following above.

[68] [1974] AC 273, 299 by Lord Reid.

[69] [1974] AC 273, 313.

[70] [1974] AC 273, 319. See also Lord Cross at 332 to 333.

[71] Para 62.

[72] Contempt of Court: a Discussion Paper (1978) Cmnd 7145 paras 36 to 42.

[73] (1979) 2 EHRR 245 (App No 6538/74).

[74] [1966] Ch 484, 495 to 496.

> It is a contempt of this court for any newspaper to comment on pending legal proceedings in any way which is likely to prejudice the fair trial of the action. That may arise in various ways. It may be that the comment is one which is likely in some way or other to bring pressure to bear upon one or other of the parties to the action, so as to prevent that party from prosecuting or from defending the action, or encourage that party to submit to terms of compromise which he otherwise might not have been prepared to entertain, or influence him in some other way in his conduct in the action, which he ought to be free to prosecute or to defend, as he is advised, without being subject to such pressure.[75]

A.56 However, it was held not to justify restraint in the circumstances, as the articles in question did not add significantly to the public pressure that already existed.

> One of the reasons relied on was the pressure which the article would have brought to bear on Distillers to settle the actions out of court on better terms. However, even in 1972, publication of the article would probably not have added much to the pressure already on Distillers (see para 29, second sub-para, above). This applies with greater force to the position obtaining in July 1973, when the House of Lords gave its decision: by that date, the thalidomide case had been debated in Parliament and had been the subject not only of further press comment but also of a nationwide campaign (see paras 13 and 14 above).[76]

There was no discussion of whether a law of contempt based on the pressure principle alone would be justifiable in principle. The main point of the decision was that a restriction based on the prejudgment principle was too wide.

The Bill

A.57 The 1981 Act makes no provision specifically relating to pressure on litigants. The common law in this area, whatever it may be, is therefore unaltered.[77] In this respect the Act follows the Bill, which appears to have departed from the Phillimore recommendation for the reasons given in the Green Paper.

A.58 In the second reading debate in the House of Lords, Lord Mishcon pointed out that the Bill did not give effect to the Phillimore recommendation[78] that "it should also be provided by statute that bringing influence or pressure to bear upon a party to proceedings shall not be held to be a contempt unless it amounts to intimidation or unlawful threat to his person, property or reputation".[79] The Lord Chancellor interposed that the Strasbourg judgment related only to the prejudgment principle and that the pressure principle was therefore unaffected.

[75] (1979) 2 EHRR 245 at [51].

[76] (1979) 2 EHRR 245 at [63].

[77] For "deterring and obstructing" generally, see *Halsbury's Laws of England,* vol 9(1) (4th ed 1998) para 436 and cases cited.

[78] See para A.53 above.

A.59 An amendment was introduced in the House of Lords inserting a provision that

> Bringing influence or pressure to bear upon a party to proceedings shall not be held to be a contempt unless it amounts to intimidation or unlawful threats to his person, property or reputation.[80]

A.60 Lord Gardiner cited a Law Society report to the effect that implementing the recommendation about risk of prejudice or impediment alone would only return the law to the position taken by the Divisional Court and Court of Appeal in the *Sunday Times* case. This, without the recommendation about threats and intimidation, may not be sufficient to comply with the judgment of the ECtHR. Lord Mishcon agreed, saying that there had been some doubt expressed[81] as to whether the Lord Chancellor, in the second reading debate, had been right in saying that disapproval expressed by the ECtHR extended only to the prejudgment principle.

A.61 The Lord Chancellor opposed the amendment. The merits of the pressure principle did not arise for decision in the Strasbourg proceedings, as the *Sunday Times* had won on that point in the House of Lords.[82] It is not sufficient to protect litigants from open intimidation and threats: protection from subtler forms of pressure is often necessary to ensure a fair trial in accordance with Article 6 of the Convention. A further, technical, point is that making the amendment in that form would probably only affect the strict liability principle, whereas most instances of improper pressure would fall within intentional prejudice.

A.62 The amendment was withdrawn.

A.63 At second reading in the House of Commons, the Attorney General explained why this particular recommendation of the Phillimore report had not been adopted.[83] In his view it was desirable to preserve the position on the "pressure principle" laid down by the House of Lords in the *Sunday Times* case, namely that a fair and temperate campaign to influence a litigant is permissible but an unfair and intemperate campaign is not. The Phillimore recommendation would have the effect of allowing any campaign, however unfair and intemperate, falling short of actual intimidation.

A.64 No further reference was made in the Commons either to the Phillimore recommendation about threats and intimidation or to the meaning of "impede".

[79] *Hansard* (HL), 9 Dec 1980, vol 415, col 675.

[80] *Hansard* (HL), 15 Jan 1981, vol 416, col 194.

[81] Principally by the Outer Circle Policy Unit.

[82] That is, a majority of their lordships appeared to regard the degree of pressure as acceptable. As they held against the *Sunday Times* on the prejudgment point, their conclusions on pressure were expressions of opinion and were not necessary for the result.

[83] *Hansard* (HC), 2 Mar 1981, vol 1000, col 39.

TIME WHEN PROCEEDINGS ARE ACTIVE

The statutory provisions

A.65 The definition of "the strict liability rule" in section 1 of the 1981 Act is narrowly focused. Its scope is only such conduct as tends to interfere with the course of justice "in particular legal proceedings". Section 2 then confines the operation of that rule to a publication taking place when "the proceedings in question" are active, creating the risk of impediment or prejudice to "the proceedings in question".

A.66 Sections 2(3) and (4) of the 1981 Act read:

> (3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.
>
> (4) Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.

A.67 Schedule 1 of the Act provides that criminal proceedings become "active" from whichever of the following steps is the first to occur:

> (a) arrest without warrant;
>
> (b) the issue, or in Scotland the grant, of a warrant for arrest;
>
> (c) the issue of a summons to appear, or in Scotland the grant of a warrant to cite;
>
> (d) the service of an indictment or other document specifying the charge;
>
> (e) except in Scotland, oral charge.[84]

They cease to be active when concluded:

> (a) by acquittal or, as the case may be, by sentence;
>
> (b) by any other verdict, finding, order or decision which puts an end to the proceedings;
>
> (c) by discontinuance or by operation of law.[85]

A.68 Appeals are treated as separate proceedings.[86]

[84] Para 4.

[85] Para 5.

[86] Paras 15 and 16.

The issues

A.69 The principles behind the rule for criminal cases is that the further away in time a given publication is from the proceedings to which it relates, the less likely it is to prejudice or impede those proceedings, and the stronger the case for a requirement that it was intended to do so.

A.70 The following possibilities for the starting point were canvassed.

(1) When proceedings are imminent (the common law test).

(2) Summons, warrant or arrest (as in the 1981 Act).

(3) When the accused is charged (proposed in the Phillimore report).

Before the Bill

A.71 The Justice report "Contempt of Court"[87] drew attention to the case of *R v Odhams Press Ltd ex parte Attorney-General*.[88] This case held that, even before a suspect is arrested, it can be contempt to publish details which would not have been admissible as evidence at his or her trial, and that liability is strict. The Shawcross report recommended that this should continue, but that there should be liability only if the publisher knows the contents of the publication, and knows that the arrest of the suspect is imminent.[89] These defences were enacted in the Administration of Justice Act 1960[90] and reproduced with changes in section 3 of the 1981 Act. It should be noted that the recommendation only concerns particular forms of prejudicial publicity, such as the disclosure of previous convictions, and does not envisage a general ban on prejudgment of the proceedings.

A.72 The House of Lords in the *Sunday Times* case held that the prejudgment principle could apply to a case that was either pending or imminent. Lord Reid said:

> There is no magic in the issue of a writ or in a charge being made against an accused person. Comment on a case which is imminent may be as objectionable as comment after it has begun.[91]

The effect of the restriction is not to prevent publication but to postpone it: the restriction therefore lapses when the proceedings are concluded or settled.

A.73 Lord Simon of Glaisdale explained that interference with negotiations for settlement is as culpable as interference with actual litigation, and that the restriction therefore applies even though the proceedings are "dormant".[92] Like Lord Reid, he held that the restriction lapses when the proceedings are

87 Justice (Chairman: Lord Shawcross), *Contempt of Court* (1959), ("Shawcross report").

88 [1957] 1 QB 73.

89 Shawcross report pp 10 to 12.

90 Section 11(1).

91 *A-G v Times Newspapers Ltd* [1974] AC 273, 301.

92 *A-G v Times Newspapers Ltd* [1974] AC 273, 317. Lord Diplock makes the same point at 311.

concluded; but he does not address publications that may affect proceedings that have not yet begun, except for one remark about "TV discussion of matters which are the subject matter of pending or imminent litigation".[93]

A.74 Lord Cross discussed and rejected a submission that, because civil cases take longer than criminal cases, the restriction in criminal cases should apply when the proceedings are "imminent" but that in civil cases it should not begin until they are set down for trial.[94]

A.75 The Phillimore report argued that the test of proceedings being "imminent" was too vague.[95]

> The risks of creating prejudice and of damaging public confidence before proceedings begin undoubtedly exist, but they should not be exaggerated and can largely be eliminated if a sufficiently early starting point for the operation of the law is selected. … These arguments confirm our view … that the law of contempt should not apply before proceedings begin.

A.76 For criminal proceedings the restrictions should start when the accused is summoned or charged.

> It is essential that whatever starting point is chosen should be readily ascertainable so that the editor or legal adviser who has to make a decision at short notice has a fair opportunity of informing himself of the position. The choice lies between an earlier moment, such as the issue of a warrant for the arrest, or possibly the actual arrest, of the wanted man and a later moment such as when the accused is charged or first appears in court. The disadvantage of a later date is that it would allow comparatively unrestricted comment during a police search for the wanted man which might culminate at any moment in an arrest and charge. On the other hand, a warrant for arrest is usually issued in private, and even an actual arrest may not, for good reasons, be immediately announced by the police. In these circumstances the press might well not know whether they were at risk. Moreover, if the wanted man was never found publication would be restricted, at least in theory, as long as the warrant for his arrest still existed. **We have come to the conclusion that the right point in England and Wales is the moment when the suspected man is charged or a summons served …**[96]

A.77 These recommendations would have the further advantage of coinciding with the *sub judice* rule in the House of Commons, which also restricts debate only from the time when a charge is laid.

[93] *A-G v Times Newspapers Ltd* [1974] AC 273, 321 to 322.

[94] *A-G v Times Newspapers Ltd* [1974] AC 273, 323.

[95] Para 117.

[96] Para 123 (emphasis in original).

A.78 The Phillimore report recommended that the law of contempt should cease to apply at the conclusion of the trial or hearing at first instance.[97] Exceptions should be:

(1) where criminal proceedings result in a conviction, restrictions should continue until sentence is passed;

(2) where the trial ends without a verdict or because a jury disagrees, restrictions should continue until it is clear that there will be no further trial;

(3) there is an argument for restricting publications liable to deter a party from appealing (but Phillimore comes to no definite conclusion on this);

(4) restrictions should apply again when, following an appeal, a new trial is ordered;

(5) restrictions should apply in the case of a Crown Court appeal by way of rehearing, from the time of setting down.

With these exceptions, appellate proceedings themselves should not be protected, as appeal judges are unlikely to be improperly influenced.

A.79 The Green Paper described the Phillimore proposals in full, setting out the arguments for and against them.

> It has many times been pointed out that statements made before proceedings begin can be just as prejudicial as those made thereafter: "it is possible very effectively to poison the fountain of justice before it begins to flow". Moreover, the "imminent" rule may not be much more uncertain in practice than any apparently fixed point which might be selected. Further, the media already have the protection of section 11 of the Administration of Justice Act 1960, which provides a defence to a publisher if he can show that he did not know and had no reason to suppose that proceedings were pending or imminent, as the case may be. … But in spite of these arguments against restricting the period of application of contempt, Phillimore considered that the concept of "imminence" was unacceptably vague and had "an inhibiting effect on the freedom of the press which is out of all proportion to any value there may be in preserving it".[98]

A.80 In relation to criminal proceedings, the Green Paper acknowledged the force of the argument in the Phillimore report that the time of charge was the easiest to identify and ascertain.

[97] Para 132.

[98] Contempt of Court: a Discussion Paper (1978) Cmnd 7145 paras 10 to 23.

> These are important considerations. But, in giving full weight to them, dangers may be created in other directions. Charges often follow shortly after a serious crime becomes known; and indeed, from the point of view of an accused person it may be as important to have protection from prejudicial comment during the period immediately before he is charged, when media and public interest in the crime is strong, as it is after a charge has been formally laid.

A.81 The Green Paper listed various alternative approaches, including leaving the existing law as it was. In criminal proceedings the alternatives to Phillimore were: to leave the "imminent" rule in place; to backdate it to when the crime is known to have been committed (as in Scotland); the same, subject to a defence of public interest. It expressed no decided preference among these approaches.

