Law Commission

Consultation Paper No 209

CONTEMPT OF COURT

Appendix C: Contempt in overseas jurisdictions

THE LAW COMMISSION

APPENDIX C: CONTEMPT IN OVERSEAS JURISDICTIONS

CONTENTS

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 C
CONTEMPT IN OVERSEAS JURISDICTIONS

C.1 In this Appendix we consider the law of contempt as it exists in Australia, Canada, New Zealand and the Republic of Ireland. These jurisdictions are chosen on the grounds that:

(1) the law is similar enough to that in England and Wales for the comparison to be relevant;

(2) there are enough differences (in particular the absence of reforms corresponding to the Contempt of Court Act 1981) for the comparison to be instructive; and

(3) there is literature, whether in the form of proposals by law reform bodies or of academic articles, discussing questions that arise in England and Wales as well as in the jurisdictions in question.

AUSTRALIA

Constitutional setting and procedure

C.2 In Australia, contempt of court, as it affects superior courts, exists at common law in much the same form as it did in England and Wales before the Contempt of Court Act 1981, and does not vary significantly among the states.[1] There is, however, some difference between the states in the way in which contempt of court fits into the framework of criminal law.

C.3 In some states (New South Wales and Victoria), there has been partial codification of the criminal law,[2] but both statutory and common law offences, including contempt of court, continue to exist outside the framework of those Acts.

C.4 The remaining states, led by Queensland in 1899, have adopted comprehensive criminal codes.[3] Section 8 of the Criminal Code Act 1899 (Qld) provides that:

> Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as contempt of court, but so that a person can not be so punished and also punished under the provisions of the Code for the same act or omission.

[1] Under the Australian Courts Act 1828 (UK), the law in the then Australian colonies incorporated the common law of England and Wales as it stood on 25 Jul 1828. Similar provisions for South Australia and Western Australia put the date a few years later: D Barker, *Essential Australian Law* (2nd ed 2005) p 10.

[2] Crimes Act 1900 (NSW); Crimes Act 1958 (Vic).

[3] Criminal Code Act 1913 (WA); Criminal Code Act 1924 (Tas); Criminal Law Consolidation Act 1935 (SA); Criminal Code Act (NT, no year); Criminal Code 2002 (ACT; partially applied). Some statutory offences do exist outside the codes; eg in Queensland, the offence of investigation by jurors, on which see para C.30(2) below.

Similar provisions exist in the other codes, which were largely based on that of Queensland. Accordingly, in these fully codified states, contempt of court is the only surviving common law offence. The same saving is made in the federal criminal code.[4]

C.5 It has been held that the superior courts, both federal and state, have an inherent jurisdiction to deal with contempt conferred by the statutes creating those courts, and that this enjoys some measure of constitutional protection.[5] This has limited but not precluded Australian initiatives to reform the law of contempt.

C.6 The same problem does not appear to arise in the case of inferior courts, though there are statutes giving them powers to deal with disruptive or prejudicial behaviour. Some of these, for example, the District Court Act 1973 section 199 (NSW), simply give the court powers to deal with "contempt of court" without providing further detail. Others, such as the District Court of Western Australia Act 1969 section 63 (WA), prohibit particular conduct and may not refer to "contempt" at all.

Proposals for reform

C.7 The law of contempt has been considered several times by Australian law reform bodies, though none of the proposals made have been implemented.

(1) The most comprehensive consideration, which sets out much of the history of contempt in England and Wales as well as in Australia, is the Australian Law Reform Commission's report of 1987.[6]

(2) New South Wales published a discussion paper[7] followed by a report[8] on the jury system; a discussion paper on contempt by publication followed in 2000.[9]

(3) Western Australia published three discussion papers starting in 2001, considering different branches of contempt,[10] and a final report covering all three.[11]

4 Criminal Code Act 1995, Schedule, para 261.2.

5 *Re Colina ex p Torney* [1999] HCA 57 at [16] to [19], cited in Western Australia Law Reform Commission, *Discussion Paper on Contempt in the Face of the Court,* Project No 93(I) (2001) p 14. As concerns the High Court of Australia, see Australian Law Reform Commission, *Contempt,* Report No 35 (1987) ("the 1987 report") para 54.

6 Australian Law Reform Commission, *Contempt*, Report No 35 (1987), "the 1987 report".

7 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper No 12 (1985).

8 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986): in both documents, ch 7 considers jury secrecy and misconduct.

9 New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000), ("NSW discussion paper").

10 Western Australia Law Reform Commission, *Discussion Paper on Contempt in the Face of the Court*, Project No 93(I) (2001); *Discussion Paper on Contempt by Publication*, Project No 93(II) (2001); *Discussion Paper on Contempt by Disobedience to the Orders of the Court* (2002) Project No 93(III).

C.8 The 1987 report recommended reforms to the law of contempt as concerned federal courts (other than the High Court of Australia[12]) and state courts exercising federal jurisdiction. These reforms consisted of abolishing the entire common law of contempt and replacing it with a series of statutory offences: two draft Bills were annexed to the report. It was proposed that the procedure for the offences replacing contempt in the face of the court should remain summary, but with the option to be tried by a different judge; all the other offences should be tried as normal criminal offences.

C.9 The Western Australian report recommended that:

(1) the law of contempt should be codified and form part of the Criminal Code;[13] and

(2) except in the case of contempt in the face of the court,[14] contempt should be tried as a normal criminal offence.[15]

The report made no recommendations about jury misconduct or the meaning of publication.

Types of contempt

C.10 The 1987 report classifies contempts as follows.

(1) Interference with proceedings:

(a) improper behaviour in court;

(b) pressure on parties and others (by means other than publication);

(c) reprisals; and/or

(d) obstruction.

(2) Publications:

(a) influence on juries;

(b) pressure on judges and parties;

(c) breach of jury secrecy;

(d) prejudgment or embarrassment; and/or

(e) scandalising the court.

[11] Western Australia Law Reform Commission, *Report on Review of the Law of Contempt*, Project No 93 (2003), ("the Western Australia report" or "WA report").

[12] There are constitutional reasons for this exclusion: see para C.5 above.

[13] WA report, recommendation 1, p 8; recommendation 32(a), p 68.

[14] See para C.40 below.

[15] WA report, recommendation 16, p 45.

(3) Disobedience to court orders.

C.11 This is closely similar to English law as it stood before the Contempt of Court Act 1981, and English as well as Australian authorities are cited to support each of these heads. There is therefore no need to give a comprehensive account of each type of contempt. Here we briefly consider some topics relevant to the areas considered by the current project.

(1) The scope of "publication", particularly in relation to modern media.

(2) The test of prejudice.

(3) Juror misconduct.

(4) Contempt in the face of the court.

Publication

C.12 As in England and Wales, "publication" covers not only distribution through the mass media to the world at large but also communication to more limited subsets of the public. The 1987 report states:

> The common law of contempt treats as a "publication" any material disseminated by recognised institutions of the media, such as newspapers, radio stations or television channels. But narrower forms of dissemination of information have also been treated as publications. A recent New South Wales decision involving the distribution of pamphlets on the footpath outside court buildings[16] may be interpreted as meaning that this activity constituted a sufficient publication, particularly if jurors and potential jurors involved in cases currently being tried were likely to receive copies of the pamphlet.[17]

MODERN MEDIA

C.13 *Halsbury's Laws of Australia*[18] states that "publication may take any form" and lists nine examples, including newspapers, broadcasting and theatrical performances. There is no specific mention there, or in such cases as we have been able to discover, of electronic social media such as Twitter and Facebook, but as in England and Wales there can be no reason not to regard these as types of publication provided that they reach a large enough audience.[19]

C.14 One important problem concerns materials stored on the internet, for example, in a newspaper's archive of its past articles. Both the time and the place of publication are disputable: is an article published when (and where) it is posted? Or when it is downloaded? Or all the time it is stored? Courts in Britain have sometimes ordered or requested newspapers to remove articles from their

[16] *Prothonotary v Collins* (1985) 2 NSWLR 549, 562 to 567.

