

ANALYSIS OF RESPONSES

RELATING TO REPORT 340 CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS

CHAPTER 1 - INTRODUCTION

NUMBER OF RESPONSES

- 1.1 Consultation on our Contempt of Court project closed on 28 February 2013. Seventy written responses were received to our Consultation Paper (CP).¹ Many of these were sent on behalf of organisations, including responses from:

Association of Chief Police Officers (ACPO)

Association of High Court Masters

BBC

Chancery Bar Association

Chartered Institute of Journalists

Coroner's Society of England and Wales

Council of Circuit Judges

Criminal Bar Association (CBA)

Criminal Cases Review Commission (CCRC)

Crown Prosecution Service (CPS)

Doughty Street Chambers (Crime Team) Equality and Human Rights Commission (EHRC)

False Allegations Support Organisation

Guardian News and Media Limited

Independent Print Ltd

Information Commissioner

Internet Services Providers Association (ISPA)

ITN

¹ Contempt of Court (2012) Law Commission Consultation Paper No 209.

Justices' Clerks Society

Law Reform Committee of the Bar Council of England of Wales

Law Society of England and Wales

Legal Committee of the Council of Her Majesty's District Judges
(Magistrates' Courts)

London Criminal Courts Solicitors' Association

Lord Justice Treacy and Mr Justice Tugendhat, on behalf of some
members of the Senior Judiciary²

Magistrates' Association

Media Law Resource Center

Media Lawyers Association (MLA)

National Union of Journalists (NUJ)

Newspaper Society

Press Association

Publishers' Association

Society of Editors

South East London Bench

Trinity Mirror Plc

Western Circuit

Wiggin LLP

1.2 Responses were also received from individuals, including:

Anthony Arlidge QC, 18 Red Lion Court

Professor Eric Barendt, University College London

Peter Bartlett, Partner, Minter Ellison Lawyers, Melbourne

Robert Brown, Partner, Corker Binning

Godwin Busuttil, 5 Raymond Buildings

Andy Dumbiotis, Police Federation

² Note this was not the response of the Rose Committee.

Professor Louise Ellison, University of Leeds

Professor Vanessa Munro, University of Nottingham

Professor Helen Fenwick and Professor Gavin Phillipson, University of Durham

Professor Alisdair Gillespie, University of Lancaster

Joshua Rozenberg, legal journalist

Oliver Sells QC, 5 Paper Buildings

Richard Shillito, Consultant, Farrar and Co

Dr Findlay Stark, University of Cambridge

Inspector Rick Sumner

Nick Taylor, University of Leeds

and 19 other individuals.

- 1.3 In January 2013 we held a symposium at the Judicial Institute of University College London with expert speakers from academia, the judiciary, police, media, parliament and legal practice. Each of the chapters of the consultation paper, on contempt by publication, the new media, contempt by jurors and contempt in the face of the court, was debated by the speakers and an audience of over 100 journalists, solicitors, barristers, academics, judges, government officials, and representatives of non-governmental organisations. We have treated the speeches of panel members at the symposium and our notes of the discussion that was held in relation to each chapter as part of the responses to the consultation.
- 1.4 In addition, we held a seminar with members of the media and of the judiciary at the Royal Courts of Justice to discuss the modern media chapter of the CP. This event was held under the Chatham House rule. We have also cited here some of the views expressed at that event, on an anonymous basis.

This document is an analysis of those responses which relate to chapter 3 (modern media) and chapter 4 (juror contempt) of the CP. These aspects of the CP, and the responses to them analysed below, formed the basis of our report Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340, published on the 9th December 2013 and available at: http://lawcommission.justice.gov.uk/publications/contempt_of_court_juror_misconduct.htm

- 1.5 The remainder of the issues dealt with in the CP will be considered in two further reports on contempt of court, the first regarding reporting restrictions and the second regarding contempt in the face of the court. These reports, and the analysis of the responses to the CP which relate to them, will be published in 2014.