A.82 The ECtHR did not discuss the question of timing. The majority held that the existing rule, both in its "pressure" form and in its "prejudgment" form was certain enough to satisfy the test of being "prescribed by law". This implies that the "imminent" test is not unacceptably vague.[99]

The Bill

A.83 The 1981 Act more or less follows the Phillimore proposals, except that criminal proceedings can become active at the time of the initial arrest or warrant rather than when a charge is laid. The Phillimore report had expressed some anxiety that a journalist or editor might not know whether a warrant for arrest had been issued, but Lord Hailsham in introducing the Bill argued that, in a case of notoriety where such comment is likely, this fact is readily ascertainable.[100] An amendment was moved to substitute the Phillimore definition, namely that the prohibition should start when the accused is charged or summoned.[101] As against that, it was argued that, if there are indeed difficulties in ascertaining whether a suspect has been arrested, there will be a defence under section 3, that the publisher could not reasonably have known that the proceedings were active. The amendment was withdrawn.

Criminal proceedings

A.84 As stated, the Bill departs from the Phillimore recommendations by choosing the date of arrest or the issue of a warrant, rather than the date of charge, as the starting point of liability.

HOUSE OF LORDS, SECOND READING

A.85 As explained by the Lord Chancellor in the second reading:

[99] The minority opinion of Judge Zekia at [18] does give lack of accuracy in the rules for when civil proceedings are *sub judice* as a reason for holding that the law is uncertain.

[100] *Hansard* (HL), 9 Dec 1980, vol 415, col 661. See also *Hansard* (HC), 2 Mar 1981, vol 1000, col 31.

[101] *Hansard* (HL), 20 Jan 1981, vol 416, col 392.

> The selection for England, but I think not for Scotland, of the warrant deviates from the precise recommendation of Phillimore. … The principal argument recognised by Phillimore in favour of the earlier point of time appears to me to be overwhelming. The disadvantage, it says, of the later point of time — and here I am quoting — is that it would allow comparatively unrestricted comment during a police search for the wanted man, which might culminate at any moment in an arrest and charge.[102]

In answer to concerns that an editor might not know whether a warrant for arrest has been issued or not, he observed that:

(1) in cases of notoriety, such as that of Lord Lucan, this fact would be well known; and there may be a public interest defence under clause 4 as well;

(2) in other cases, the editor would have the defence of innocent dissemination in clause 3.

A.86 Lord Elwyn-Jones addressed the point briefly, observing that the press opposed this departure from the Phillimore recommendations, as they were less likely to be aware of an arrest or the issue of a warrant than of an accused person being charged.[103]

A.87 Lord Wigoder preferred the rule set out in the Bill.[104] Any time later than arrest or warrant would create a risk of very real prejudice to a defendant. The press claimed that they would find the rule difficult to apply because they might not know whether a warrant has been issued or whether a person has been arrested; but in such a case clause 3(1) (innocent publication) would provide a defence. Lord Renton also agreed with the timing in the Bill.[105]

A.88 Lord Hutchinson argued that, logically, it makes sense for protection to start when a person is brought within the ambit of the court and that, practically, it is impossible for the press to know whether a person at a police station is arrested or there voluntarily.[106]

A.89 Lord Ardwick, in response to the Lord Chancellor's point that, even if the earlier time is chosen, editors still have the defence of innocent dissemination, observed that there could still be doubts about whether journalists have made sufficient enquiries, for example, if they ring the police but the police are reluctant to give information.[107]

[102] *Hansard* (HL), 9 Dec 1980, vol 415, cols 661 to 662.

[103] *Hansard* (HL), 9 Dec 1980, vol 415, col 667.

[104] *Hansard* (HL), 9 Dec 1980, vol 415, col 671.

[105] *Hansard* (HL), 9 Dec 1980, vol 415, col 677.

[106] *Hansard* (HL), 9 Dec 1980, vol 415, cols 680 to 681.

[107] *Hansard* (HL), 9 Dec 1980, vol 415, col 689.

HOUSE OF LORDS, LATER STAGES

A.90 In committee, Lord Wigoder moved an amendment which would have restored the "imminence" test, but only as a defence.[108] The definition of "active" would remain as in Schedule 1. But the editor or publisher would then have a defence either if he did not know they were active, or if he did know they were active but believed they were not imminent. This was a probing amendment, designed to allow discussion of cases such as Lord Lucan where a warrant was issued but no trial was likely to occur for a very long time, if ever. It was withdrawn by consent.

A.91 Lord Gardiner moved an amendment to Schedule 1, so that criminal proceedings would become active only "when the accused person is charged or a summons served", in other words to reproduce the Phillimore test.[109] According to him, the National Council for Civil Liberties, the International Press Institute, the Guild of Newspaper Editors, the Outer Circle Policy Unit, the Law Society and the major newspapers all disapproved of the draft in the Bill and preferred the Phillimore test.

A.92 Lord Mackay of Clashfern argued that the main concern of the newspapers and other bodies was the difficulty of knowing whether a person had been arrested or whether there was a warrant.[110] This was sufficiently addressed by the defence that exists where the publisher does not know and has no reason to suspect that relevant proceedings are active. The test in the Bill also coincides with the common law rule in Scotland. The arrest already links the suspect to the crime in question, and it is at that time that the most damaging prejudicial material is likely to emerge.

A.93 Lord Wigoder agreed, pointing out that the period between arrest and charge is just the one in which unrestricted press comment can harm the prospects of a fair trial, particularly in terrorism cases where this period can be extended.[111]

A.94 Lord Gardiner pointed out that, in the Sutcliffe case, the police had called a press conference before he was charged, and argued that it was anomalous that the police could release information but the press could not comment on it. Lord Wedderburn argued that, if Schedule 1 was going to be changed, clause 3 should be reviewed as well. The amendment was withdrawn.[112]

HOUSE OF COMMONS, SECOND READING

A.95 The Attorney General, at the second reading in the Commons, explained that in the Phillimore report itself the choice between the time of arrest or warrant and the time of charge was finely balanced.[113] However, the time between arrest and charge is a particularly sensitive one, especially if the suspect's previous history (such as convictions) or facts apparently linking him to that or a similar crime are disclosed.

[108] *Hansard* (HL), 15 Jan 1981, vol 416, cols 184 to 185.

[109] *Hansard* (HL), 20 Jan 1981, vol 416, col 392.

[110] *Hansard* (HL), 20 Jan 1981, vol 416, col 395.

[111] *Hansard* (HL), 20 Jan 1981, vol 416, col 398.

[112] *Hansard* (HL), 20 Jan 1981, vol 416, cols 403 to 404.

[113] *Hansard* (HC), 2 Mar 1981, vol 1000, col 32.

A.96 Again, some of the discussion of this revolved round the Sutcliffe case. Johnson Smith argued that the rule in the Bill, making strict liability run from the time of arrest, could lead to prolonged periods of uncertainty, for example, where a suspect has gone to a police station but may not have been formally arrested, or when someone is on the run or has left the country.[114]

A.97 Keith Best argued for the Phillimore recommendation. It was often difficult for a journalist to ascertain whether a person had been arrested or a warrant had been issued; but if this was simply because the police refused to say, it is doubtful whether the journalist could be said to have "taken all reasonable care" for the purposes of the clause 3 defence of innocent publication.[115] Peter Archer agreed with this point, and warned against overreacting to a single case such as Sutcliffe.[116] Nicholas Fairbairn pointed out that the wording of the Bill as it stood brought the law of England and Wales into conformity with what had always been the common law in Scotland.[117]

HOUSE OF COMMONS, LATER STAGES

A.98 No amendment was moved in the Commons to reproduce the Phillimore test, and the matter was not further debated in committee. An amendment was moved and accepted, adding what is now Schedule 1 para 11, to the effect that proceedings cease to be active if a warrant has been outstanding for twelve months without an arrest.[118] This was to deal with the Lucan type of case. The debate on this was not detailed and needs no analysis or quotation here.

Appeal proceedings

A.99 The rule for appellate proceedings is set out at the end of Schedule 1 to the 1981 Act.

> 15. Appellate proceedings are active from the time when they are commenced—
>
> (a) by application for leave to appeal or apply for review, or by notice of such an application;
>
> (b) by notice of appeal or of application for review;
>
> (c) by other originating process,
>
> until disposed of or abandoned, discontinued or withdrawn.
>
> 16. Where, in appellate proceedings relating to criminal proceedings, the court—
>
> (a) remits the case to the court below; or

[114] *Hansard* (HC), 2 Mar 1981, vol 1000, col 59.

[115] *Hansard* (HC), 2 Mar 1981, vol 1000, col 81 to 82.

[116] *Hansard* (HC), 2 Mar 1981, vol 1000, col 94 to 95.

[117] *Hansard* (HC), 2 Mar 1981, vol 1000, col 99.

[118] *Hansard* (HC), 16 Jun 1981, vol 6, cols 952 to 957.

(b) orders a new trial or a venire de novo, or in Scotland grants authority to bring a new prosecution,

any further or new proceedings which result shall be treated as active from the conclusion of the appellate proceedings.

In other words, appeal proceedings are separate from the proceedings at first instance: the proceedings at first instance do not remain active during the time within which an appeal can be brought. These paragraphs are reproduced without change from the original Bill, except for the renumbering caused by the insertion of paragraph 11.

A.100 There was little or no debate about the exact time limits. The main question debated was whether, given that in appeal proceedings there are neither witnesses nor a jury, there is any need for protection at all.

A.101 At second reading Lords Elwyn-Jones,[119] Wigoder,[120] Salmon[121] and Hutchinson[122] all agreed that this protection was unnecessary because it was inconceivable that Court of Appeal judges would be influenced by press comment.

A.102 Lord Rawlinson replied that the issue was not the likelihood of actual influence on the Court of Appeal but of public perception.

> … there is another consideration that has nothing to do with them [the judges], but it has a lot to do with the rest of us; and it is the effect on public opinion of a vast barrage of comment — a vast barrage of comment all directed in one way. I believe that to permit such a barrage, unlimited, can have an effect upon public confidence in the administration of justice.
>
> If there is a campaign for or against an appellant, then the decision of the judges or Lords Justices will be viewed in the light of that campaign in the press and the media; and either the result may arouse bitter hostility to the Court of Appeal or it will look as though the Court of Appeal has bowed to that campaign.[123]

A.103 In committee Lord Wigoder moved an amendment to leave out paragraph 14 (now paragraph 15) altogether.[124] Rather than arguing that appellate judges would never be affected by press comment at all, he said that the press had a legitimate function in bringing matters of public concern to judicial attention. The Court of Appeal could, perfectly properly, be motivated by a press investigation to "investigate the background of the case with even more meticulous care than they usually exercise in order to ensure that public disquiet is allayed".

[119] *Hansard* (HL), 9 Dec 1980, vol 415, cols 667 to 668.

[120] *Hansard* (HL), 9 Dec 1980, vol 415, cols 670 to 671.

[121] *Hansard* (HL), 9 Dec 1980, vol 415, col 674.

[122] *Hansard* (HL), 9 Dec 1980, vol 415, col 681.

[123] *Hansard* (HL), 9 Dec 1980, vol 415, col 685.

[124] *Hansard* (HL), 20 Jan 1981, vol 416, col 405.

A.104 The Lord Chancellor answered that removing that paragraph would not have the effect of removing liability for publications concerning appellate proceedings, only of leaving it uncertain when those proceedings are active.[125] The test of liability would remain that of risk of serious prejudice. He justified the application of the rule to appeals by the following reasons.

(1) If appellate judges are less likely to be influenced, then there is less risk of prejudice and the test will be held not to be satisfied. There is therefore no undue restriction on the press.

(2) Not all appeals are to the Court of Appeal: the provision also applies to Crown Courts hearing appeals from magistrates, in which witnesses are heard.

(3) Judges cannot always be aware of what influences them; in some cases the possession of prejudicial information is experienced as embarrassing.

(4) Some appeals result in new trials, where the issue of influence on juries can arise again.

(5) In sensational cases, there can be a perception, both by the parties and by the public, that the court was influenced by the publicity, even if it was not in fact so influenced.

The amendment was withdrawn.

A.105 In the Commons, the Attorney General explained that the net effect of the Bill was not to apply the strict liability rule to appeals (at common law it applied anyway) as to disapply it between the conclusion of first instance proceedings and the notice of appeal.[126] He repeated the arguments that:

(1) if indeed appellate judges cannot be influenced, that will mean that the "prejudice" test is not satisfied, and there will therefore be no untoward restriction on the press; and

(2) the issue might be not actual influence on those judges but the perception of it.

A.106 John Morris argued that it is juries, not judges, that need to be protected from prejudicial material, and that leaving appellate proceedings within the scope of the rule "is in flat contradiction of Phillimore".[127] The point about the Phillimore recommendation was also made by Johnson Smith.[128]

A.107 Donald Anderson made the point that the problem was met by the requirement of "substantial risk" in clause 2(2): that would be a heavier burden to meet in the case of appellate judges.[129] Ivan Lawrence argued that it was in principle

[125] *Hansard* (HL), 20 Jan 1981, vol 416, col 406.

[126] *Hansard* (HC), 2 Mar 1981, vol 1000, col 34.

[127] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 47 to 48.

[128] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 59 to 60.