[17] 1987 report para 249.

[18] *Contempt* para [105-45], stated as correct to 1 Jan 2008.

[19] See Ch 3.

websites, implying that an article is published all the time it is there.[20] *Halsbury's Laws of Australia*[21] states "generally, newspapers and magazines are regarded as being published at the place where and at the time when they are first made available to the public or to the relevant section of the public."[22] At first sight, this would appear to suggest that internet material is published only when and where first uploaded.

C.15 In Australia, the leading case is *Digital News Media Pty Ltd v Mokbel*.[23] It was held that, for the purpose of contempt of court, the material is published at every time and place that it is available to a juror or potential juror. Nevertheless, an order that the material be removed should not be made unless there is a real and substantial risk that jurors will access and be prejudiced by it. This is similar to, and based on, the conclusion in the Scottish case of *HM Advocate v Beggs (No 2)*.[24] The court in *Mokbel* went on to observe that, given the normal judicial warning to the jury against internet research, an article stored in an archive is not likely to cause prejudice if it can only be found by specifically searching for it, as opposed to being linked to from the home page of a newspaper site or in other prominent form. It will therefore not normally be appropriate to order the removal of material from an archive, though it will be appropriate to forbid the posting of further material.

C.16 In *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim*[25] it was held that:

(1) the court has power to make a suppression order (that is, an order requiring a person to remove content of a particular description) addressed to any particular internet content host, that is, anyone controlling a website to which content can be uploaded;

(2) that host will be liable for breach of the order only if the order is brought to his or her attention;

(3) however, such an order cannot be addressed to the world at large, as a host may not be aware of the presence of the relevant content on the site, and can only be expected to look for it if specifically named in the order; and

[20] For example in *Harwood,* judgment of 20 Jul 2012*,* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/simon-harwood-judgment-20072012.pdf (last visited 1 Nov 2012).

[21] *Contempt* para [105-45], stated as correct to 1 Jan 2008.

[22] *Viner v Australian Building Construction Employees' and Builders' Labourers' Federation* (1981) 38 ALR 550 (appeal on other grounds dismissed); *Australian Building Construction Employees' and Builders' Labourers' Federation v David Syme & Co Ltd* (1982) 40 ALR 518. Compare *Re Ouellet* (No 1) (1976) 67 DLR (3d) 73 (appeal on other grounds) and *Re Ouellet* (Nos 1 and 2) (1976) 72 DLR (3d) 95). See also *Registrar of Court of Appeal v Willesee* (1985) 3 NSWLR 650 (television broadcasts). See further [105-50] (criminal proceedings), [105-55] (civil proceedings). [Footnote in *Halsbury's Laws of Australia*].

[23] [2010] VSCA 51.

[24] 2002 SLT 139; See Ch 3, para 3.55.

[25] [2012] NSWCCA 125.

(4) an order will not be made if it is obviously ineffective, for example, if the host operates outside the jurisdiction, or the same content is already readily accessible on other sites which cannot be controlled.

C.17 In *Perish*[26] it was held that an order can still be made, even though it is not possible to remove all offending material from the internet, if it makes access to prejudicial material through the most frequently used websites (major newspapers, Google, Yahoo etc) less easy. Neither such an order nor the direction given to juries not to do their own internet research is foolproof, but both together can significantly improve the chances of a fair trial.

PROPOSAL FOR REFORM

C.18 The 1987 report recommended that the meaning of "publication" should be treated flexibly, with a wider dissemination required in the case of imputations against judges than in the case of statements prejudicing proceedings.[27] The meaning of publication was not discussed in either the New South Wales discussion document or the Western Australian report. None of the reports and documents addressed modern media or internet storage.

C.19 The 1987 report also devotes some attention to the respective liabilities of the person who utters or contributes prejudicial content and the person who disseminates it.[28] The report notes a tendency to prosecute the publisher or distributor rather than the contributor, as the former is likely to be a large media organisation. It recommended that the person with "substantial control" over the publication should continue to be liable unless the publication was wholly innocent. In other words, there would be a defence if the publisher could not, by using reasonable care, have found out that proceedings were pending or that the publication contained the material in question. For a contributor without such control, the test should be whether he or she aided, abetted, counselled or procured the publication by the person with control.

The test of prejudice

C.20 In England and Wales, as we have seen,[29] there is a two-stage test set out in statute: the publication must be such as to risk serious impediment or prejudice to active proceedings, and the risk of this happening must be "substantial".[30] In Australia, the test remains what it was at common law:[31] that the publication has a "real and definite tendency to prejudice or embarrass" the proceedings.[32]

[26] [2011] NSWSC 1102.

[27] 1987 report para 253.

[28] 1987 report paras 256 and 257.

[29] See Ch 2.

[30] Contempt of Court Act 1981, s 2(2).

[31] New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) paras 4.3 to 4.21.

[32] *John Fairfax and Sons Pty Ltd v McRae* [1955] HCA 12, (1955) 93 CLR 351 at [25].

C.21 The common law test has been variously described:[33]

(1) "'a real risk, as opposed to a remote possibility' of interference with the administration of justice in particular pending proceedings";[34]

(2) the publication must reveal, "as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case";[35]

(3) that interference is "likely";[36]

(4) "substantial risk of serious injustice".[37]

The test goes beyond the nature and tendency of the document, and requires the risk to be assessed in the light of the circumstances.[38]

C.22 The result of these descriptions taken together looks very like the statutory test in England and Wales. However, there has been discussion of whether a test like that in England and Wales should be enacted, in order to make the requirement stricter.

(1) The 1985 New South Wales discussion paper took the view that "substantial risk", as in England and Wales, was a higher standard than "tendency", though it acknowledged that "substantial" might mean "not insubstantial" rather than "considerable", and that "tendency" excluded a remote possibility.[39] It concluded that "substantial risk" was preferable to "tendency", and that the nature of the risks should be spelled out:[40] there was, however, no reason to require the prejudice to be "serious".

(2) The Western Australia report quoted the New South Wales paper and made a similar recommendation.[41]

(3) Professor A T H Smith argues that in England and Wales the enactment of section 2(2) has raised the bar too high and made the law of contempt by publication a dead letter.[42]

[33] *Halsbury's Laws of Australia*, *Contempt* para [105-60]. The notes to that paragraph set out the interpretations given below, and list further authorities in support.

[34] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982] HCA 31, (1982) 152 CLR 25 at [29].

[35] *John Fairfax and Sons Pty Ltd v McRae* [1955] HCA 12, (1955) 93 CLR 351 at [22].

[36] *Bell v Stewart* [1920] HCA 68, (1920) 28 CLR 419, 432.

[37] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982] HCA 31, (1982) 152 CLR 25 at [53] and [55].

[38] *Hinch v A-G* [1987] VR 721 (Victoria Supreme Court); (1987) 164 CLR 15 at [15], [25] and [26] (High Court of Australia).

[39] NSW discussion paper 1985 paras 4.13 to 4.21.

[40] See para C.24(1) below.

[41] WA report pp 28 and 29.

PROPOSALS FOR REFORM

C.23 The 1987 report recommended that:

(1) from the time of arrest or charge, whichever comes first, certain listed types of published statement should be treated as prejudicial, such as a statement that the accused is guilty or innocent of the offence;[43] and

(2) a person should be liable for a prejudicial publication if he or she intended it to prejudice a trial or was recklessly indifferent as to this question.[44]

C.24 The New South Wales discussion paper made the following proposals, most of which were repeated in the Western Australia report.

(1) The test for prejudicing contempt should be that there is a substantial risk that jurors would encounter the statement, recall it at the time of the trial and be prejudiced by it.[45]

(2) There should be an illustrative, but not exhaustive, list of types of prejudicing statement.[46]

(3) There should only be liability if proceedings are "pending", namely from arrest, summons or charge.[47]

(4) There should be defences of innocent dissemination[48] and good faith discussion of matters of public interest (other than the trial itself).[49]

Juror misconduct

C.25 As in England and Wales, there is an understanding that discussions in the jury room are confidential and ought not to be disclosed. Legally speaking, this may impinge on two quite different questions:

[42] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) paras 2.50 to 2.52, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012): see the discussion of this issue in relation to New Zealand at paras C.67 and following below.