CHAPTER 2 - MODERN MEDIA

PUBLICATION

Do consultees agree with our conclusion that the definition of publication in section 2(1) of the 1981 Act is broad enough to cover things appearing in the new media? If not, why not? [paragraphs 3.22 and 6.24]

- 2.1 There was near unanimous agreement with our conclusion. Those who agreed with our interpretation of section 2(1) included Anthony Arlidge QC, Professor Eric Barendt, the Bar Council, the Society of Editors, London Criminal Courts Solicitors' Association, the National Union of Journalists, the Newspaper Society, the Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts), the Press Association, Trinity Mirror Plc, the Law Society, Wiggin LLP, Independent Print Limited, the Media Lawyers Association, ACPO, the Council of Circuit Judges, Professor Alisdair Gillespie, Criminal Bar Association, Justices' Clerks Society, CPS and eight other individuals.
- 2.2 Professor Alisdair Gillespie explained his agreement as follows:
- I agree with the logic of the Law Commission in terms of, for example, the fact the decision in *R v Sheppard and Whittle* ... means that there is little doubt that internet-based writings will amount to 'writing' for the purposes of contempt. It would seem inevitable that this is the case and there is no reason why the law should distinguish internet-based text from how it is construed in other parts of the law. For the same reason I believe that the term 'publication' remains perfectly suitable to the current converged environment. The law is familiar with the term 'publication' and, in particular, the circumstances under which it can be said to arise in the context of the internet¹ and there is no reason to believe that the law of contempt cannot adopt this approach.
- 2.3 The Criminal Bar Association also agreed with our interpretation, but commented that "the illustrative examples currently included in section 2(1) (speech, writing, programme included in a programme service), *could* be added to with words such as 'on-line communication of any kind'".
- 2.4 The Justices' Clerks Society also agreed but raised concerns, which are beyond the scope of this consultation paper, that
- the Children and Young Persons Act appears to cover traditional media outlets only and that a person using social media or other aspects of the internet to publish the identity of a young person whose identity has been protected under that Act appears to be immune from action.
- 2.5 Likewise, the CPS was also in agreement but commented that

¹ Footnote in original: A useful case in this context is *R v Smith* [2012] 1 WLR 3368.

the broad term “other communication in whatever form” is not included in sections 39 and 49 of the Children and Young Persons Act 1933 which restrict publication of the identity or detail that lead to the identification of children and young persons involved in criminal proceedings, whether as victims, witnesses or children. There have been amendments to both sections to include publication by way of a programme service, but this appears to exclude social media such as Facebook and Twitter. Implementation of section 45 of the Youth Justice and Criminal Evidence Act 1999 would clarify the position with regard to proceedings in courts other than a youth court as it would prohibit any publication of any matter relating to the identity of a child or young person.

- 2.6 Mr Tovey of the Pirate Party also agreed with our interpretation, but commented

It may be that the definition could be simplified by making it less technology-dependent and referring generically to any sort of communication. However, this would be more of a style and efficiency issue than a substantive one, although it could prevent having to update the law for new specific technologies.

- 2.7 Two individual respondents disagreed with our interpretation of the section 2(1). One thought that the section “should be much more clearly defined to cover electronic and internet publications”.

- 2.8 Mr Lewis, a member of the public, did not say whether he agreed with our position, but responded that:

Some thought needs to be given to penalties appropriate to the the originator - initiator, original publisher - and those who spread and further disseminate the originally 'published' item, with or without their own comment.

Also to the liability of the originator of an item if it was originally restricted to a closed circle of recipients with an express request for confidentiality, without any such request, or with an explicit suggestion/ request that it should be further disseminated.

- 2.9 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) explained:

We agree that the definition of publication ought to be statutory. So too should responsibility for publication (paras 3.30 to 3.49), although no question is asked about this point.

- 2.10 The Press Association commented that there has been “a fundamental shift in technology that the very basis on which part of the contempt law works is now no longer a feasible approach”. On the meaning of “publication” and the question of whether internet publication is a single or continuing act, the Association argue that “illogical decisions [are] being made in attempt to bend 19th Century concepts to match the needs of the 21st Century”.

- 2.11 The Information Commissioner drew attention to recent developments in data protection and the ongoing Spanish case concerning Google’s liability as a data

controller. They noted that the decision may provide “legal clarity as to the position from a data protection perspective”.

- 2.12 That case has now been decided, with the European Court of Justice finding that Google must remove irrelevant and outdated information which appears in web searches should an individual request it unless there are very particular reasons for not doing so: a so-called “right to be forgotten”.² In addition, future European legislation on data protection suggests that publishers such as search engines will soon be covered by data protection legislation.