[129] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 76 to 77.

undesirable that, as soon as a person is sentenced, there should be complete freedom for comments that could prejudice a later court, and repeated the point that justice should be seen to be done and that the accused should not be given occasion for even an ill-founded belief that the judges could have been prejudiced.[130]

A.108 Peter Archer said that the argument against there being a rule of contempt was stronger in relation to appeals.[131] A judge is a spokesman for the community and it may actually assist the court to know the reactions of non-lawyers to what emerged in a lower court.

A.109 No amendments to these paragraphs were proposed in the House of Commons.

ORDERS AGAINST DISCLOSURE

A.110 A person is not liable for contempt under the strict liability rule if all he or she does is publish a fair and accurate report of pending or imminent legal proceedings. However, the court may order that publication of the report be postponed.

> **Contemporary reports of proceedings**
>
> **4.**—(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
>
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

A.111 Another such power is contained in section 11.

> **Publication of matters exempted from disclosure in court**
>
> **11.** In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

Again no penalty is specified, and breach of such a direction is presumably a civil contempt.

[130] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 89.

[131] *Hansard* (HC), 2 Mar 1981, vol 1000, col 95.

A.112 Differences between the two powers are:

(1) the section 4(2) power relates to reports of the whole or any part of the proceedings, even though the public may be present; the section 11 power relates only to names and facts that are withheld from the public;

(2) section 11 does not itself give power to withhold names or facts from the public, but applies only where the court has power to do so for some other reason, for example, in trying blackmail or sexual offences; and

(3) the section 4(2) power postpones publication for a period specified by the court; the section 11 power can be indefinite.

Before the Bill

A.113 Before the enactment of the 1981 Act a person could be liable for a publication prejudicing proceedings that were imminent but had not yet started and there was no equivalent to the present "active" rule. In *R v Odhams Press Ltd ex parte Attorney-General*[132] it was held that, even before a suspect is arrested, it can be contempt to publish details which would not have been admissible as evidence at his trial, and that liability is strict. In *Attorney General v Times Newspapers Ltd*[133] ("the *Sunday Times* case") it was held that this extended to all prejudicial material, as prejudgment of a case by the press is inherently objectionable.

A.114 There was no statutory power to make an order in advance, equivalent to section 4(2), but the courts appear on occasion to have exercised an inherent power to do so.[134] This most often occurred when several defendants were charged with the same offences but elected separate trial, and it was felt that publicising the evidence given against one defendant might prejudice the trial of another.[135] However, it was also known for the court to refuse an order in these circumstances, on the ground that publication was unlikely to cause bias in a future jury.[136]

A.115 There was therefore some uncertainty in the law and practice on this point. On one view,[137] even before the 1981 Act, there was a common law defence for reports of court proceedings, equivalent to that of privilege in libel.[138] On another possible view, reports of court proceedings should be treated just like any other publication, and the question of whether prejudice is likely to be caused to other proceedings should be decided on the facts. For example, if two defendants charged together have opted for separate trials, information revealed at one trial could have a prejudicial effect on the other.

[132] [1957] 1 QB 73.

[133] [1974] AC 273.

[134] See, eg, "Trial Reporting and Contempt" [1974] Criminal Law Review 141; *Re Poulson* [1976] 1 WLR 1023.

[135] *Clement* (1821) 4 Barnewell and Alderson's King's Bench Reports 218.

[136] See, eg, *Kray* (1969) 53 Cr App R 412.

[137] Borrie and Lowe: The Law of Contempt pp 62 to 68.

[138] Law of Libel Amendment Act 1888, s 3.

A.116 The Shawcross report, published shortly after the *Odhams* case, recommended that the rule in that case should continue to exist, as far as it concerned matter of which the law forbids evidence being given at the trial, subject to a defence of innocent publication.[139] It also recommended that, in general, "the court should retain a residuary power in all cases effectively to prevent 'trial by newspaper' by punishment for contempt".[140] However, it did not recommend or even discuss the possibility of any power to make an order prohibiting publication in advance.

A.117 The Phillimore report recommended that there should be an exemption for fair and accurate reporting of legal proceedings. It considered whether there should be an exception for cases where subsequent proceedings are likely to be prejudiced, as in the case where jointly charged defendants elect separate trial or the same defendants are tried for two offences in succession.[141] The conclusion was that a general rule to this effect would unduly hamper the reporting of cases, as the press cannot be expected to check in every case whether a person against whom damaging evidence emerges is likely to be subject to future proceedings.[142]

A.118 The Phillimore report mentioned the cases in which the court had made an order prohibiting or postponing the reporting of proceedings, but did not discuss whether this power was useful or should be perpetuated. In other words, it considered two positions:

(1) complete exemption for fair and accurate reports of legal proceedings; and

(2) no exemption at all: such reports always to amount to contempt if they are likely to prejudice future cases, without the need for any non-disclosure order by the court hearing the earlier case.

It did not consider the third possibility (as eventually adopted in the Bill):

(3) general exemption, but the court in the earlier case to have power to impose reporting restrictions if it considers prejudice likely.

This would largely overcome the objections of difficulty and uncertainty which the Report gave as its reasons for rejecting option (2).

A.119 The Phillimore report did recommend that, where evidence is heard in the absence of the jury in a "trial within a trial", this should not be reported until the evidence is held to be admissible.[143] In a footnote[144] added after the main report was complete, it alluded to a recent case[145] in which a newspaper had published the names of blackmail victims as evidence that the traditional cooperation of the

[139] Shawcross report pp 10 to 12.

[140] Shawcross report p 13.

[141] As in *Kray* (1969) 53 Cr App R 412.

[142] Paras 134 to 141.

[143] Para 141.

[144] Footnote 72 to para 141.

[145] *Socialist Worker Printers and Publishers Ltd ex p A-G* [1975] QB 637.

press could no longer be relied upon, and recommended that the courts should be empowered to forbid the publication of names and facts of this kind.

A.120 The Green Paper described the Phillimore discussion in detail, summarising the arguments for and against an exemption for the fair and accurate reporting of legal proceedings: it noted that the Phillimore report came down in favour of the exemption but expressed no view of its own.[146] The Green Paper devoted more attention to the question of the trial within a trial and confidential details, such as the names of blackmail victims, and agreed with the recommendation added in the footnote that there should be a judicial power to forbid the publication of these details. It raised the question of whether this power should be in general terms, or take the form of a list of situations, such as blackmail cases and official secrets, and inclined to the first view.

A.121 Briefly, then, the Phillimore report and the Green Paper did not recommend anything equivalent to section 4(2) but did make a recommendation later reflected in section 11. They did recommend protection for the "trial within a trial" without saying how this would be achieved; and today this would probably be done by an order under section 4(2) rather than under section 11.

The Bill

A.122 Section 4(1) and (2) reproduces clause 4(1) and (2) of the Bill as originally introduced, except that the Bill did not contain the word "substantial" before "risk" in clause 4(2). Section 11 reproduces clause 10 of the Bill without change (the present section 10 was introduced as an amendment).

A.123 Lord Hailsham explained these provisions as follows.[147]

(1) Clause 4 existed to give immunity for the publication of reports of legal proceedings, and was modelled on the equivalent immunity in the law of defamation.

(2) It gave the court power to order postponement of publication of particular details, such as a "trial within a trial" held in the absence of a jury, or facts that might prejudice future proceedings.

(3) The advantage of this was certainty. An editor, instead of having to assess whether a proposed article might prejudice future proceedings, would only have to find out whether there was a postponement order.

(4) Clause 10 (now section 11) gave power to protect, for example, the names of blackmail victims, and was inserted following the *Socialist Worker* case[148] and the consequent Phillimore recommendation.[149]

[146] Contempt of Court: a Discussion Paper (1978) Cmnd 7145 paras 25 to 27.

[147] *Hansard* (HL), 9 Dec 1980, vol 415, cols 660 to 661 and 664.

[148] *Socialist Worker Printers and Publishers Ltd ex p A-G* [1975] QB 637.

[149] See footnote 72 to para 141.

A.124 Lord Mishcon wished the Bill to give more detailed guidance on when the clause 4(2) power should be used, given that cases over the last few decades had come to widely different conclusions on the common law power.[150]

A.125 Lord Gifford said that the clause 4(2) was dangerously wide, and that the common law rules forbidding the publication of (for example) previous convictions were already well known.[151]

A.126 The amendment to insert the word "substantial" before "risk" in clause 4(2) was first proposed in committee,[152] and was designed to make the test in clause 4(2) match that proposed for section 2. It was withdrawn without discussion, to allow the Government to consider the question and reintroduce it at report stage if necessary.

A.127 Immediately after that discussion, Lord Gardiner addressed the substance of clause 4(2), and quoted a memorandum from the Law Society recommending that there should be a detailed list of circumstances in which the judges have power to make postponement orders. This memorandum was closely similar to Lord Mishcon's speech cited above.[153]

A.128 The Lord Chancellor answered that the main purpose of the Bill was to provide certainty for editors, and this was sufficiently achieved if they could be certain whether an order had been made or not. Such orders could be made not only because of possible further charges against the same defendant, but also because of possible separate trial of the same charges against different defendants. He promised to consider the question further before report stage.

A.129 In committee in the Lords, clause 10 (now section 11) was agreed to without debate.[154]

A.130 At report stage, Lord Gifford moved an amendment to leave out the words "or in any other proceedings pending or imminent" from clause 4(2).[155] The effect of this would be that the court could only make a postponement order if publication was likely to prejudice the proceedings in connection with which the order was made, and not future proceedings. His reasons were that any power of postponement should be limited, as news quickly loses interest and immediacy, while a series of linked cases could stretch out almost indefinitely. His first instinct was to leave out clause 4(2) altogether, as it reflected nothing in Phillimore, but the compromise he suggested would at least cater for the "trial within a trial" situation. He also expressed concern that, unlike in clause 2, the prejudice or risk of it did not have to be "serious" or "substantial".

A.131 The Lord Chancellor answered that, since the defence of fair and accurate reporting only applied within the confines of the strict liability rule, the limitation to

[150] *Hansard* (HL), 9 Dec 1980, vol 415, col 676.

[151] *Hansard* (HL), 9 Dec 1980, vol 415, col 687.

[152] *Hansard* (HL), 15 Jan 1981, vol 416, col 188.

[153] See para A.124 above.

[154] *Hansard* (HL), 20 Jan 1981, vol 416, col 384.

[155] *Hansard* (HL), 10 Feb 1981, vol 417, col 144.

"serious risk of substantial prejudice" was already implicit.[156] The risk of prejudice to future, but linked, proceedings is a real one, and was reflected in the existing practice about the making of such orders, which had existed for at least 160 years.

A.132 Lord Mishcon supported the amendment.[157] It was important to respect the right of the public to be informed of what is happening in the courts. Where it is claimed that there is a risk of prejudice to the same case, the court is in full possession of the facts and can decide whether the risk exists or not. But when it is claimed that there may be prejudice to future cases, the court is being asked to accept the advocate's say-so.

A.133 Lord Gifford disagreed with the Lord Chancellor's argument on the law.[158] The power in section 4(2) is exercisable as soon as there is any risk of any prejudice: the barrier is a low one. The question was put, and the amendment failed.

A.134 On second reading in the Commons, the Attorney General explained that the clause resolved the previously existing doubt about the reporting of legal proceedings: was there liability if a report of one set of proceedings might prejudice future proceedings?[159] Different judges had come to opposite conclusions on this. The effect of the clause would be that there was liability only if the court in the first proceedings had made an order.

A.135 Ivan Lawrence and Sam Silkin both expressed surprise that an express order would have to be made every time there is a trial within a trial, rather than the restriction on publication being understood as at present.

A.136 On clause 10 (now section 11), the Attorney General explained that it clarified the position where a court orders information to be withheld, for example, the name of a witness in a blackmail case or where witnesses need to be protected on grounds of national security.[160] It reflected the footnote on page 60 of the Phillimore report, which was prompted by the *Socialist Worker* case.[161]

A.137 John Morris said that the definition in clause 4 needed to be looked at very carefully.[162] Percy Grieve said that he was pleased that provision had been made for protecting information such as a trial within a trial and matters discussed between a judge and counsel in the absence of a jury.[163]

[156] *Hansard* (HL), 10 Feb 1981, vol 417, cols 146 to 147.

[157] *Hansard* (HL), 10 Feb, vol 417, cols 148 to 149.

[158] *Hansard* (HL), 10 Feb, vol 417, col 149.

[159] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 36 to 37.

[160] *Hansard* (HC), 2 Mar 1981, vol 1000, col 41 to 42.

[161] *Socialist Worker Printers and Publishers Ltd ex p A-G* [1975] QB 637.

[162] *Hansard* (HC), 2 Mar 1981, vol 1000, col 49.

[163] *Hansard* (HC), 2 Mar 1981, vol 1000, col 52.

A.138 Johnson Smith[164] said that both clauses were unacceptable inroads on the free reporting of legal proceedings. Of the two, clause 10 was the more objectionable because it gave power to suppress information in perpetuity.

A.139 There was no further allusion to the two clauses in the reported House of Commons debates. At that time the debates of Commons committees were not reported in Hansard. Presumably one of these was responsible for the insertion of the word "substantial" before "risk" in clause 4(2).