[43] Para 299.

[44] Para 308.

[45] NSW discussion paper, proposal 3, following para 4.58; WA report, recommendation 5, p 29.

[46] NSW discussion paper, proposal 4, following para 4.75; not reproduced in WA report.

[47] NSW discussion paper, proposal 11, following para 7.39; WA report, recommendation 7, p 31.

[48] NSW discussion paper, proposal 8, following para 5.47; WA report, recommendation 14, p 42.

[49] NSW discussion paper, proposal 19, following para 8.43; WA report, recommendation 13, p 41.

(1) whether there is a criminal sanction for breaching jury confidentiality; and

(2) whether evidence of what was said in the jury room is admissible in those or other proceedings.[50]

C.26 There are many forms of juror misconduct other than breach of confidentiality. The obvious modern example is carrying out research about the case on the internet.[51] Again, this may be considered under two headings, the sanctions against the offending juror and the effect on the case being tried.

CRIMINAL OFFENCE

C.27 There do not appear to be Australian cases holding that the disclosure of jury deliberations constitutes contempt or any other common law offence.[52] Indeed, the Supreme Court of Victoria has observed that:

> No constraint can be placed upon a juror who wishes to discuss his experiences at the trial and views he formed in the deliberations which took place in the jury room.[53]

There are, however, judicial comments to the effect that this is highly undesirable, and the 1987 report cites the Jeremy Thorpe case,[54] without discussing whether it represents the law in Australia.

C.28 The 1987 report recommended that there should be offences covering:

(1) disclosure of jury deliberations by a juror during the trial;

(2) disclosure of jury deliberations by a juror for profit, at any time; and

(3) publication of jury deliberations, at any time.[55]

The report did not address investigation by jurors.

C.29 Since that report, statutory offences have been created, which are not described as forms of contempt. None of these exactly follows the recommendations in the report.

(1) In Victoria, section 78 of the Juries Act 2000 makes it an offence to disclose "any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury". It is also an offence for a member of a jury to disclose such statements "if the person has reason to believe that any of the information is likely to be or will be published to the public".

[50] See Ch 4.

[51] For the law in England and Wales, see Ch 4, paras 4.17 to 4.19.

[52] 1987 report para 350.

[53] *Re Donovan's Application* [1957] VR 333, 336 to 337 by Justice Barry.

[54] *A-G v New Statesman* [1981] QB 1.

[55] 1987 report para 369.

(2) Similar provisions exist in New South Wales;[56] but unlike in England and Wales and in Victoria, the absolute prohibition on disclosure only lasts for the duration of the trial.[57]

C.30 There are also offences covering illegitimate research by jurors, including:

(1) in Western Australia, sections 56A to 56E of the Juries Act 1957 (WA);[58]

(2) in Queensland, section 69A of the Jury Act 1995 (Qld);[59]

(3) in New South Wales, section 68C of the Jury Act 1977 (NSW);[60]

(4) In Victoria, section 78A of the Juries Act 2000 (Vic).[61]

C.31 The Victorian provision may be taken as typical:

> **78A Panel member or juror must not make enquiries about trial matters**
>
> (1) A person who is—
>
> (a) on a panel for a trial; or
>
> (b) a juror in a trial—
>
> must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror. Penalty: 120 penalty units.
>
> …
>
> (4) Anything done by a juror in contravention of a direction given to the jury by the trial judge is not a proper exercise by the juror of his or her functions as a juror.
>
> (5) In this section, making an enquiry includes—
>
> (a) consulting with another person;
>
> (b) conducting any research by any means;
>
> Example: Using the internet to search an electronic database for information.

[56] Jury Act 1977 (NSW), ss 68A and 68B.

[57] *Laws* [2000] NSWSC 885 at [29]; J Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, 94.

[58] Inserted by Juries Amendment Act 2000 (WA), s 10.

[59] Inserted by Criminal Law Amendment Act 2002 (Qld), s 54.

[60] Inserted by Jury Amendment Act 2004 (NSW), sch 1; this was recommended by the court in *K* [2003] NSWCCA 406 at [87].

[61] Inserted by Courts Legislation Amendment (Juries and Other Matters) Act 2008 (Vic), s 7.

(c) viewing or inspecting a place or object that is relevant to the trial;

(d) conducting an experiment;

(e) requesting another person to make an enquiry.

C.32 At least one case in which this law was enforced has been in the news.[62] However, a consultation paper on the subject of jury directions[63] reports that the problem of amateur research by jurors still continues, that the new offence does not appear to have altered their attitudes and that judicial directions to juries often fail to mention it.

ADMISSIBILITY

C.33 There is general consensus, expressed in the Australian Law Reform Commission Report,[64] that evidence of jury discussions is inadmissible except for the purpose of showing a radical impropriety, such as that one juror did not hear or assent to the verdict.[65] However, all the cases cited in support of this proposition are from England and Wales.

C.34 There have been several appeals against conviction on the ground that a jury illegitimately received information from the internet. The view taken is that this is always a material irregularity, sufficient to justify an exception to the rule that the court must not admit evidence of jury room discussions.[66] However, it does not always amount to a miscarriage of justice sufficient to quash the conviction: whether it does so in any individual case must be determined according to how much influence the inadmissible information had on the jury's decision.[67]

C.35 Section 78A of the Juries Act 2000 (Vic)[68] makes it an offence for jurors to make their own inquiries, but does not automatically invalidate the verdict if such inquiries are made; the same would presumably be true of the corresponding provisions in other states. That question is still decided according to the common law test,[69] of how far the irregularity affected the jury's decision.[70]

62 "Juror in Hot Water for Online Search", *Herald Sun* (Melbourne), 19 Jun 2011, http://www.heraldsun.com.au/news/victoria/juror-in-hot-water-for-online-search/story-fn7x8me2-1226077656291 (last visited 1 Nov 2012).

63 New South Wales Law Reform Commission, *Consultation Paper 4: Jury Directions* (2008) para 5.34.

64 1987 report para 351.

65 For this exception, see Jury Act 1977 (NSW), s 75C. Similar rules are found in the Evidence Acts of some other states.

66 *K* [2003] NSWCCA 406; see case comment at (2004) 8 *International Journal of Evidence and Proof* 136.

67 *K* [2003] NSWCCA 406; *Folbigg v R* [2007] NSWCCA 371; *Brown* [2012] QCA 155.

68 See para C.31 above.

69 See para C.34 above.

70 *Martin v R* [2010] VSCA 153.

Contempt in the face of the court

C.36 As mentioned above,[71] in individual states, there are statutes giving powers to inferior courts to deal with disruptive or prejudicial behaviour, while for constitutional reasons contempt in superior courts remains largely governed by the common law. This corresponds closely to the position in England and Wales, where there are specialised statutes governing disruptive behaviour in county courts[72] and magistrates' courts.[73]

C.37 The range of behaviour covered by the common law of contempt in the face of the court is similar to that in England and Wales,[74] and the range of judicial responses, from ignoring it through excluding the contemnor from the court room to the imposition of penalties, is similar too.[75]

C.38 Traditionally, a judge who witnessed an act of contempt in the face of the court would ask the contemnor if he or she had anything to say and proceed to consider the question of penalty there and then. By the time of the 1987 report, it had become usual to allow an adjournment to permit the accused to consider the defence, and occasionally the matter would be referred to a different judge.[76] The report comments that:

> These powers of presiding judges, taken in combination, have a peremptory and authoritarian quality similar to those of school teachers or parents dealing with young children. It is "summary" discipline in the fullest sense of the word.[77]

C.39 The 1987 report concluded that this position was unsatisfactory, as it contradicted the assumptions on which all other criminal proceedings were based, such as certainty, impartiality and the presumption of innocence. The final recommendation was that:

(1) a series of offences, specifying what forms of conduct in or near a courtroom should be deemed unacceptable, should replace the present broad criterion of liability for contempt in the face of the court;

(2) a person accused of any one of these offences should not be tried by the presiding judge unless both this person and the presiding judge consent to this mode of trial; and

[71] See para C.6 above.