CONFIDENTIALITY OF JURY DELIBERATIONS

Section 8 and the confidentiality of jury deliberations

A.140 Section 8 of the 1981 Act provides that the deliberations of the jury remain secret. In particular, section 8(1) provides that with certain limited exceptions:

> It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

A.141 The exceptions are given in section 8(2) which states that:

> (2) This section does not apply to any disclosure of any particulars—
>
> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
>
> (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,
>
> or to the publication of any particulars so disclosed.

A.142 Under section 8(3), proceedings for a contempt of court under section 8 (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it.

A.143 Clause 8 of the Bill derives from the facts which the Criminal Law Revision Committee published in July 1968 and subsequent events resulting from the Jeremy Thorpe case.[165]

[164] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 60 to 61.

[165] *Hansard* (HL), 9 Dec 1980, vol 415, cols 663 to 664.

A.144 The offence created by section 8, which exists to prevent disclosure by jurors, remains separate from the common law prohibition, which exists to limit the evidence which a court will entertain on appeal.[166] According to Ferguson, this is demonstrated by the way in which section 8 evolved.[167]

The events in brief

A.145 In 1922, the confidentiality of juror deliberations was discussed in two court cases in which newspapers had published information about jurors' deliberations.[168] The issue continued to be discussed from time to time.

A.146 In 1965, the Report of the Departmental Committee on Jury Service[169] made a number of recommendations regarding jury secrecy and the issue was raised again in 1967 in a House of Lords debate[170] when Lord Brooke of Cumnor moved to insert a new clause into the Criminal Justice Bill of that year.[171]

A.147 This proposed clause would have made it a criminal offence for anybody to seek to obtain from a juror information as to what occurred in the jury room while the jury was considering its verdict. It would also be a criminal offence for any member of the jury, after it has returned a verdict, to disclose anything that happened when the jury was considering its verdict.

A.148 This amendment was withdrawn by Lord Brooke following a discussion which in the main centred on the question of jury research, and it was felt that the amendment needed to be looked at in more depth.[172]

A.149 The question of jury secrecy was subsequently examined by the Criminal Law Revision Committee, who felt that while revelation of jury deliberations was not a criminal offence it could give rise to a contempt of court in some circumstances. They did not recommend any change to the existing rules.[173]

A.150 Somewhat surprisingly, the Phillimore report in 1974 did not make any recommendations on the question of jury deliberations. The real catalyst for the original inclusion of clause 8 in the Contempt of Court Bill was the jury revelations to the New Statesman following the trial in 1979 of Mr Jeremy Thorpe. A subsequent action by the Attorney General to find the New Statesman in contempt of court failed, and this led to the inclusion of the clause in the Bill.[174]

[166] P W Ferguson, "Jury Secrecy and Criminal Appeals" (2004) 8 *Scots Law Times* 43.

[167] P W Ferguson, "Jury Secrecy and Criminal Appeals" (2004) 8 *Scots Law Times* 43, 44.

[168] *Armstrong* [1922] 2 KB 555, 568; *Ellis v Deheer* [1922] 2 KB 113, 118.

[169] Report of the Departmental Committee on Jury Service (1965) Cmnd 2627.

[170] *Hansard* (HL), 6 Jun 1967, vol 283, col 365.

[171] Which subsequently became the Criminal Justice Act 1967.

[172] *Hansard* (HL), 6 Jun 1967, vol 283, cols 366 to 373.

[173] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750.

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

A.151 The Bill was debated in both the House of Lords and the House of Commons with clause 8 being particularly hotly debated, before the final legislation was enacted in 1981.

A.152 The main arguments (as described below) centred on whether the clause went far enough to protect jurors from unwanted investigation into their deliberations by journalists or researchers, whether allowing jury research could undermine the whole jury system and, following the amendment put forward by Lord Hutchinson in the House of Lords debate of 1 July 1981,[175] whether the amended clause went too far in potentially criminalising members of the jury who casually mention details of their jury service to families and friends.

A.153 The proposed clause did not escape criticism outside the House. In contrast with most of the concerns expressed by both the House of Commons and the House of Lords, the Council for Civil Liberties commenting on the proposals felt that the terms of the original clause 8 were unnecessarily restrictive.[176] Whilst accepting that there needed to be some limit to disclosures of what went on in the jury room, for example, while a trial was still in progress, they felt that the concession to unidentified disclosures did not go far enough and that there needed to be more defence of public interest to protect other disclosures which bring to light unsatisfactory features of the operation of the jury system and so enable its operation to be improved.[177] They pointed out that "at a time when there is a movement in favour of open government it would be a retrograde step to create a brand new range of official secrets".[178]

A.154 An amended clause was finally passed by both Houses in July 1981. The Attorney General indicated in the House of Commons debate on 22 July that whilst he felt that the clause as amended went further than he had intended legislation to go, "because of the strength of feeling that has been expressed in both Houses, the government do not wish to oppose the amendment further".[179]

Reasons for jury secrecy

A.155 Prior to the enactment of the 1981 Act, the confidentiality of jury deliberations was governed entirely by the common law.

A.156 The general understanding that disclosure of juror deliberations was forbidden could be interpreted in any of the following ways.

(1) As a moral obligation on the part of jurors not to reveal deliberations: this was reinforced by the notices displayed in jury rooms.

[175] See para A.237 below.

[176] A Nicol and H Rogers, *Changing Contempt of Court* (National Council for Civil Liberties and the Campaign for Press Freedom, Jan 1981).

[177] "Jury Room Deliberations" (29 Jan 1981) 131 *New Law Journal* 101.

[178] A Nicol and H Rogers, *Changing Contempt of Court* (National Council for Civil Liberties and the Campaign for Press Freedom, Jan 1981) p 27.

[179] *Hansard* (HC), 22 Jul 1981, vol 9, col 416.

(2) As a rule that disclosure of deliberations, being a breach of a judge's instructions, could lead to a charge of civil contempt. This belief was also fostered by the jury room notices. It was this proposition that was tested in the *New Statesman*[180] case.

(3) As a rule of evidence that information regarding the jurors' deliberations is inadmissible in court and thus cannot be used to reopen a case on appeal. There would also be implications if a case were to be appealed as to whether information from the jury room could prejudice a further trial.

A.157 There are a number of reasons which can be surmised for the secrecy of jury deliberations under the common law.

(1) First, it is important that when a verdict is given it is final. If the deliberations of the jury were made public, then it could give rise to doubt as to whether a verdict was correct.

(2) Second, it is very necessary that jurors are able to speak freely during their deliberations in the jury room, and not be concerned that what they say may lead to intimidation after the trial by the defendant, his associates or family and friends.

(3) A further reason is that there must be "respect for jurors' privacy and their legitimate expectation that once their duty is done they will be allowed to carry on in their lives without being held up to possible ridicule and embarrassment over their decision".[181] In other words, to be able to deliberate freely they need to be sure that nothing they say will be disclosed outside the jury room.

Period leading up to the enactment of the Contempt of Court Act 1981

A.158 The question of the secrecy of jury deliberations had been looked at in the years prior to the case of *Attorney General v New Statesman and Nation Publishing Co Ltd*[182] as concerns had been raised over the privacy of the jury.

A.159 Lord Hewart CJ when dismissing an appeal by Armstrong, was referred to newspaper reports of a statement by the jury foreman which disclosed the jury's deliberations.[183] He said:

> If one juryman might communicate with the public upon the evidence and the verdict so might his colleagues also, and if they all took this dangerous course differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence

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

[181] P W Ferguson, "Jury Secrecy and Criminal Appeals" (2004) 8 *Scots Law Times* 43, 44.

[182] [1981] QB 1.

[183] Miller para 13.39.

> that the public rightly has in the general propriety of criminal verdicts.[184]

A.160 In the case of *Ellis v Deheer*[185] it was stated by Lord Justice Bankes that generally it was an accepted rule that discussions taking place in the jury room were private and confidential. However, whilst he went on to criticise the publication of the newspaper article which had quoted the foreman of the jury in *Armstrong*,[186] he declined to express an opinion as to whether or not this was contempt of court.[187] Both Bankes LJ and Atkin LJ mentioned the question of whether a person who presses a juror into making a disclosure is guilty of contempt of court but declined to express an opinion about it.

A.161 In 1951, the Home Office requested that a notice should be displayed in jury rooms warning of the need for secrecy of jury deliberations. In assize courts the notice read:[188]

> Her Majesty's Judges remind you of the solemn obligation upon you not to reveal, in any circumstances, to any person, either during the trial or after it is over, anything relating to it which has occurred in this room while you have been considering your verdict.

A.162 In 1956, Sir Patrick Devlin (as he then was) gave a lecture as part of the Hamlyn Series[189] on the subject of "Trial by Jury". In one part he looked at the convention which governed jury secrecy. Lord Devlin's view was that what went on in the jury room was subject to no interference but was also to be kept secret. This view was supported by the cases of *Armstrong*[190] and *Ellis v Deheer*:[191] in the *Ellis* case Bankes LJ said that he did not think it necessary to express an opinion as to whether publication of jury deliberations amounted to contempt of court, but that anyone reading the statement of facts in *Armstrong* would realise the importance of maintaining the rule (namely that jury deliberations should be secret).

A.163 In its report of 1965, the Departmental Committee on Jury Service recommended that, in addition to this notice, a pamphlet of guidance should be sent out with the jury summons and recommended that it should emphasise the confidential nature of jurors' functions and warn that this extended beyond the actual trial.[192]

A.164 The committee acknowledged that some people felt that there was no need to preserve jury secrecy. However, it recognised that while the prohibition on jury

[184] *Armstrong* [1922] 2 KB 555, 568.

[185] [1922] 2 KB 113, 118.

[186] *Armstrong* [1922] 2 KB 555.

[187] [1922] 2 KB 113, 118.

[188] Cited in Report of the Departmental Committee on Jury Service (1965) Cmnd 2627 para 354.

[189] The Hamlyn Lectures, Eighth Series, "Trial by Jury" (1956) p 47, http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Trial_by_Jury.pdf (last visited 1 Nov 2012).

[190] [1922] 2 KB 555.

[191] [1922] 2 KB 113.

[192] Report of the Departmental Committee on Jury Service (1965) Cmnd 2627 para 354.

disclosures meant that it was difficult to determine the merits or otherwise of the jury system, it did protect jurors from intimidation by defendants. It would also allow jurors to speak their minds without a risk of disclosure of their opinions to the press.

A.165 The recommendation of the committee was that the notice in the jury room should continue to be displayed. The committee went on to say:

> Gross breaches of the obligation to preserve secrecy might be treated as a contempt of court, especially if the judge in a particular case had expressly told the jury that they must not make any disclosure.[193]

A.166 In 1967, the issue was raised once again in a debate in the House of Lords.[194] Lord Brooke of Cumnor proposed an amendment to the Criminal Justice Bill which would make it a criminal offence for jurors to reveal secrets of jury deliberations and also penalise those who sought to find out such information. There was fear that bringing in the possibility of majority verdicts would mean that the press might take a greater interest in the way verdicts were reached. Lord Brooke of Cumnor said that it was his understanding that no penalty was attached to either a juror disclosing secrets, or a newspaper enquiring after and publishing such secrets.

A.167 In reply, the Lord Chancellor said that he had some sympathy with the proposed amendment and that he felt that it was "an odd thing that there has never been a law against a juryman in a sensational murder case telling a Sunday newspaper exactly what went on in the jury room".[195]

A.168 He went on to say that many people believed that there was a law against this, partly he believed because there was a notice in most jury rooms telling jurors that they should not disclose the deliberations.[196] He said that many newspapers believed that such a law existed and whilst he told them that there was nothing to stop them printing articles revealing what juries had discussed he went on to say "I have added, of course, 'If you do it there jolly soon will be a law against it.'"[197]

A.169 At that time, though the idea of such a clause was welcome, it was felt that more research needed to be done into its effect, so the clause was not adopted.

A.170 The question was looked at again later in 1967 by the Criminal Law Revision Committee in response to a request from the Home Secretary to consider:

> Whether statutory provision would be made to protect the secrecy of the jury room; and in particular whether, and if so, subject to what exemptions and qualifications, it should be an offence to seek

[193] Report of the Departmental Committee on Jury Service (1965) Cmnd 2627 para 355.

[194] *Hansard* (HL), 6 Jun 1967, vol 283, cols 365 to 366.

[195] *Hansard* (HL), 6 Jun 1967, vol 283, col 367.

[196] This notice had been in place since 1951: see Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 para 3.

[197] *Hansard* (HL), 6 Jun 1967, vol 283, col 367.

information from a juror about a jury's deliberations or for a juror to disclose such information.[198]

A.171 In its report issued in 1968, the Criminal Law Revision Committee said that there appeared to be very little judicial comment on the question and no judicial authority.[199] The report stated that if jury deliberations were revealed, then in the opinion of the committee this would not amount to a criminal offence, although in some circumstances it could give rise to contempt of court.[200]

A.172 They recommended that no change was necessary as the conventions were understood and observed by jurors. It was felt that even though the press knew that there were no sanctions in place for breach of this rule of conduct, it was clear that the press and public had continued to respect the rule, and as such it was better to be left as a "solemn obligation" rather than one enforced by criminal sanctions.[201]

A.173 In the Phillimore Committee report on Contempt of Court there was no consideration of the question regarding the secrecy of jury deliberations.

A.174 However, in the House of Lords debate on the Phillimore report, the Lord Chancellor said that when the forthcoming Bill (on contempt of court) was drafted, it would endeavour "to define the extent to which the duty of confidentiality of the secrets of the jury room ceases to be a mere matter of moral obligation and becomes a matter amenable to legal decision".[202] He went on to say that this was a wide question which could not be handled at present, but that the intention was to include a clause on that subject.

A.175 This intention was reflected in clause 8 of the Contempt of Court Bill.

The impact of the "Jeremy Thorpe case"

A.176 It appears that the main catalyst for the inclusion of this clause (and the comments by the Lord Chancellor in the debate)[203] was the result of an action by the Attorney General which attempted to have an order for contempt of court made against the publisher of the New Statesman magazine for publishing articles about the Jeremy Thorpe trial, one of which revealed jury deliberations.

A.177 In 1979, Jeremy Thorpe, a Liberal MP, was accused and stood trial with three other men on charges of conspiring to murder Mr Norman Scott, a male model who had allegedly had a previous homosexual relationship with Mr Thorpe. Mr

[198] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 para 1.

[199] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 para 2.

[200] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750, para 2.

[201] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 para 5.

[202] *Hansard* (HL), 7 May 1980, vol 408, col 1756.

[203] *Hansard* (HL), 7 May 1980, vol 408, cols 1723 to 1757.

Thorpe was acquitted, but a series of articles appeared in the New Statesman, one of which revealed the jury deliberations at the trial.

A.178 Part of this article revealed that one of the prosecution witnesses, Peter Bessell, had accepted money to appear in court and had been promised a bonus if there was a conviction. It was revealed that this fact had influenced the jurors in their deliberations and in their final decision to deliver a not guilty verdict.

A.179 As a result of this article in particular, the Attorney General applied[204] for an order that the publishers of the New Statesman were in contempt of court. The grounds were that the article constituted an interference with the due administration of justice as a continuing process in that the disclosure tended to imperil the finality of jury verdicts and thereby diminish public confidence in the general correctness and propriety of such verdicts. It would also affect adversely the attitude of future jurors and the quality of their deliberations.[205]

A.180 The Attorney General conceded that this particular article could not have interfered with the administration of justice and that the article itself actually showed that the jury had decided the case in a sensible and responsible manner.

A.181 The Divisional Court held that:

> Although the mere disclosure of the secrets of the jury room was not necessarily a contempt of court, if such a disclosure or any other similar activity tended to imperil the finality of jury verdicts or to affect adversely the attitude of future jurors and the quality of their deliberations it was capable of being a contempt, and each case had to be judged on its facts.[206]

A.182 In the court's view, each case should be judged in the light of the circumstances in which the publication took place and in this case:

> The sole ground on which the allegation of contempt was based was the disclosure of some of the secrets of the jury room. However, there were no special circumstances and therefore the publication did not amount to contempt and the application was dismissed.[207]

A.183 Unfortunately, the court did not lay down any other guidelines as to what would constitute contempt and from this point of view the decision was not seen as being helpful.

A.184 This view was expressed in a House of Lords debate following this case when Lord Wigoder asked whether the Government were contemplating including measures to deal with jury disclosures in their upcoming legislation proposals.[208] The Lord Chancellor replied that the Divisional Court had been asked to decide

[204] Under RSC Ord 25, r 9.

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

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

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

[208] *Hansard* (HL), 7 May 1980, vol 408, col 1735.

— and in the event failed to decide — whether the secrets of the jury room were protected. He went on to say that:

> The Divisional Court's judgment in the New Statesman case leaves too much undecided. In the Bill, when it comes, we shall endeavour to define the extent to which the duty of confidentiality of the secrets of the jury room ceases to be a mere matter of moral obligation and becomes a matter amenable to legal decision.[209]

A.185 In the debates on the Contempt of Court Bill, this point was again raised in committee by Lord Hutchinson who said that when such a breach (of confidentiality) came before the court it had been hoped by many "that the court would robustly hold that any such interference with what has happened within a jury room … would be held to be a contempt of court".[210] However, the court had held in that case that the revelation did not imperil the finality of the verdict, and thus clause 8 was an attempt to create a statutory sanction.[211]

Why the verdict in the New Statesman case was unexpected

A.186 The general belief before this case was that jury deliberations were secret. With a few exceptions,[212] there had not been any publication of jury deliberations. It appears that the generally held belief was that it was an offence for jurors to discuss cases outside the jury room or for newspapers to publish the deliberations.

A.187 In the debate on the Bill in the House of Commons, Mr Budgen MP said:

> [The decision] in the *New Statesman* case was unexpected … It may be there was a minority within the legal profession which anticipated it but the generality of us understood the law to be expressed by Lord Devlin [in the Hamlyn Lectures].[213] It was a shock to us that the minority view prevailed in the *New Statesman* case. My argument is that we should return to the position that most of us believe to be right before that case.[214]

Passage through Parliament

A.188 Clause 8 was the subject of some debate during the passage of the Bill through Parliament. In particular, the House of Lords discussed at length the various amendments which were suggested to the clause. The history in brief is as follows.

A.189 In the House of Lords debate at the second reading of the Bill the Lord Chancellor observed that though the Criminal Law Revision Committee had felt that there should be no change in the status quo with regard to the confidentiality

[209] *Hansard* (HL), 7 May 1980, vol 408, col 1756.

[210] *Hansard* (HL), 20 Jan 1981, vol 416, col 370.

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

[212] *Armstrong* [1922] 2 KB 555; *Ellis v Deheer* [1922] 2 KB 113.

[213] See para A.162 above.

[214] *Hansard* (HC), 16 Jun 1981, vol 6, col 933.

of jurors' deliberations,[215] they had still felt that it was undesirable for jurors to reveal what had passed in the jury room.[216] He went on to say that following the recent open and deliberate breach in the convention (of jury confidentiality) that it was essential that the protection of jurors' secrecy should be observed, for the protection of jurors, for the protection of the accused (particularly in cases of acquittal) so that the verdict was final, and that confidentiality needed to be observed to retain respect for the administration of justice.

A.190 When the clause was debated in the House of Commons, they considered a number of amendments: one from the Attorney General,[217] one from a Government MP[218] and one from an Opposition member.[219] At this stage if an amendment was not carried then there would be no opportunity for the Lords to look at the clause again.[220]

A.191 The amendments proposed by the Attorney General and that of the Government MP were passed, but were not accepted during the subsequent debate in the House of Lords. At this point Lord Hutchinson moved a further "draconian" amendment,[221] which, after being hotly debated in the House of Lords, was subsequently agreed and passed at the last minute by means of a "well-orchestrated campaign led by Lords Hutchinson and Wigoder".[222] The House of Lords debate over this new proposal was protracted but did not introduce any new arguments.

A.192 In what follows, the arguments are set out at greater length and divided by theme. The topics debated were as follows.

(1) The purpose of clause 8.

(2) The need for jury research.

(3) The risk of information being gathered for a retrial.

(4) The risk of jurors speaking with third parties.

(5) The effect of the clause on the existing law: in particular, whether it would supersede any common law prohibition, or exist alongside it.

(6) The need to protect jurors.

(7) Whether the type of disclosure authorised by the clause in its original form would tend to undermine the jury system.

[215] Criminal Law Revision Committee Tenth Report, Secrecy of Jury Room (1968) Cmnd 3750 para 4.

[216] *Hansard* (HL), 9 Dec 1980, vol 415, col 663.

[217] *Hansard* (HC), 16 Jun 1981, vol 6, col 920.

[218] *Hansard* (HC), 16 Jun 1981, vol 6, col 923.

[219] *Hansard* (HC), 16 Jun 1981, vol 6, col 924.

[220] *Hansard* (HC), 16 Jun 1981, vol 6, col 932.

[221] *Hansard* (HL), 1 Jul 1981, vol 422, col 252.

[222] N Lowe and G Borrie, *Borrie and Lowe's Law of Contempt* (2nd ed 1983) p 248.

Why was clause 8 introduced?

A.193 According to the Explanatory and Financial Memorandum to the original Bill, the effect of clause 8 was:

> … that it would be a contempt of court to publish certain information about the deliberations of a jury in such a way as to enable the case or any of the jurors to be identified, or to disclose or solicit the disclosure of such information with a view to its publication. Proceedings in England and Wales and Northern Ireland are not to be instituted except by or with the consent of the Attorney-General or on the motion of the court.[223]

A.194 Clause 8(1) in its original form provided that:

> **8.**—(1) Subject to subsections (2) and (3) below, it is a contempt of court—
>
> (a) to publish any particulars of statements made, opinions expressed, arguments advance or votes cast by members of a jury in the course of their deliberations in any legal proceedings;
>
> (b) to disclose any such particulars with a view to their being published or with knowledge that they may be published;
>
> (c) to solicit the disclosure of such particulars with intent to publish them or cause or enable them to be published.

A.195 The aim of the clause was to deal with the mischief which was identified as a result of the decision in the *New Statesman* case.[224] This was to prevent details of jurors' deliberations being published and was probably also an attempt to limit press intrusion into the deliberations of the jury. Clearly the Press Council had been ineffective in preventing abuse of the deliberation process by the media as had been the hope of the Criminal Law Revision Committee.[225]

A.196 The Lord Advocate was quite clear that the clause had been introduced solely to deal with "mischief which was identified as a result of the decision in the Divisional Court in the New Statesman case"[226] (namely the mischief by way of publication) and that there was no need to go any further and prevent all types of enquiry into the workings of the jury room. He was clear that there was no need to prevent bona fide research and that the necessity for the Attorney General to be consulted before proceedings could be taken would be a safeguard against innocent conversations falling foul of clause 8. He felt that the publication of any material should be prevented where the particular proceedings could be identified.

[223] Contempt of Court Bill (1980) Explanatory and Financial Memorandum.

[224] *Hansard* (HL), 20 Jan 1981, vol 416, col 373.

[225] Criminal Law Revision Committee, Tenth Report: Secrecy of Jury Room (1968) Cmnd 3750 para 5.

[226] *Hansard* (HL) 20 Jan 1981, vol 416, col 373.

> The clause was originally designed to plug the gap which arose as a result of the decision in the *New Statesman* case.[227]

A.197 Christopher Price, later in the same debate, gave more of the background to the development of clause 8.[228] He said that, before publishing the article, the New Statesman had taken advice on the state of the common law. It believed that the circumstances of the case were proper matters for public comment and decided to publish. This had caused great concern and the expectation was that the Lord Chief Justice would "do his duty" and clarify the situation. However, the unsatisfactory judgment had forced the need to legislate.

The need for jury research

A.198 Clause 8(2) of the Bill provided that:

> (2) This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place or the names of particular jurors, and do not enable such matters to be identified, or to the disclosure of solicitation of information for the purposes of such publications.

The question of whether this subsection should be retained was extensively debated and, in the Bill as finally passed, it was removed.

A.199 Clause 8 of the Bill appears to have been drafted so as to allow research in good faith within the field of juror deliberation. In particular, the Lord Chancellor explained that clause 8(2) had been included to safeguard jury research:[229]

> Provided that individual cases are not identified, there is also a place for bona fide research in this field, and bona fide research has taken place sometimes of a most useful kind. That is safeguarded by clause 8(2).

A.200 In committee on 20 January 1981, Lord Hutchinson questioned the need for a clause that would allow research into juror deliberations. He described clause 8 (2) as giving protection to "a most dangerous animal, the sociologist"[230] which he said could carry out research designed to undermine the jury system.

> And what, may I ask, in any case is the purpose of this research which this clause wishes to protect? Clearly it is — is it not? — to discredit the system, because our dear professors are not going to spend hours and hours and months of their time in establishing that indeed the jury is the lamp that shows freedom still lives.[231]

[227] *Hansard* (HC) 16 Jun 1981, vol 6, col 921.

[228] In this debate called cl 9, as a new clause (now s 7, concerning consent for the institution of proceedings) had been added but the original cl 7, concerning jurisdiction to protect inferior courts, had not yet been omitted.

[229] *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

[230] *Hansard* (HL), 20 Jan 1981, vol 416, col 371.

[231] *Hansard* (HL), 20 Jan 1981, vol 416, col 372.

A.201 The Lord Advocate replied that while there was good research and bad research, the clause did not attempt to distinguish between these but to limit the mischief to the situation which had arisen with regard to the publication of jury deliberations.

A.202 Returning to the question of jury deliberations, the Lord Chancellor spoke of Lord Hutchinson's hostility and scepticism towards sociology and research, saying that he was not hostile to research, and gave the example of jury research carried out using dummy juries.

A.203 The concern regarding jury research even by well-intentioned researchers continued to be a topic of debate.

A.204 In the debate on 10 February, Lord Wigoder moved amendment 7 which would amend clause 8(1) to refer to "subsection (3)" instead of "subsections (2) and (3)". This amendment existed to pave the way for two further amendments, including one to remove the original subsection (2).