[72] County Courts Act 1984, s 118.

[73] Contempt of Court Act 1981, s 12.

[74] 1987 report para 77.

[75] 1987 report para 74.

[76] 1987 report paras 83 and 84.

[77] 1987 report para 92.

(3) the power of the presiding judge to resort to alternative means of dealing with improper conduct — in particular, ordering that the relevant individual or individuals be removed from the courtroom — should be preserved.[78]

It did not recommend that the new offences should be triable on indictment.[79]

C.40 The approach of the Western Australia report was similar. Its recommendations include the following.

(1) Contempt in the face of the court should be replaced by a series of discrete offences,[80] including the making of tape recordings.[81]

(2) There should be a uniform procedure for trying these,[82] but unlike in the case of other contempts[83] this should be before a judge only.[84]

(3) Contempt in the face of the court should be tried by the judge before whom it occurred only if:

(a) the defendant consents; or

(b) the judge considers there is an immediate threat to the authority of the court or the integrity of the proceedings.[85]

CANADA

Constitutional setting and procedure

C.41 Canada is a federal state like Australia. Unlike in Australia, however, only the federal legislature can create criminal offences,[86] though criminal offences can be and usually are tried in provincial courts. There is a Criminal Code,[87] though some offences, particularly in relation to drugs, are contained in other federal statutes.

C.42 Contempt of court is the only surviving common law offence. The Criminal Code provides:

[78] 1987 report para 113.

[79] 1987 report para 132.

[80] WA report, recommendation 25, p 61.

[81] WA report, recommendation 29, p 64.

[82] WA report, recommendation 33, p 70.

[83] WA report, recommendation 16, p 45; recommendation 48(a), p 98.

[84] WA report, recommendations 34 to 37, pp 74 and 75.

[85] WA report, recommendation 34, p 74.

[86] Constitution Act 1867 (originally British North America Act 1867), ss 91 to 92.

[87] Criminal Code, RSC 1985.

Application to territories

8. …

(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

Criminal offences to be under law of Canada

9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730 [conditional and absolute discharge]:—

(a) of an offence at common law,

(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

C.43 As a matter of constitutional law, the superior courts of the provinces have general jurisdiction equivalent to that of the High Court in England and Wales, and therefore have the inherent contempt jurisdiction preserved by these sections.[88] This jurisdiction includes power to punish contempt of other courts.[89] The Supreme Court of Canada also has inherent contempt jurisdiction, implied in the statute making it "a common law and equity court of record".[90] The power of all other courts, including federal courts,[91] to deal with contempt depends on statute. Particular examples of statutory contempts are as follows.

[88] *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725.

[89] *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725.

[90] *Re Duncan* [1958] SCR 41, 43. The relevant statute is now re-enacted as Supreme Court Act, RSC 1985, s 3.

[91] This refers to the Federal Court and the Federal Court of Appeal. The Supreme Court of Canada is not a federal court for this purpose, being in a category of its own.

(1) It is a statutory contempt of court for a person called as a witness to fail to attend court.[92]

(2) There is also a statutory contempt of court consisting of refusing to answer a question or produce a record or thing under the Mutual Legal Assistance in Criminal Matters Act.[93]

(3) The rules committee for the federal courts has power to designate an act or omission as a contempt of court and provide for procedure and penalties.[94]

C.44 Common law contempt remains an indictable offence, though the indictment procedure is very rarely used. It was held in *Vermette*[95] that the saving for "power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court" includes the existence of contempt of court as an indictable offence as well as the power to deal with it by the summary procedure.

Law reform proposals

C.45 As criminal law is a federal responsibility, none of the provincial law reform bodies has considered contempt of court. The Law Reform Commission of Canada published a report in 1982,[96] which was followed by a Bill in 1984.[97] This Bill proposed to abolish the common law of contempt and replace it with three new offences, to be incorporated in the Criminal Code:

(1) knowingly making a publication creating a substantial risk of seriously impeding or prejudicing pending proceedings;

(2) affront to judicial authority; and

(3) disruption of judicial proceedings.

C.46 The first of these is similar to contempt by publication in England and Wales,[98] with the exception of the requirement of knowledge. The second one is equivalent to scandalising the court, but must be "wilful". The third is equivalent to contempt in the face of the court. Civil contempt, for disobedience to court orders, would remain unaffected.[99]

C.47 All three offences would be triable as normal criminal offences, either on indictment or summarily. For disruption of judicial proceedings, there would also

92 Criminal Code, RSC 1985, s 708.

93 Mutual Legal Assistance in Criminal Matters Act, RSC 1985, s 22.

94 Federal Courts Act, RSC 1985, s 46. This power has been exercised in relation to contempt in the face of the court by the Federal Courts Rules, SOR/98-106, rr 466 to 472.

95 [1987] 1 SCR 577.

96 Report No 17, *Contempt of Court.*

97 Criminal Law Reform Act 1984, Bill C-19, 32nd Parliament, 2d session, 1983 to 1984, cited in L Fuerst, "Contempt of Court" [1984] *Ottawa Law Review* 316.

98 Contempt of Court Act 1981, s 2.

99 For a full description, see L Fuerst, "Contempt of Court" [1984] *Ottawa Law Review* 316.

be a procedure by citation, which would result in trial before a judge of the court in which the proceedings took place, other than the judge before whom the disruptive act occurred.

C.48 The Bill lapsed when the then government fell from office,[100] and no similar Bill has been introduced since.

The test of prejudice

C.49 The Canadian Law Reform Commission recommended the introduction of a statutory offence of publishing "anything he knows or ought to know may interfere" with pending proceedings.[101] Apart from the requirement of knowledge, there was no suggestion that this represented any change from the common law test. The Bill departed from this recommendation by including a test of substantial risk of serious prejudice, as in the Contempt of Court Act 1981.[102]

C.50 The court has power to make an order restraining publication of details which pose a real and substantial risk of interference with the right to a fair trial in a pending or forthcoming case. This power is exercisable by the trial judge if appointed, otherwise by any superior court judge.

C.51 This power was comprehensively reviewed in the case of *Dagenais v Canadian Broadcasting Corporation*,[103] which considered among other things the impact of the Canadian Charter of Rights and Freedoms. Since the Charter, it is no longer the case that the right to a fair trial prevails over the right to free speech, as in the common law test.[104] Rather, the two rights are of equal standing and the court should only make an order if:

(1) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk;[105] and

(2) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

C.52 One condition for making an order is that it would be efficacious in keeping prejudicial material from the jury. In *Dagenais* Chief Justice Lamer observed:

[100] 1987 Report (Australia) paras 13 and 111.

[101] Pages 43 to 44 of report, cited in Irish Law Reform Commission, *Consultation Paper on Contempt of Court* (1991) p 306.

[102] L Fuerst, "Contempt of Court" [1984] *Ottawa Law Review* 316, 317.

[103] [1994] 3 SCR 835.

[104] For the older view, see *Re Global Communications Ltd and A-G for Canada* (1984) 44 OR (2d) 609.

[105] See also *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 SCR 97 at [135] to [137].