A.205 Lord Wigoder elaborated on the reasons for the amendment. He put forward the view that the jury should be able to debate the case in private to enable them to speak their minds without "fear or favour, muddled and confused as they sometimes are, in the knowledge that nothing … will at any time be disclosed to any prying person".[232] He felt that the existing common law of contempt as to the secrecy of jury deliberations was "thoroughly unsatisfactory and very limited, if it indeed exists at all".[233]

A.206 He went on to say that if an attempt was made to limit by statute enquiries into the jury room, it would have the effect of removing all voluntary restraints on keeping deliberations quiet and as the clause limited sanctions to those made with the purpose of publication, that it would be an open incentive for anyone not intending to publish to inquire at will what went on in the jury room.[234] As a result, he felt that a complete blanket ban on all jury room investigations was the only course to take.[235]

A.207 Lord Scarman felt that while there was a need for legitimate research, subsection (3) of clause 8 did not go far enough to permit worthwhile research and the result might be disclosures which harmed the system of jury trials.[236]

A.208 Lord Elwyn-Jones, who had previously supported the original clause 8, felt that whilst his first inclination had been to support the clause, he now agreed with Lord Scarman that in terms of legitimate research it could be that many jurors could be unable to give a fair and accurate account of what went on in the jury room. He also felt that the arguments put forward by Lord Hutchinson and Lord Wigoder were relevant to his change of position.[237]

[232] *Hansard* (HL), 10 Feb 1981, vol 417, col 182.

[233] *Hansard* (HL), 10 Feb 1981, vol 417, col 183.

[234] *Hansard* (HL), 10 Feb 1981, vol 417, col 183.

[235] *Hansard* (HL), 10 Feb 1981, vol 417, col 184.

[236] *Hansard* (HL), 10 Feb 1981, vol 417, col 185.

[237] *Hansard* (HL), 10 Feb 1981, vol 417, cols 185 to 186.

A.209 Lord Mackay of Clashfern once again reiterated that the clause was only being introduced as a means of controlling publication and that it was not intended that the "existing structure" relating to jury confidentiality should be demolished.[238]

A.210 At the end of the debate, Lord Wigoder said that whilst he still felt that enactment of the clause as it was proposed would have the effect of breaking down the voluntary restraints on jury confidentiality, he withdrew the amendment and said that he hoped to succeed by means of "quiet persuasion".[239]

A.211 In the House of Commons debate on the order for a second reading, the Attorney-General put the point that the jury should be subject to some scrutiny and investigation as to how decisions are reached, and any provisions made must permit research in good faith and the interviewing of jurors for that purpose, providing it was not done with a view to publication.[240]

A.212 Both Mr Percy Grieve MP and Mr Best MP were in favour of the clause which they said provided for there to be anonymity of jury deliberations and the prevention of publication.[241]

A.213 In the debate on 6 June 1981, Mr Budgen returned to the question of jury research. He said that the finality of the verdict was not the only thing that might be diminished. If research was allowed into the reasons for a certain verdict being passed, it could lead to a situation where, for example, a person acquitted of rape would not necessarily be seen as innocent, but as the "bloke acquitted of rape because a number of men on the jury did not like women".[242]

A.214 In the Commons on 16 June 1981, another amendment was put forward to remove the original subsection (2) from clause 8.[243] This was debated as an alternative to amendment no 14, which inserted new subsections (2) and (3) into the clause. Donald Dewar said:

> I agree with those who have said from the Opposition Front Bench that we would prefer amendment No 6, which would remove subsection (2). That would be sensible. It would leave the position in the clear and simplistic sense that any publication was a contempt.[244]

The Attorney General also preferred the approach of amendment no 6;[245] and amendment no 14 was not passed.[246]

[238] *Hansard* (HL), 10 Feb 1981, vol 417, col 187.

[239] *Hansard* (HL), 10 Feb 1981, vol 417, col 189.

[240] *Hansard* (HC), 2 Mar 1981, vol 1000, col 41.

[241] *Hansard* (HC), 2 Mar 1981, vol 1000, col 52.

[242] *Hansard* (HC), 16 Jun 1981, vol 6, col 934.

[243] Amendment No 6: "in page 3, line 41, leave out subsection (2)". *Hansard* (HC), 16 Jun 1981, vol 6, col 924.

[244] *Hansard* (HC), 16 Jun 1981, vol 6, cols 931 to 932.

[245] *Hansard* (HC), 16 Jun 1981, vol 6, col 945.

[246] *Hansard* (HC), 16 Jun 1981, vol 6, col 946.

A.215 In the House of Lords debate on 1 July 1981, on the Commons amendments, Lord Hutchinson moved that the House of Lords disagree with some other amendments passed in the House of Commons, but proposed a further amendment to leave out subsection (2) and amend subsection (1) to read "subsection (3)" instead of "subsections (2) and (3)".[247] This amendment was approved and (subject to the renumbering of the subsections) is represented in the Act as passed.[248] In effect, then, the approach of amendment no 6 that had been discussed in the Commons as an alternative to amendment no 14 was adopted.

A.216 This amendment was debated in the House of Commons on 22 July 1981, and concern was again expressed that the new clause would prevent legitimate jury research. Mr Silkin expressed the belief that the original clause would have protected proper research where no particular proceedings could be identified.[249] He went on to say that the amendment completely nullified the provision which had existed to carry out legitimate research.[250] Despite further heated arguments during this debate, the Lords amendment was passed.

Risk of information being gathered for a retrial

A.217 Lord Hutchinson was in favour of a total prohibition of any form of jury revelation on the basis that there may be a disagreement in the trial and the case would have to be retried.[251]

A.218 The Attorney General expressed the view in the House of Commons debate in February 1981 that the clause had been inserted as a result of the New Statesman case, and that its aim was to clarify the position regarding the publication of details of the deliberation of the jury. He said that interviews like the one given in that case "can easily lead to a re-trial of the case in the newspapers, since a published interview with one juror may well prompt a rejoinder by another and so on".[252]

A.219 He returned to this subject in the debate on the publication of jury's deliberations, again emphasising the need for finality in a criminal case and the necessity of not having a public retrial based upon accounts published by jurors.[253]

A.220 The question of information being gathered for a retrial was again discussed during the House of Commons debate on the publication of jury deliberations. This included consideration of the difficulties that could arise if a juror were bribed to "concoct some such irregularity where none existed."[254]

[247] *Hansard* (HL), 1 Jul 1981, vol 422, col 239.

[248] The wording of the Lords amendment is given at para A.237 below.

[249] *Hansard* (HC), 22 Jul 1981, vol 9, col 416.

[250] *Hansard* (HC), 22 Jul 1981, vol 9, col 417.

[251] *Hansard* (HL), 20 Jan 1981, vol 416, col 373.

[252] *Hansard* (HC), 2 Mar 1981, vol 1000, col 41.

[253] *Hansard* (HC), 16 Jun 1981, vol 6, col 921.

[254] *Hansard* (HC), 16 Jun 1981, vol 6 col 930.

A.221 In the same debate, Dr Glyn pointed out that the clause as it stood meant that if there was leakage of any information regarding the jury's deliberations, then this might affect the reasoning, legality and the background of the second trial.[255]

A.222 In the House of Lords debate of 1 July, the Lord Chancellor dismissed the idea that information could be gathered from jurors for the purpose of launching an appeal.[256] He cited the case of *Boston v Bagshaw*[257] where affidavits were collected from jurors in a civil case and this information was used to try to launch an appeal. The Court of Appeal refused to look at the affidavits.

Risk of jurors speaking with third parties

A.223 The Lord Chancellor accepted that jurors are likely to discuss with friends and family what has taken place: this would not be caught by clause 8(1), which referred to "publication".[258] He further explained that clause 8(3) of the original Bill would allow limited disclosure from the jury room to take place "in the interests of the administration of justice" in pending or subsequent proceedings.[259] He added that "prosecution in this field is not a proper occasion for private enterprise. This is taken care of by clause 8(5) which makes it subject to a fine."[260]

A.224 In the House of Lords debate on 17 February 1981, the Lord Chancellor said that he was aware that the legal profession clearly wanted to make it a criminal offence for jurors to talk, but he felt that the Government would "make asses of themselves" if they ever prosecuted a juror for speaking to a third person such as his wife, and that such an offence would be unenforceable. He endorsed the view of Lords Elwyn-Jones and Wigoder that jurors were under an "obligation of honour" not to talk about what went on in the jury room, but did not feel that it was appropriate to penalise them if they did.

A.225 In the debate on Commons amendments, Lord Hutchinson, in defending his proposed amendment,[261] spoke about the criticism that had been levelled against his amendment on the grounds that it could mean that a jury member could be prosecuted for disclosing deliberations "in a public house or at home." He described this as a totally ingenuous argument because, first, the permission of the Attorney General was needed before "idiotic prosecutions" could be commenced and second this argument could apply to any area of the criminal law.[262]

[255] *Hansard* (HC), 16 Jun 1981, vol 6, col 943.

[256] *Hansard* (HC), 1 Jul 1981, vol 422, cols 248 to 249.

[257] *Boston v WS Bagshaw and Sons* [1966] 1 WLR 1135.

[258] *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

[259] *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

[260] *Hansard* (HL), 9 Dec 1980, vol 415, col 664.

[261] See para A.237 below.

[262] *Hansard* (HL), 1 Jul 1981, vol 422, col 242.

Effect of the clause on the existing law

A.226 Lord Wigoder felt that if the clause was adopted in its original form then common law contempt relating to jury room secrets would cease to exist: clause 8 would be interpreted as setting out the whole law of contempt in that area.

A.227 Lord Wigoder felt that the clause did not go far enough in establishing contempt in a number of different situations. In particular, he put forward a number of scenarios where he felt that it would be unclear as to whether a contempt had taken place, either under the clause or at common law.[263]

(1) First was the example of a juror who in the course of a trial meets the defence solicitor and reveals that the jury thought that the evidence given was good but needed clarification on one or another point. Under the existing law, it would not be a contempt of court at common law or an attempt to pervert the course of justice.

(2) The second example was where there had been a disagreement at the end of a trial and the defence team enquire of a juror how the jurors' votes were divided. While not a contempt at common law and not an attempt to pervert the course of justice, it would be "thoroughly and utterly undesirable".[264]

(3) The third example was if the family or friends of a convicted gang member wished to intimidate those on the jury who were responsible for the conviction. They would be able to question the jury members and again this would not be contempt of court, either under clause 8 or in existing common law, or an attempt to pervert the course of justice.

A.228 In response, the Lord Chancellor felt that certainly in the third case the right course is not to prosecute the juror, but that the amendment proposed by Lord Hutchinson and Lord Wigoder would result in that happening.[265]

A.229 Lord Wigoder returned to this argument in a later debate.[266] He felt that at the time the confidentiality of jury deliberations was "entirely voluntary" and "supplemented to a very small extent by existing law".[267]

A.230 One of his arguments was that clause 6 of the Bill (which dealt with "liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice") specifically referred to the foregoing provisions of the Bill and clause 8 was a subsequent provision. The effect of putting clause 8 where it was in the Bill was that it could be argued that the clause would provide (for the first time) a statutory definition of what was meant by contempt of court in relation to jury room deliberations.[268] This could lead to many thinking that the clause 8 offence was the only effective sanction against publication or inquiry into

[263] *Hansard* (HL), 20 Jan 1981, vol 416, cols 375 to 376.

[264] *Hansard* (HL), 20 Jan 1981, vol 416, col 375.

[265] *Hansard* (HL), 20 Jan 1981, vol 416, col 378.

[266] *Hansard* (HL), 10 Feb 1981, vol 417, col 182.

[267] *Hansard* (HL), 10 Feb 1981, vol 417, col 182.

[268] *Hansard* (HL), 10 Feb 1981, vol 417, col 183.

jury deliberations, meaning that all voluntary restraints would be removed, thus leaving the jury vulnerable to enquires from police, lawyers and others.

A.231 The Attorney General, in the House of Commons debate on 16 June 1981, proposed an amendment to deal with this problem, by inserting the words "Without prejudice to any rule of law which prohibits disclosures by or approaches to jurors during or after the trial".[269]

A.232 At the same time, the Commons considered Government amendment no 22 which would have the effect of inserting the words "by virtue of this section" after the word "court" in clause 8(1). The aim of the amendment was to make it absolutely clear to anyone reading the clause that it dealt only with publication of jury secrets. It would not in any way seek to restrict or limit the existing powers of contempt in respect of improper dealings with jurors.[270]

A.233 Nick Budgen felt that if the law was based partly on common law and partly on statute, then "those who are perhaps not inclined to look up the law books might easily assume that the whole of the law is to be found in the statute".[271]

A.234 An amendment was proposed by opposition MP Edward Gardiner which would have amended the clause to read as follows:

> **8.**—(1) Subject to subsections (2) and (3) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
>
> (2) This section does not apply where any such particulars are obtained, disclosed or solicited with intent that they should be published and—
>
> (a) the publication does not identify the particular proceedings in which the deliberations of the jury took place or the names of particular jurors, and does not enable such matters to be identified; and
>
> (b) the consent of the Attorney-General to the publication has been obtained before any such particulars are solicited.
>
> (3) This section does not apply to any disclosure of any such particulars—
>
> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict; or
>
> (b) in any appeal from the verdict of the jury in the proceedings in question; or

[269] Amendment No 21: "in page 3, line 29". *Hansard* (HC), 16 Jun 1981, vol 6, col 920.