> It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.[106]

Conversely, however, the ease of accessing material on the internet, however long after the original publication, makes it harder to sustain the "fade factor" argument, that there is no need to prohibit publication because the trial is so far away that by then the jurors will have forgotten about the publication.[107]

C.53 If an order is made, it appears that breach of it is treated as contempt by publication interfering with the course of justice, rather than as civil contempt consisting of breach of the order. However, under what is known as the rule against collateral attack, the alleged contemnor may not use the proceedings for breach to challenge the legitimacy of the order (for example, by disputing the existence of the risk), as that should have been done by appealing against it.[108] Liability is in principle strict, but there is a defence if the publisher could not by due diligence have found out about the existence of the order.[109]

Jury misconduct

C.54 As in England and Wales, breach of jury confidentiality has been made a statutory offence. According to the Criminal Code:

> **Disclosure of jury proceedings**
>
> **649.** Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who, except for the purposes of
>
> (a) an investigation of an alleged offence under subsection 139(2) in relation to a juror, or
>
> (b) giving evidence in criminal proceedings in relation to such an offence,
>
> discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

[106] *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, (1994) 94 CCC (3d) 289.

[107] *Toronto Star Newspapers Ltd v Canada* (2009) ONCA 59, (2009) 94 OR (3d) 82 at [106].

[108] *Domm* (1996) 31 OR (3d) 540.

[109] *Edge* [1988] 4 WWR 163.

There is no corresponding restriction on the media, except that they may not publish information about parts of the trial when the jury was not present until the jury has retired to consider its verdict.[110]

C.55 Independently of section 648 there is, in Canada as in England and Wales, a common law rule that jury deliberations ought to be confidential and therefore disclosures by a juror are not normally admissible to impugn the verdict.[111] Questions have been raised about whether restrictions on academic research into the working of juries should be relaxed,[112] for example, in order to assess the prevalence of racial bias.[113]

Contempt in the face of the court

C.56 As stated above,[114] the superior courts of common law in each province have inherent power to punish contempt of court, including contempt of other courts. Particular statutes can give inferior courts power to punish contempts, but not so as to oust the power of the superior courts.[115] Accordingly, there are statutes conferring powers on particular courts. For example, the Youth Justice Act[116] gives the youth justice courts the same power to deal with contempt of those courts as the superior criminal court of the province.

C.57 The Federal Courts Rules[117] provide that:

> … a person is guilty of contempt of court who
>
> (a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;
>
> (b) disobeys a process or order of the court;
>
> (c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the court … .

The normal procedure is that the alleged contemnor is ordered to appear before a judge at a later date for the charge to be investigated.[118] In a case of urgency, however, the judge in whose presence the contempt occurred may deal with it there and then.[119]

[110] Criminal Code, RSC 1985, s 648.

[111] *Zacharias* (1987) 39 CCC (3d) 280 at [8]; *Pan* [2001] 2 SCR 344.

[112] *Pan* [2001] 2 SCR 344.

[113] *Spence* [2005] 3 SCR 458.

[114] See para C.43 above.

[115] *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725.

[116] SC 2002, s 15(1).

[117] SOR/98-106, r 466.

[118] Rule 467.

[119] Rule 468.

C.58 Similar rules apply to proceedings for contempt at common law. The normal procedure is for the complaint to be adjourned to be dealt with at a "show cause" hearing. Where it is important that the matter be dealt with expeditiously, the "show cause" hearing can be before the judge who was present at the time, provided that the rules of natural justice are observed and the accused has a full opportunity to prepare and present a defence.[120] Only in cases of extreme urgency should it be dealt with immediately after its occurrence.[121]

C.59 The balance was somewhat altered by the enactment of the Canadian Charter of Rights and Freedoms as part of the constitutional reforms of 1982.[122]

> Where a refusal to be sworn or answer questions takes place on the grounds of alleged duress on the part of a third party and the refusal is made to the presiding judge in a polite and respectful manner, it cannot be said that the trial of the contempt proceedings by the same judge would reasonably create in the mind of the alleged contemnor an apprehension of bias or lack of impartiality on the part of the judge. Nevertheless, there are undoubtedly cases where the judge before whom the alleged contempt is committed should not be the judge presiding at the contempt proceedings, for example, where the act complained of consists of insulting or insolent behaviour towards such judge: *Cohn v R*;[123] *Winter v R*.[124]

C.60 There is no general rule against making video or tape recordings in court rooms, this being something to be decided by the judges of particular courts.[125]

[120] *Paul v R* [1980] 2 SCR 169.

[121] *Arradi* [2003] 1 SCR 280; *K (B)* [1995] 4 SCR 186.

[122] Canadian Charter of Rights Decisions Digest, on s 11(d) of the Charter, http://www.canlii.org/eliisa/highlight.do?text=insults+judge&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/charter_digest/s-11-d.html (last visited 1 Nov 2012).

[123] (1984) 15 CCC (3d) 150; leave to appeal refused (Supreme Court of Canada, Mar 14, 1985).

[124] [1986] 72 AR 164.

[125] *Société Radio-Canada v Quebec (A-G)* [2008] RJQ 2303.

NEW ZEALAND

C.61 As in the Australian "code" states,[126] in principle the whole of the substantive criminal law is codified:[127] the present code is contained in the Crimes Act 1961, though some offences exist in other statutes. Contempt of court is the one offence that was omitted from this code and continues to exist at common law.[128]

C.62 Also as in Australia, the law of contempt is largely governed by common law and takes much the same form as it did in England and Wales before the enactment of the Contempt of Court Act 1981. Particular points that arise are:

(1) the test of prejudice, in particular the relationship between the risk of prejudice and public interest considerations; and

(2) communication with jurors.

C.63 The New Zealand Law Commission has not undertaken a project on the law of contempt. However, Professor A T H Smith has published a scoping paper at the request of the Attorney General of New Zealand, describing the existing law and concluding with a series of questions about possible reforms.[129] The following account relies heavily on that paper, and we are grateful to Professor Smith for his assistance on the whole of the present project.

Publication and modern media

C.64 There is no specific power to prohibit the publication of material, unless it is clear that to publish the material would constitute contempt of court.[130] If an order is made, it is contempt to post the material on the internet, even on a server outside New Zealand, provided that it is accessible from within New Zealand.[131]

C.65 As in England and Wales, there is no requirement that a person must intend to prejudice particular proceedings in order to be liable for contempt: it is sufficient that that person intends to publish the material.[132]

C.66 It is not even certain that this last requirement always applies. Newspaper proprietors, broadcasting corporations and distributors have all been held

[126] That is, all the states except New South Wales and Victoria: see para C.4 above.

[127] Originally in Criminal Code Act 1893: A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) para 1.13, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

[128] New Zealand inherited the common law as it stood in 1840: A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) para 9.4, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012). This presumably refers to the common law of New South Wales, from which New Zealand became a separate colony in 1840: see preamble to New Zealand Constitution Act 1846 (passed in the ninth and tenth year of the reign of Her Majesty Queen Victoria).

[129] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) ("Smith"), http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

[130] Smith para 2.67.

[131] *Police v Slater* [2011] DCR 6, cited by Smith para 2.68.

[132] *A-G v Hancox* [1976] 1 NZLR 171; *S-G v Radio New Zealand Ltd* [1993] NZHC 423, [1994] 1 NZLR 48; Smith paras 2.71 to 2.73.

liable:[133] it appears to be sufficient to intend to publish the physical document or transmission, without knowing that it contains the offending material. (Alternatively, this could in some cases be explained as an instance of vicarious liability.) In England and Wales, there is now a defence of innocent dissemination,[134] but the position in New Zealand remains uncertain and Smith recommends that such a defence should be introduced, at any rate for internet service providers.[135]

The test of prejudice

C.67 The test of liability is that "the actions of a particular respondent caused a real risk … of interference with the administration of justice".[136] This applies equally to the publication of material that may prejudice particular proceedings and to the offence of scandalising the court.[137]

C.68 The *Wellington Newspapers* case[138] concerned a person who stabbed a police officer. Three newspapers and one radio programme revealed the fact that, when arrested for this, he was already on bail on another charge of assaulting the police, and had previous convictions for similar offences. They were all charged with contempt of court and convicted by the Full Court.[139] Relevant observations by the court are as follows.

> The onus rests on the Crown. The standard of proof is beyond reasonable doubt. The question is whether as a matter of practical reality there is a real risk, as opposed to a remote possibility, of interference with a fair trial; and, if such real risk exists, whether there are any public policy considerations which militate against contempt. The question is one of tendencies, not actual effect, and in assessing tendencies the court will use its own experience. Intention to commit contempt is not essential, although of course it is a considerable factor in relation to any consequent penalty. The contempt jurisdiction is one to be used sparingly.[140]

[133] Smith paras 2.74 to 2.76.

[134] Contempt of Court Act 1981, s 3.

[135] Smith para 2.77.

[136] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 47 (Smith para 2.11); *Gisborne Herald Co Ltd v S-G* [1995] 3 NZLR 563, 569, 571, 574 to 575 (Smith paras 2.13 to 2.16).

[137] *S-G v Radio Avon Ltd* [1978] 1 NZLR 225.

[138] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45.

[139] That is, the High Court of New Zealand sitting as a bench of two judges, equivalent to the Divisional Court in England and Wales.

[140] McGechan J, p 56 at lines 46 and following. The offence is described in very similar terms by Eichelbaum CJ on p 47 at lines 16 to 24.

> … to publish the criminal record of an accused or comment on the previous bad character of the accused before trial is a prime example of interference with the due administration of justice and subject to considerations such as time and place almost invariably is regarded as a serious contempt.[141]

C.69 Professor Smith, having recommended that the law of contempt be codified, devotes some paragraphs of his paper to the question of whether the "real risk" test should be adopted in legislation.[142] He contrasts this test with the statutory test in England and Wales, of substantial risk of serious prejudice.[143]

C.70 The English test is described in detail in *Attorney General v MGN*.[144] Both "substantial risk" and "serious prejudice" refer to the effect of the publication taken on its own: it is not sufficient that a publication by itself only aggravates the possible prejudice to a small degree but forms part of a wave of publicity that does so to a large degree. The risks of the publication first coming to the attention of a potential juror, then influencing him or her at the time, and then retaining that influence by the time of the trial, must all be individually assessed: the risk of prejudice is the mathematical product of the three.[145]

C.71 Professor Smith refers to an article in which he argues that this test sets the bar very high and has made the law of contempt by prejudicial publication something of a dead letter in the United Kingdom.[146] He concludes that, if the law in New Zealand is to be codified, the "real risk" test should be adopted.[147]

Balancing free speech and fair trial interests

C.72 In the *Wellington Newspapers* case[148] there was some difference of emphasis concerning public interest defences. Eichelbaum CJ said:

[141] Eichelbaum CJ p 48 at lines 6 to 9.

[142] Smith paras 2.48 to 2.52.

[143] Contempt of Court Act 1981, s 2(2).

[144] [1997] 1 All ER 456.

[145] The Australian law reform bodies have recommended explicitly stating this three-step test in statute: NSW discussion paper, proposal 3, following para 4.58; WA report, recommendation 5, p 29.

[146] "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 *Hong Kong Law Journal* 593, 596 to 600.

[147] Smith para 2.52.

[148] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45.

> I turn to the balancing of public interest factors. Although sometimes treated as a matter of defence, this court in *Solicitor General v Radio New Zealand Ltd*[149] preferred to regard it as an element to be considered in deciding whether a contempt has been committed … In this country, as in Australia, it is clear that in the event of a conflict between the concept of freedom of speech and the requirements of a fair trial, other things being equal the latter should prevail. …[150]
>
> Reference was made to Australian cases such as *Ex parte Bread Manufacturers Ltd*[151] where the issue was whether as an incidental but unintended by-product, discussion of public affairs may cause some likelihood of prejudice in relation to litigation then in progress. In *Hinch v Attorney General for the State of Victoria*[152] the view was taken that this was not so much a statement of principle as an example of a publication which had not crossed the borderline into contempt merely because, in the course of a discussion of a matter of public concern or interest, there was an incidental and unintended risk of prejudice to a litigant or accused person.[153]

In other words, there is no real balancing exercise to be carried out. Once the required risk of prejudice exists, it automatically prevails over free speech considerations, especially as publication is not barred but only postponed. If ever it does not do so, that is only because the risk was not significant enough in the first place.

C.73 McGechan J put it a little differently.

> There must, of course, be due regard to freedom of speech. However, freedom … is not untrammelled. It is to be balanced against other rights, and notably the right to a fair trial.[154]

He went on to make the point that the restriction involved was only a delay: "if the issue is worth discussing at all, it will bear the wait".[155]

C.74 One of the newspapers concerned appealed, and this appeal is reported as *Gisborne Herald Co Ltd v Solicitor General*.[156] The appeal was allowed on one point, concerning how likely a publication in Gisborne was to create prejudice in Napier, some 135 miles away, but this made no difference in the result as there was also the prospect of a trial in Gisborne.

[149] [1993] NZHC 423, [1994] 1 NZLR 48.

[150] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 48 at lines 39 and following.

[151] (1937) 37 SR (NSW) 242.

[152] [1987] VR 721.

[153] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 49 at lines 1 and following.

[154] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 57 at lines 15 and following.

[155] *S-G v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 57 at lines 22 and following.

[156] [1995] 3 NZLR 563.

C.75 The Court of Appeal delivered a collective judgment. This contained further discussion of the balance between the values of free speech and fair trial, by reference to the New Zealand Bill of Rights Act 1990. The approach of the court was similar to that of McGechan J at first instance. On the one hand, there is a balancing exercise to be carried out and there is no rule that free speech must always give way to a perceived risk of prejudice, however slight.[157] On the other hand:

> The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.[158]

The Court rejected the Canadian approach whereby a publication ban is always a last resort and the court must first consider every possible alternative, such as moving or delaying the trial or keeping the jury in isolation.[159]

Jury misconduct

C.76 Unlike in England and Wales[160] and Australia,[161] in New Zealand there is no specific statutory offence of breach of jury confidentiality.

C.77 Nor is there any statutory offence of jurors doing their own research.[162] It is suggested by Smith[163] that, given that judges invariably give juries a direction not to do this, offending jurors could be prosecuted for failing to comply with judicial directions.[164] However, in the one case that he mentions where a trial was aborted when a juror did private research, no prosecution appears to have been brought.

C.78 As in other jurisdictions, there is an understanding that jurors must not disclose their deliberations and that the press and others must not ask them to do so. However, there do not appear to have been prosecutions for this until the 1990s. In *Solicitor General v Radio New Zealand*[165] the court held that a radio journalist who made telephone contact with members of a jury after a trial was in contempt. This followed the English case of *Attorney General v New Statesman and Nation Publishing Co Ltd*.[166] The implication of the judgment was that it was only recently

[157] *Gisborne Herald Co Ltd v S-G* [1995] 3 NZLR 563, 574 at lines 4 to 20, citing the Canadian case of *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, (1994) 94 CCC (3d) 289, 370 and 371; see para C.51 above.

[158] *Gisborne Herald Co Ltd v S-G* [1995] 3 NZLR 563, 575 at lines 24 to 27.

[159] *Gisborne Herald Co Ltd v S-G* [1995] 3 NZLR 563, 573 throughout and 575 at lines 28 to 37; see also Smith paras 2.28 and following.

[160] Contempt of Court Act 1981, s 8.

[161] See para C.29 above.

[162] Unlike in Australia: see para C.30 above.

[163] Smith paras 2.57 and 2.63.

[164] Crimes Act 1961, s 401(1)(c).

[165] [1993] NZHC 423, [1994] 1 NZLR 48.