[270] *Hansard* (HC), 16 Jun 1981, vol 6, cols 920 to 921.

[271] *Hansard* (HC), 16 Jun 1981, vol 6, col 921.

(c) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings.[272]

A.235 One objection to the first of these amendments was that subsection (2) referred to particulars "obtained". The point was made by Christopher Price that this could make it an offence if a journalist was given unsolicited information by a juror.

A.236 Mr Gardiner's amendment was approved in the Commons and the Bill was returned to the House of Lords for further debate.

A.237 In the House of Lords debate on 1 July 1981, the House disagreed with the Commons amendments. At the same time as proposing his amendment to leave out subsection (2), Lord Hutchinson proposed that clause 8(1) should be changed by leaving out lines 28 to 37 and inserting the following:

> To obtain, disclose, or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations in any legal proceedings.[273]

This amendment was passed by the House of Lords and the Bill returned to the Commons for debate.

A.238 In the debate on the publication of jury's deliberations on 22 July 1981, there was further discussion on the effect of the amendment on the existing law.

A.239 The Attorney General expressed a preference for an amendment which did not "create the stupid, silly criminal offences arising, for example, from a discussion over the dinner table or a juror returning to his home and talking to his wife or neighbour over the fence".[274] This desire was echoed by other speakers in the debate, such as Mr Hogg who said that the Lords amendment if preserved would "render criminal the casual observation of a juror to his wife or to his neighbour".[275]

A.240 In answer to Mr Hogg, Jeffrey Thomas raised the point that when jurors talked to their families there was no possibility of a prosecution taking place. However, Mr Hogg retaliated by pointing out that there is no good reason for creating a criminal offence which because it is only trifling will not result in a prosecution.[276] He reiterated the point that the original clause would not have altered the common law as described in the New Statesman case, that is that any disclosure that intimidated jurors or might prejudice a case constituted a contempt punishable at common law. The original clause had been introduced solely to plug the gap in the common law with regard to publications, and it should have no effect on the existing common law.

[272] *Hansard* (HC), 16 Jun 1981, vol 6, cols 923 to 924. During this debate the clause on jury confidentiality was referred to throughout as cl 9: see n 228 above.

[273] *Hansard* (HL), 1 Jul 1981, vol 422, col 239.

[274] *Hansard* (HC), 22 Jul 1981, vol 9, col 412.

[275] *Hansard* (HC), 22 Jul 1981, vol 9, col 420.

A.241 However, these arguments did not prevent the Lords amendment being passed by the Commons. The wording of the amendment was that used when the legislation was enacted later in the year.[277]

The need to protect jurors

A.242 Whilst Lord Elwyn-Jones originally appeared to agree with the proposed clause 8, saying that it would safeguard the jury from interference, for example, reprisals from criminals, but still allow jury research, Lord Wigoder was "a little unhappy" about it. He felt that while jury deliberations were safeguarded from publication it would not prevent jurors speaking to others, such as solicitors or counsel, and as a result the deliberations could become public and put the jurors in danger.[278]

A.243 In particular, he was concerned that in the case of a majority verdict it could be open to anyone to speak with jurors willing to talk and find out where the areas of disagreement lay, which witnesses were impressive and how, if there was a retrial, the case could be handled better. Under the proposed clause 8, this would not amount to contempt.[279] Citing the Bar Council and the Criminal Bar Association, he went on to say that others were very concerned about the implications of clause 8(2), also that "Blackstone said that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate".[280]

A.244 He submitted to the Committee that there would be an "inherent danger" in legislating for some parts (of jury confidentiality) and thus the only way to deal with the matter was to have a total prohibition on revelations from the jury room as "nothing else will achieve the purpose".[281]

A.245 In the debate on 10 February, Lord Wigoder invited the Government to reconsider clause 8 in both form and substance as he felt that as it stood it was an open invitation to anyone who wished to question jurors, which would lead to investigations that would more often be in bad faith than in good faith, being articles written by those wanting to write about sensational trials.[282] He once again thought that clause 8 should be changed to impose a blanket ban on any revelation of jury room discussion.[283]

A.246 In the House of Commons debate on the Publication of Jury Deliberations on 16 June 1981, commenting on the amendment that was proposed, the Attorney General stated that the clause was originally designed to plug the gap which arose as a result of the decision in the New Statesman case.[284] It did not in any

[276] *Hansard* (HC), 22 Jul 1981, vol 9, col 420.

[277] See para A.237 above.

[278] *Hansard* (HL), 9 Dec 1980, vol 415, col 672.

[279] *Hansard* (HL), 9 Dec 1980, vol 415, cols 672 to 673.

[280] *Hansard* (HL), 20 Jan 1981, vol 416, col 372.

[281] *Hansard* (HL), 20 Jan 1981, vol 416, col 373.

[282] *Hansard* (HL), 10 Feb 1981, vol 417, col 183 to 184.

[283] *Hansard* (HL), 10 Feb 1981, vol 417, col 184.

[284] See para A.218 above.

way seek to restrict or limit the existing powers of contempt in respect of improper dealings with jurors.

A.247 He went on to say that the amendment proposed was to prevent the publication of any part of a jury deliberation which would identify the juror or the accused.[285] Following the comments by Nick Budgen on the confusion which may arise between the common law and statute, he reiterated the point that the amendment to the clause was designed to remove the doubt which surrounded the current law of contempt in relation to jurors.[286]

A.248 During the House of Lords debate on 1 July 1981, Lord Renton once again made reference to the need to protect the jury. He said that the reason majority verdicts were brought in during 1967 was because of perceived pressure on jurors. However, unless the amendment proposed by Lord Hutchinson[287] were adopted, it could lead to more pressures on jurors, "some of them most insidious".[288]

Effect of clause 8 on the jury system

A.249 Concern was expressed in the House of Commons that, if clause 8 were introduced in its original form, it could have the effect of undermining the jury system to the extent that it might be "condemned to the ultimate extinction".[289]

A.250 This view had also been expressed by the Criminal Bar Association who had looked at the question of whether there should ever be revelation of the jury room secrets and if they ever were revealed when should publication take place. It felt that any approach to a juror asking about how a verdict was reached would result in "unwarranted and harmful pressure" and further, that such disclosures could undermine the whole purpose of jury trials.[290]

A.251 Mr Gardiner quoted the Lord Chief Justice as describing any loosening of the rules on jury disclosure as anathema.[291]

A.252 Jeffrey Thomas, later in the debate, called for a total rejection of the amendment proposed by Mr Gardiner.[292] He felt that it did not go far enough to preserve confidentiality of jurors' deliberations. Whilst he said that he would support the amendment if it were voted on, he considered that it was the "thin end of the wedge for the jury system". He went on to elaborate on how the jury system had developed and how it could be damaged by clause 8 as it was proposed. He was also concerned that the clause could diminish public confidence in the jury system.

[285] *Hansard* (HC), 16 Jun 1981, vol 6, col 921.

[286] *Hansard* (HC), 16 Jun 1981, vol 6, col 921 to 922.

[287] See para A.237 above.

[288] *Hansard* (HL), 1 Jul 1981, vol 422, col 244.

[289] *Hansard* (HC), 16 Jun 1981, vol 6, col 924.

[290] *Hansard* (HC), 16 Jun 1981, vol 6, col 924.

[291] *Hansard* (HC), 16 Jun 1981, vol 6, col 925.

[292] See para A.234 above.

A.253 This view was echoed by Martin Stevens who felt that the jury "would not survive the kind of spotlight that [was] inherent in the clause as drafted."[293] In the same debate, Mr Lawrence also felt that the clause, if passed, would damage the jury system. He said that nothing should be done that would make a juryman afraid to serve on a jury. If a person could approach a jury as long as it is not for publication, then jurors could be intimidated. He also felt that even well-intentioned researchers would end up showing the faults of the jury system, and this could lead to the public losing confidence in the jury.[294]

CONTEMPT IN THE FACE OF THE COURT

Introduction

A.254 The 1981 Act does not restate or amend the law relating to contempt in the face of the court, and leaves it as it was at common law. It did create an analogous procedure for misbehaviour in magistrates' courts, which was modelled on the existing provision for county courts.

A.255 At common law, contempts of inferior courts are punished by the Queen's Bench Division of the High Court.[295]

A.256 In the original form of the Bill, this power was restated and expanded in clause 7, which gave the High Court power to punish contempts of inferior courts and tribunals generally. For this purpose, the relevant courts were defined as including "any tribunal or body exercising the judicial power of the state": this definition was derived from Lord Scarman's speech in *Attorney General v British Broadcasting Corporation*,[296] which was the leading authority on the scope of the common law power. This definition was the subject of considerable debate: the question was whether to leave it in general terms or to have a list of courts in a Schedule. The debate primarily concerned prejudicial publications, but the proposed power in clause 7 would have applied equally to contempt in the face of inferior courts and tribunals, and the debate is therefore treated at some length below. Following Parliament's inability to agree on a suitable list, clause 7 was removed from the Bill.

A.257 In section 19 of the 1981 Act, "court" is defined in the same way as in clause 7. In the context of section 19, the definition is confined to mentions of "court" in the Act, and does not have the effect of extending the ambit of the common law of contempt: it therefore has no impact on contempt in the face of the court.

[293] *Hansard* (HC), 16 Jun 1981, vol 6, col 931.

[294] *Hansard* (HC), 16 Jun 1981, vol 6, col 939.

[295] *Halsbury's Laws of England,* vol 9(1) (4th ed 1998) paras 454 to 456.

[296] [1981] AC 303.

Before the Bill

A.258 The issues discussed include:

(1) whether the judge before whom a contempt is committed should have the power to commit the contemnor without reference to another judge;

(2) how to enable a person accused of contempt to present a proper defence;

(3) whether inferior courts should have powers similar to those of the High Court; and

(4) whether there should be a maximum sentence.

A.259 Historically, it is clear that judges of the superior courts have always had the power to deal summarily with those who misbehave in their presence. The controversy has been whether they do, or should, have similar powers in relation to contempt not in the face of the court.[297]

A.260 On the first issue, the Justice report "Contempt of Court" recommended that "the High Court, and courts of equivalent status, must have power to deal with contempts committed in their face, but that cases of really grave contempt should be determined by a judge other than the judge personally involved in the contempt."[298] However, to enable the judge to maintain order in his or her court, there should be a limited power of committal, and the judge of the court should continue personally to dispose of minor contempts such as refusal to answer questions.

A.261 On the second issue, it recommended that, in the case of more serious contempts, such as personal affronts to judges, the accused should be given written notice of the charge and a summary of the evidence.[299]

A.262 The Phillimore report devotes the whole of Part II to contempts in court. On the first issue, it concluded that "the present practice whereby the judge deals with contempts in the face of the court himself should continue".[300] It also rejects the suggestion that judges should have the option to refer cases to another judge. Such an option would put the judge in an invidious position.

> A judge who refused to exercise the option could be open to criticism for high-handedness, while one who did exercise it might be criticised for weakness or indecision.[301]

A.263 On the second issue, Phillimore recommended no major change to the existing summary procedure.

[297] J Fox, *The History of Contempt of Court: the Form of Trial and the Mode of Punishment* (1972); R Dhavan, "Contempt of Court and the Phillimore Committee Report" (1976) 5 *Anglo-American Law Review* 186.

[298] Shawcross report p 30.

[299] Shawcross report pp 32 to 33.

[300] Para 30.

[301] Para 31.

> The judge should always ensure that the suspected contemnor is in no doubt about the nature of the conduct complained of, and give him an opportunity of denying or explaining it. … In the course of any summary proceeding before the judge the alleged contemnor, in addition to being informed of the precise nature of his alleged contempt, must be afforded the opportunity of giving evidence and of calling and cross-examining witnesses. We recommend that for this purpose he should be entitled to be legally represented.[302]

They also recommended that emergency legal aid should be made available.

A.264 On the third issue, the Phillimore report recommended that magistrates' courts should be given power to deal with contempt in the face of the court,[303] and that bankruptcy registrars should have the same powers as the county court.

> There have been instances recently of disorderly conduct in magistrates' courts which have brought proceedings to a standstill. The offenders may sometimes be removed from court, but this represents no deterrent to those who make a practice of disruption.[304]

A.265 On the fourth issue, the Phillimore report recommended that all contempts should be subject to a maximum penalty of two years' imprisonment.[305] In the case of contempt in the face of the court, if imprisonment (or anything more than a small fine) is being considered, there should always be a delay between determination of the issue of contempt and the imposition of the penalty.[306] There should be power to remand in custody pending determination of the penalty, and the contemnor should have the right to be heard in mitigation, with legal representation and legal aid if necessary.

A.266 The Green Paper sets out the Phillimore recommendations in an appendix, but otherwise does not discuss contempt in the face of the court.[307]

The Bill

A.267 In the second reading in the Lords, the Lord Chancellor explained that, as clause 6(c) provided that the law of intentional contempt remained as before, the Bill made no difference to contempt in the face of the court except as concerned sentencing.[308]

A.268 In the same vein, in the House of Commons, Percy Grieve observed that the substance of the Bill concerned the balance between the interests of litigants and defendants and the need for open discussion: the debate did not concern "the

[302] Para 32.

[303] Paras 36 to 37.

[304] Para 38.

[305] Para 201.

[306] Para 34.

[307] Contempt of Court: a Discussion Paper (1978) Cmnd 7145.

[308] *Hansard* (HL), 9 Dec 1980, vol 415, col 659.

capacity of the courts to protect themselves from overt insult and misbehaviour in the court".[309]

A.269 Of the issues listed above, the only one to attract substantial attention was the question of contempt of inferior courts and tribunals. This in turn divided into:

(1) clause 7, concerning the power of the High Court to punish contempt of inferior courts and tribunals; and

(2) clause 11, concerning the power of magistrates' courts to punish insulting behaviour and interruptions.

The Phillimore recommendation on the maximum sentence was implemented in section 14 of the 1981 Act. There was no debate on whether a judge should have the power to punish contempt committed in his or her presence, or on opportunities for defence.

High Court's powers to protect inferior courts

A.270 Clause 7 of the Bill read:

> **Scope of jurisdiction to protect inferior courts**
>
> **7.**—(1) The jurisdiction of the High Court, the Court of Session and the High Court of Justiciary to prohibit and punish contempt of court in or in respect of the proceedings of inferior courts extends to the proceedings of all inferior courts, tribunals and bodies (however described and wherever established) which are constituted by law and exercise any part of the judicial power of the State.
>
> (2) This section does not affect the jurisdiction of any court to enforce the law in respect of its own proceedings.

This clause did not become part of the Act, though a similar definition of "court" forms part of section 19.[310]

A.271 On clause 7, the Lord Chancellor explained that the High Court already had power to punish contempt in some inferior courts, in particular coroners' courts, ecclesiastical courts and courts martial, but that, given the great proliferation of specialised tribunals since the war, it was uncertain where the boundaries of this power lay.

A.272 Lord Elwyn-Jones commented that the proposed definition was ambiguous.[311] For example, it was uncertain whether tribunals coming under the umbrella of the Council on Tribunals were to be included. It would be better to have a schedule setting out the relevant bodies.

A.273 Lord Wigoder expressed the view that, as tribunals were meant to be informal and inexpensive, there was no need for them to have the whole panoply of

[309] *Hansard* (HC), 2 Mar 1981, vol 1000, col 50.

[310] See para A.255 above.

[311] *Hansard* (HL), 9 Dec 1980, vol 415, col 669.

contempt proceedings.[312] In the same vein, Lord Mishcon raised the question whether rent tribunals and planning inquiries fell within the proposed definition.[313]

A.274 Lord Renton favoured listing the relevant courts and tribunals in a Schedule, while agreeing that some tribunals had administrative as well as judicial functions.[314]

A.275 Lord Gardiner agreed.[315] The definition of tribunals and bodies "which are constituted by law and exercise any part of the judicial power of the State" was incomprehensible to him and probably to other lawyers, and therefore presumably to laymen. If the clause was necessary at all, there should be a list of the inferior courts concerned.

A.276 In Committee, an amendment was moved to clause 7, so that it read "the inferior courts and tribunals specified in Schedule 5"; however, no draft of Schedule 5 was provided.[316] The Lord Chancellor referred to this approach as Ko-Ko's "little list",[317] and Lord Gardiner questioned the need to have the clause at all, as it did not reflect anything in the Phillimore report. The amendment was withdrawn and clause 7 was agreed to.

A.277 The important point in this debate was not so much the need for a list, on which little was said that was not raised at second reading, but the division of opinion on whether tribunals, such as valuation courts, should be included. Lord Gardiner said:

> I would therefore contend that there are two possible objections to clause 7(1). First, it extends the contempt jurisdiction of the High Court to too wide a range of inferior courts, tribunals and bodies; and, secondly, its definition of those inferior courts, tribunals and bodies to which the jurisdiction extends is unclear.
>
> I submit that the contempt jurisdiction should apply only to courts of law.[318]

A.278 Lord Wigoder thought that a distinction should be drawn between the ambit of contempt in the face of the court and that of the strict liability rule. There was a case for punishing contempts in the face of inferior courts: "the chairman of a local valuation court ought not to have, in classical terms, a dead cat thrown into his face". It did not follow that all the rest of the law of contempt, such as that concerning prejudicial publication, should also apply.[319]

[312] *Hansard* (HL), 9 Dec 1980, vol 415, col 672.

[313] *Hansard* (HL), 9 Dec 1980, vol 415, cols 676 to 677.

[314] *Hansard* (HL), 9 Dec 1980, vol 415, cols 677 to 678.

[315] *Hansard* (HL), 9 Dec 1980, vol 415, col 692.

[316] *Hansard* (HL), 15 Jan 1981, vol 416, cols 221 to 235.

[317] The reference is to Gilbert and Sullivan's *The Mikado*.

[318] *Hansard* (HL), 15 Jan 1981, vol 416, col 222.

[319] *Hansard* (HL), 15 Jan 1981, vol 416, col 223.

A.279 Lord Rawlinson said that he did not see why editors should not also be restrained from prejudicial comment about proceedings in tribunals, and Lord Elwyn-Jones agreed, but said that the point of the amendment was simply so that one could know which tribunals are covered.[320]

A.280 A similar amendment was put down at a later stage, this time with a Schedule listing the inferior courts and tribunals to be protected.[321] These included magistrates' courts, coroner's courts, courts martial, consistory courts, the Lands Tribunal, the Employment Appeals Tribunal and industrial tribunals.

A.281 The debate was a short one, and largely concerned further courts to be included or excluded. The Bishop of London raised the question of ecclesiastical courts other than consistory courts, and Lord Fraser mentioned the courts of the Church of Scotland. Lord Mackay pointed out that many tribunals listed under the Tribunals and Inquiries Act 1958 had both judicial and administrative functions, and mentioned mental health review tribunals as candidates for inclusion, given that they dealt with issues of liberty. A vote was taken and the amendment was defeated.

A.282 At Third Reading, Lord Elwyn-Jones again mentioned the question of what courts and tribunals were covered.

> Without taking up too much time of the House, I should like to refer in particular to clause 7 of the Bill, which leaves uncertain the scope of the extension of the risk of contempt of court to a potentially large area of inferior courts and tribunals. If I may say so, if the Lord Chancellor's Office finds it impossible to identify them in advance of contempt proceedings being taken to test the matter, how can editors be expected to know better?[322]

Lord Wigoder agreed, and again proposed that there should be a list of tribunals, rather than a definition depending on "any part of the judicial power of the state".[323]

A.283 The Lord Chancellor answered that the reason for the clause was to resolve the confusion caused by *Attorney General v British Broadcasting Corporation*.[324] The five Law Lords in that case all agreed that local valuation courts were not covered by the law of contempt, but each gave different reasons. The wording of the clause was derived from the speech of Lord Scarman, and the purpose was to resolve the uncertainty by adopting his view. If he (the Lord Chancellor) had been required to make a "little list" he could not have done so. The clause was not necessary, but made the law clearer than if it were not there.[325]

[320] *Hansard* (HL), 15 Jan 1981, vol 416, col 227.

[321] *Hansard* (HL), 10 Feb 1981, vol 417, col 163.

[322] *Hansard* (HL), 17 Feb 1981, vol 417, col 587.

[323] *Hansard* (HL), 17 Feb 1981, vol 417, cols 588 to 589.

[324] [1981] AC 303.

[325] *Hansard* (HL), 17 Feb 1981, vol 417, cols 590 to 591.

A.284 At second reading in the Commons, the Attorney General gave a similar explanation.[326] The clause was intended to resolve the uncertainty left by the BBC case. It was important that courts and tribunals generally should have protection, provided that their functions were indeed judicial rather than administrative. In the case of inferior tribunals, they do not have power to deal with contempts themselves, so it is important that the High Court should have power to exercise this jurisdiction for them.

A.285 John Morris argued that the definition of the tribunals protected by the law of contempt was not precise and that it would not be certain which tribunals were covered. Editors, particularly of local papers, needed an easily applied definition so as to know where they stood. He did not see the need to protect tribunals at all, but if there was a need, there should be a list, with a power to amend it by order.[327]

A.286 Donald Anderson agreed, saying that the definition would make the position of local valuation courts and rent tribunals no clearer than before, given that they exercise both judicial and administrative functions.[328]

A.287 Peter Archer argued that, if the clause were enacted in such general terms, there would need to be about 500 decisions before it was known which tribunals were within the protection.[329] If the Lord Chancellor and his staff found it impossible to make a list, then all the more, newspaper editors would not be able to know which tribunals were protected. In fact, however, there had already been a list, contained in Lord Fraser's amendment. It would be possible to enact this, and provide that further tribunals could be added by order.

A.288 In committee, there was some discussion about whether to use Lord Fraser's list, with the addition of mental health review tribunals. The Attorney General asked for time to consider the issue, and gave an undertaking to abandon the clause unless a suitable list could be devised. On 16 June 1981 he explained that no suitable list had been devised, and moved an amendment omitting clause 8 (clause 7 of the original Bill), which was agreed to.[330] Accordingly, there is no part of the Act reflecting clause 7 of the original Bill, and the power of the High Court to punish contempt of inferior courts and tribunals is left as it was at common law.

Powers of magistrates' courts

A.289 Clause 11 of the Bill, concerning the powers of magistrates' courts, passed unchanged into the Act, except for the renumbering caused by the insertion of what is now section 10, concerning the protection of sources of information.

> **Offences of contempt of magistrates' courts**
>
> **12.**—(1) A magistrates' court has jurisdiction under this section to deal with any person who—

[326] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 39 to 40.

[327] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 48 to 49.

[328] *Hansard* (HC), 2 Mar 1981, vol 1000, col 77.

[329] *Hansard* (HC), 2 Mar 1981, vol 1000, cols 95 to 96.

(a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

(2) In any such case the court may order any officer of the court, or any constable, to take the offender into custody and detain him until the rising of the court; and the court may, if it thinks fit, commit the offender to custody for a specified period not exceeding one month or impose on him a fine not exceeding [£2,500],[331] or both.

A.290 This clause was based on the analogous powers of the county court.[332]

Power to commit for contempt

118.—(1) If any person—

(a) wilfully insults the judge of a county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of a county court or otherwise misbehaves in court;

any officer of the court, with or without the assistance of any other person, may, by order of the judge, take the offender into custody and detain him until the rising of the court, and the judge may, if he thinks fit,—

(i) make an order committing the offender for a specified period not exceeding one month to … prison … ; or

(ii) impose upon the offender, for every offence, a fine of an amount not exceeding [£2,500], or may both make such an order and impose such a fine.

A.291 In the Committee of the House of Lords, Lord Gifford proposed an amendment to omit paragraph (a), about insulting behaviour, and another amendment to omit the reference to misbehaviour in court from paragraph (b).[333] This would confine the clause to interrupting the proceedings. The reference to insulting was too wide, as it included behaviour to a person on the way to or from a court. It was also wrong to make the magistrate "the victim, the witness, the prosecutor, the

[330] *Hansard* (HC), 16 Jun 1981, vol 6 cols 917 to 920.

[331] Amended by Criminal Justice Act 1991. The Act originally said £500.

[332] Then in County Courts Act 1959, s 157 (now County Courts Act 1984, s 118).

[333] *Hansard* (HL), 20 Jan 1981, vol 416, cols 384 to 385.

judge and the jury" with power to impose up to one month's imprisonment for offending his dignity. "Misbehaviour" was also completely undefined.

A.292 The Lord Chancellor answered that the words were taken from the equivalent powers of the county court, which had existed since 1846 and had been found to work well.

A.293 Lord Hutchinson supported the amendment.[334] The reference to "insulting" was an invitation to self-important behaviour by magistrates, and "misbehaviour" could cover things like being improperly dressed. The wording dated from 1846, but society had moved on since then.

A.294 The Lord Chancellor answered that magistrates are entitled to have their proceedings conducted in a dignified manner, and Lord Gifford said that, if there had been no complaint about the use of the county court powers, that was probably because they were never used. The magistrates' courts deal with more controversial issues than the county court. Having said that, he withdrew the amendments.

A.295 In the Commons, John Morris proposed an amendment removing the power of imprisonment and limiting the maximum fine to £50 (the Bill had £500). His reason was that "the Home Secretary seeks to ensure that fewer people are sent to prison and in that climate it is offensive to find a provision for sending people to prison when a lesser penalty — even smaller than the financial penalty proposed — would seem sufficient".[335]

A.296 The Attorney General answered that, according to Phillimore, disruption of proceedings in magistrates' courts was a real problem and that the existing power to remove offenders from the court was not a sufficient deterrent.[336] The penalties of custody of up to a month or a fine up to £500 were the minimum required in order to have a real deterrent effect.

A.297 The amendment was withdrawn.

[334] *Hansard* (HL), 20 Jan 1981, vol 416, cols 386 to 387.

[335] *Hansard* (HC), 16 Jun 1981, vol 6, col 951.

[336] Paras 36 and 37.