[166] [1981] QB 1.

that the traditional understanding with the press had broken down so that the existence of this form of contempt needed to be affirmed.[167]

> In a more stable period when there was a strong general respect for authority, conventions and institutions the justice system could more readily withstand the occasional aberration such as exhibited in the *Armstrong* case.[168] Understandably judges felt it was sufficient to condemn such conduct in strong terms without labelling it contemptuous ... The exhortatory effect of judicial disapproval of this kind was sufficient to secure compliance with the convention that jurors did not disclose the secrets of the jury room and that the media did not seek out or publicise any disclosures. That was still felt to be the position in England in 1968 when the Criminal Law Revision Committee advised against making any statutory provision for protection of the secrecy of the jury room … in 1979 the picture had changed and Lord Widgery CJ considered that the solemn obligation of secrecy was breaking down.[169] In New Zealand today we consider a very different ethos prevails among the media and breaches by one sector or member of the media inevitably put others under pressure to follow suit. Long-term we have no confidence in the ability of conventions or exhortations to preserve respect for jurors' privacy or prevent attempts to penetrate the secrets of the jury room. The recent breaches of convention referred to in these proceedings — four, including the present, in a short space of years — sufficiently illustrate the point. Nor do we see any likelihood that the trend will change if the courts are not prepared to say the conduct is unlawful.[170]

C.79 In the *Radio New Zealand* case just cited, it was held to be contempt for a journalist to approach a juror for information about the jury's deliberations, however long after the end of the case.[171] As in England and Wales,[172] this is not automatically the case in all circumstances: the court is required to assess, on each occasion, whether the nature of the approach and of any ensuing publication risks injury to the justice system.[173]

C.80 There does not appear to be any case holding the converse, namely that it is contempt for a juror to approach the press.[174] Smith makes no specific proposal

[167] *S-G v Radio New Zealand* [1993] NZHC 423, [1994] 1 NZLR 48, 56 at lines 24 to 50.

[168] [1922] 2 KB 555.

[169] *A-G v New Statesman and Nation Publishing Co Ltd* [1981] QB 1, 7, 11.

[170] [1993] NZHC 423, [1994] 1 NZLR 48.

[171] Smith para 4.16.

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

[173] *S-G v Radio New Zealand* [1993] NZHC 423, [1994] 1 NZLR 48, 57 at lines 24 and following; Smith para 4.22.

[174] Smith para 4.26.

that it should be made so, but cites this as a further instance of the uncertainty of the common law and the need for codification.[175]

C.81 The merits of jury confidentiality were discussed in depth by Jennifer Tunna.[176] She proposes that the prohibition in the *Radio New Zealand* case should be enacted in statute as an offence separate from contempt, with the following modifications.

(1) Disclosure should only be an offence if there is a real risk, as distinct from a remote possibility, that the information disclosed would undermine the administration of justice.

(2) There should be an exception to liability if the juror is assisting the investigation or prosecution of alleged misconduct by another juror.

(3) There should be another exception for authorised research into the working of the jury system.

(4) Provided that the information does not reveal the identity of any juror and that that no reward is received for the information, there should be a defence for disclosure of matters of legitimate public concern.[177]

The rationale for these modifications is that, while the maintenance of public confidence in the administration of justice is a legitimate goal, it ceases to be so when that confidence is misplaced and there is a real defect which ought to be publicly discussed and put right.

Contempt in the face of the court

C.82 Unlike the rest of the law of contempt, the law of contempt in the face of the court has in effect been put on a statutory footing. It is a statutory offence to threaten or insult court personnel, interrupt or obstruct the proceedings or disobey an order or direction made in the course of the hearing.[178] The common law concerning contempt in the face of the court remains in force in relation to acts other than these.[179]

C.83 Similar provisions exist for other courts,[180] and have been used.[181] We have discovered no recent example of the use of the common law offence.

[175] Smith para 4.29.

[176] "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79.

[177] J Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, 109 to 110.

[178] Crimes Act 1961, s 401; Smith para 5.3. The section is similar to Contempt of Court Act 1981, s 12, which governs misbehaviour in magistrates' courts in England and Wales.

[179] Crimes Act 1961, s 401(3).

[180] District Courts Act 1947, s 112; Summary Proceedings Act 1957, s 206; Employment Relations Act 2000, s 196.

[181] *Chapman v Aotearoa Resorts Ltd* [2010] NZMLC 39; *Pandey v Police HC New Plymouth* [2010] NZHC 2434; *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] 3 NZELR 390.

C.84 The question has been raised whether the use of the summary procedure for contempt is compatible with the New Zealand Bill of Rights Act. In *Siemer v Solicitor General*[182] it was held that it was. *Siemer* was not itself a case of contempt in the face of the court, but this form of contempt was used as an example of the type of case in which the summary procedure is appropriate.[183]

REPUBLIC OF IRELAND

C.85 The law of contempt in the Republic of Ireland is described in detail in a Law Reform Commission Consultation Paper published in July 1991.[184] This was followed by a final report in 1994.[185] The recommendations in the report have not been implemented.

C.86 As in England and Wales, the superior courts have an inherent jurisdiction to deal with contempt of court, including contempt of other courts. There is some doubt whether this is simply a rule of common law inherited from the time before independence or it has some entrenched constitutional protection.[186] The majority of the Law Reform Commission took the view that, while the legislature has power to modify contempt of court as a criminal offence, it cannot modify the court's inherent power to proceed by way of attachment.[187]

C.87 It appears that in theory contempt of court is an indictable offence. In practice, the court uses a summary procedure, either on its own motion or on the application of the Director of Public Prosecutions. In a series of cases, the courts have rejected the proposition that the Constitution requires jury trial in contempt cases as in all other non-minor criminal offences.[188] One reason given was that this would leave the decision to prosecute in the hands of an officer of the executive, thus offending against the separation of powers and the constitutional right of the court to protect its own processes.

Contempt by publication

C.88 There is liability for any publication "calculated" to interfere with particular proceedings. There is some disagreement on whether this refers simply to the character of the publication[189] or also to the likelihood of that effect occurring given the circumstances.[190]

[182] [2010] 3 NZLR 767.

[183] The same comparison was made in *Brown v A-G* [2005] NZCA 28 at [91].

[184] *Consultation Paper on Contempt of Court* (1991), ("1991 CP").

[185] *Report on Contempt of Court* (LRC 47/1994), ("1994 Report").

[186] 1994 Report para 3.2 and authorities cited.

[187] 1994 Report para 3.9.

[188] *The State (DPP) v Walsh* [1981] IR 412 (Sup Ct); *Murphy v British Broadcasting Corporation* [2005] 3 IR 336. For the earlier cases, see 1991 CP ch 8. For more recent consideration of how far contempt is subject to the rules for criminal offences, see *DPP v Independent Newspapers (Ireland) Ltd* [2008] IESC 8, [2008] 4 IR 88 (preliminary ruling) and [2009] IESC 20, [2009] 2 ILRM 199 (judgment).

[189] *A-G v Cooke* (1924) 58 ILTR 157. See 1991 CP p 72 to 73.

[190] *Dolan* (1907) 2 IR 260, 271. See 1991 CP p 71 to 72.

C.89 It has been held that this rule only applies to proceedings of which a court is seised at the time of publication.[191] There can be liability for prejudicial publications between the time of verdict and sentence, provided that the publication is calculated to influence the question of sentencing.[192] It appears that there is no liability for publication while there is a pending appeal, until such time as a new trial is ordered.[193]

C.90 The publisher is liable whether or not he or she knew of the existence of the proceedings or other facts contributing to the risk of prejudice, provided that he or she could reasonably be expected to find them out.[194]

C.91 There is power to prohibit contemporaneous reporting of proceedings if there is a risk that otherwise a fair trial would be impossible. This is justifiable in constitutional terms as there is a hierarchy of rights, the right to a fair trial ranks higher than the right to unrestrained free speech, and the effect of such an order is to delay rather than prevent publication.[195] This power does not extend to the making of an order requiring the Director of Public Prosecutions to search the internet for prejudicial material with a view to requiring it to be removed.[196]

C.92 The Law Reform Commission recommended that the rules governing this sort of contempt should be restated in statute. Specifically:

(1) publication should be defined as any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public or to a judge or juror who is involved in the legal proceedings to which the publication relates;[197]

(2) the rule should apply to any publication which creates a substantial risk that the course of justice in proceedings would be seriously impeded or prejudiced; for criminal cases there should be an illustrative list of types of statement which are capable of constituting such a risk;[198]

(3) criminal proceedings should be regarded as "active" from the time of arrest, warrant or charge, whichever comes first, till disposal by acquittal or sentence:[199] the rule should not apply to appeal proceedings;[200]

(4) there should be liability for publications before proceedings are active only if the publisher is aware that the publication is virtually certain to cause serious prejudice to a person involved in the proceedings;[201] and

[191] *State (DPP) v Independent Newspapers Ltd* (1985) 5 ILRM 183.

[192] *Kelly v O'Neill* [2000] 1 IR 354.

[193] *Cullen v Toibin and Magill Publications (Holdings) Ltd* (1984) 4 ILRM 577.

[194] *JM v Platinum Investment and Development Ltd* [2008] IEHC 421.

[195] *Irish Times Ltd v Ireland* [1998] 1 IR 359.

[196] *Byrne v DPP* [2010] IEHC 382.

[197] 1994 Report, recommendation 19, paras 6.2 and 6.9.

[198] 1994 Report, recommendation 20, para 6.9.

[199] 1994 Report, recommendation 21, para 6.13; see also p 68.

[200] 1994 Report, recommendation 26, para 6.14; see also p 69

(5) where proceedings are active, the test of liability should be one of negligence.[202]

Jury misconduct

C.93 The 1991 Consultation Paper recorded the existence of a convention of jury confidentiality but did not state whether, in existing law, breach of it amounted to contempt of court. Arguments in favour of jury secrecy given in the paper were:

(1) the need for security and privacy to protect jurors from fear of reprisals or obloquy;

(2) the desirability of finality for jury verdicts;

(3) the maintenance of public confidence in the jury system; and

(4) allowing the jury to use its "dispensing power" against unjust laws by perverse verdicts.[203]

Arguments against jury secrecy were:

(5) more openness would allow miscarriages of justice to be rectified;

(6) there was no evidence that harm had in fact resulted from jury leaks; and

(7) the present rule hampered legitimate research.[204]

It was further observed that "a public confidence in the jury system which depends on ignorance of how it truly operates deserves no protection".[205]

C.94 Both the Consultation Paper and the 1994 Report recommended that the law of contempt should be the means by which jury confidentiality should be enforced.[206] The rule against disclosure of deliberations should not be absolute:[207] there should be liability when the disclosure creates a risk of detriment to the interests of a party to litigation.[208] Bona fide research should be permitted subject to the approval of the senior judge of the court in question.[209]

C.95 Jury misconduct was considered again in Chapter 8 of the Law Reform Commission's Consultation Paper on Jury Service.[210] In particular this raised the

[201] 1994 Report, recommendation 24, para 6.12; see also p 69.

[202] 1994 Report, recommendation 22, para 6.10; see also p 69.

[203] 1991 CP pp 364 to 368.

[204] 1991 CP pp 368 to 369.

[205] 1991 CP p 366.

[206] 1991 CP p 372; 1994 Report, recommendation 44, paras 7.14 to 7.19; see also p 72.

[207] 1994 Report, recommendation 43, paras 7.14 to 7.19; see also p 72.

[208] 1994 Report, recommendation 48, paras 7.14 to 7.19; see also p 72.

[209] 1994 Report, recommendation 47, paras 7.14 to 7.19; see also p 72.

[210] Irish Law Reform Commission, *Consultation Paper: Jury Service* (2010), ("2010 CP").

problem of jurors attempting to obtain information outside the process of the trial, for example, by searching the internet. The paper referred to the findings of the 1994 Report on jury confidentiality and expressed the view that, if a defendant is convicted on the basis of information obtained by a juror independently of the court, that is a sufficient miscarriage of justice to justify an exception to the rule of non-disclosure according to the reasoning of the 1994 Report.[211]

C.96 The 2010 CP observed that there was little evidence of the scale of the problem in Ireland,[212] and therefore made a survey of cases of different types of juror misconduct in England and Wales, the United States and Australia and of the legislative responses to these. Instances of misconduct cited included both conscientious attempt to find out more facts, such as by visits to the site of the crime,[213] internet searches and experiments,[214] and irresponsible conduct, such as listening to music[215] or doing Sudoku puzzles[216] during the trial or using an Ouija board.[217]

C.97 The 2010 CP then considered the comparative merits of creating a specific criminal offence, like that in Australia,[218] of conducting extraneous research, and of dealing with the problem through the law of contempt. It recommended legislation on the Australian model, as that would alert the jury more forcibly to the importance of the rule.[219] It also recommended an offence of disclosing matters discussed in the jury room,[220] but did not specifically repeat the conclusions of the 1994 Report about possible exceptions to that offence, such as disclosing to the responsible authorities that unlawful extraneous research had taken place.

C.98 The 2010 CP is referred to in *Byrne v DPP*,[221] where the judge expresses the view that, as a solution to the risk of jurors being prejudiced by material they see on the internet, the enactment of an offence along these lines is more practical than attempting to wipe the internet clean of all such material.

[211] 2010 CP para 8.12.

[212] 2010 CP paras 8.10 and 8.63.

[213] "Manslaughter trial collapses after juror turns amateur sleuth", *The Times*, 20 Aug 2008 (England and Wales). See also "Juror's detective work leads to collapse of manslaughter trial", *The Guardian*, 20 Aug 2008, http://www.guardian.co.uk/uk/2008/aug/20/7 (last visited 1 Nov 2012).

[214] *Boseley* (unreported), "Rapist bailed after jury's error", *BBC News*, 31 Jul 2007, http://news.bbc.co.uk/1/hi/england/hereford/worcs/6924190.stm (last visited 1 Nov 2012).

[215] "Muslim juror listened to iPod under hijab", *The Times*, 10 Jul 2007. See also "MP3 juror faces jail for contempt", *The Guardian*, 10 Jul 2007, http://www.guardian.co.uk/uk/2007/jul/10/claredyer.uknews4 (last visited 1 Nov 2012).

[216] "Su Doku-loving jurors force judge to abandon major drugs trial", *The Times*, 11 Jun 2008 (Australia). See also "Su Doku-playing jurors halt trial", *BBC News*, 11 Jun 2008, http://news.bbc.co.uk/1/hi/world/asia-pacific/7447627.stm (last visited 1 Nov 2012).

[217] *Young* [1995] 2 Cr App R 379.

[218] See para C.30 above.

[219] 2010 CP paras 8.64 to 8.69.

[220] 2010 CP para 8.69.

[221] [2010] IEHC 382.

Contempt in the face of the court

C.99 Contempt in the face of superior courts is punishable at common law in the same way as in England and Wales. Inferior courts have statutory powers to deal with disruptive behaviour.[222]

C.100 There is no general rule against the use of tape recorders in court: this is a matter for the individual judge. A question has been raised whether a judge is entitled to forbid tape recording in all circumstances or only where a risk of impediment to the proceedings is shown.[223] Another question concerns failure to attend court when required: this is undoubtedly contempt, but is it in the face of the court?[224]

C.101 The Law Reform Commission recommended the retention of this form of contempt in its existing form.[225] The question of how it should be tried should be left till the constitutional uncertainties raised in the case of *Walsh* were resolved by the courts one way or the other.[226] They recommended the establishment of an advisory committee to consider the question of the recording of proceedings by the media,[227] but made no recommendation for any restriction on private tape recording (for example, by an advocate desiring a record of the proceedings).[228]

[222] For example, district courts: Petty Sessions (Ireland) Act 1851, s 16(1), saved by Statute Law Revision Act 2007, sch 1.

[223] 1991 CP pp 8 and 9.

[224] 1991 CP pp 10 and 11.

[225] 1994 Report, recommendation 7, para 4.8; see also p 66.

[226] 1994 Report, recommendation 5, para 3.12; see also p 66.

[227] 1994 Report, recommendation 11, para 4.49; see also p 66.

[228] 1994 Report para 4.42.