ADDRESSED TO THE PUBLIC AT LARGE OR ANY SECTION OF THE PUBLIC

Do consultees consider that the lack of a statutory definition of “a section of the public” is creating problems in practice? If so, can they provide examples? [paragraphs 3.29 and 6.25]

- 2.13 Independent Print Limited, the CPS, ACPO, the Council of Circuit Judges, the Law Society, the National Union of Journalists, Trinity Mirror Plc, the Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat), the Criminal Bar Association, the Bar Council, Professor Eric Barendt, Anthony Arlidge QC, the Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts), the Press Association and three other individuals all responded that the lack of definition was not a problem in practice. Many respondents commented that the law could be left to develop case-by-case.
- 2.14 The Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts) noted that “the technology exists to identify the number of ‘hits’ an item has received and therefore identify how many times it has been seen.”
- 2.15 Godwin Busuttil did not think that “section of the public” created problems in practice, but stated “nonetheless, it’s an imprecise definition. I’m sure it could be made clearer, with reference to modern realities.”
- 2.16 The Press Association also thought that there was no need for a statutory definition explaining that “a section of the public” “would clearly cover more than just one person – an individual member of the public.” It added:

Responsibility for publication: It should be accepted that the publisher of material is the person or organisation responsible for its publication to the public or any specific section of the public. This definition should specifically exclude all those who may play a part in the publishing process but do not take or carry responsibility for the content or meaning. Thus, the publisher of a book is the publishing house, such as Penguin, while the publisher of a message on Twitter is the person who places the message into the system.

² The case may be found here:
http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=first&dir=&cid=97254.

It would be stretching the meaning of the word “publisher” far too far to argue that any one of a large number of groups which might be involved in the physical process of publication – such as internet service providers, the providers of internet hosting or platform services, domain name registrars and registries, or providers, such as Google, of services enabling users to locate content made available by others – could or should be included within the definition of publisher. They are merely the providers of the technical services and, sometime, equipment, such as servers, which make the process of internet publication possible. They provide, as it were, the tracks on which the trains run, or the lines along which telephone conversations are transmitted, but carry no responsibility for the content and meaning of the material so transmitted, or the intentions of those who transmit it.

The PA would also argue that the providers of internet services should not be regarded as “distributors”, as they play no active part in distributing the material. A book distributor, for example, has to agree to distribute a particular work. But the systems operated by internet service providers exist, and are used by all sorts of people for all sorts of purposes, most of which are irrelevant to the working of the system and the operations of the system companies. The results of searches on Google, for example, are arrived at in milliseconds, without any human intervention.

2.17 Mr Tovey of the Pirate Party explained that:

The Party has no evidence of the definition creating problems in practice, but further clarification or a change to the definition could be appropriate. In particular, it may be worth considering the likelihood of something being accessed by a section of the public at this stage, rather than merely whether that is possible.

Vast amounts of information are “publicly accessible” on the internet, yet much of it is unlikely to be found by anyone unless they are specifically looking for it, or have been directed there (particularly if the site is not indexed by common search engines). In cases such as this, material could be accessible by the public at large, but not addressed to them due to the very low probability of a significant section of the public finding it. As such, the test of a single police officer being able to find it (paragraph 3.26) would seem overly broad.

2.18 Of those consultees who thought that the lack of statutory definition was problematic, many had concerns in relation to the impact of new technology.

2.19 Inspector Sumner argued that one problem in practice was in relation to, for example,

Facebook and Friends. They may forward or like a post to their friends or might have public view settings causing the initial post to globalise. Similarly with email, the recipient may forward it to others causing it to globalise.

2.20 Likewise, Wiggin LLP argued that

“section” gives no indication of how large that audience must be, and therefore leads to real uncertainty as to whether there is a risk of contempt or not. New media in particular has a huge degree of variance in the size of audiences. Furthermore, there it is unclear as to what would be considered “the public”, particularly when privacy settings are utilised to some degree, for example on social networking pages. Clear guidance is needed on both these issues.

2.21 In a similar vein, the London Criminal Courts Solicitors’ Association responded that the problem was:

use of status updates and wall posts on Facebook, even if privacy settings are applied status updates and wall posts may appear to all of the “writer’s” Facebook friends and in relation to wall posts may appear to the recipient’s friends. Certain posts on Facebook can be shared with others, it will be unclear who then is the publisher (i.e. the one who makes it available to the public or a section of the public). Having said this it does not seem that this is a concept which is easily defined in statute and may need to develop on a case by case basis with regard to the impact of the publication rather than merely who the publication was addressed to.

2.22 Other consultees who thought that there are difficulties with the lack of statutory definition held their views in relation to online archives. The Society of Editors questioned:

whether any article can still be deemed to be “addressed to the public at large or any section of the public” once a story is no longer on the live section of the website and discovery is only achieved after extensive searching for it in an online archive.

2.23 The Media Lawyers Association took a similar view, as did the BBC. As noted below in the context of section 2 and the time of publication,³ the BBC responded that

the existence of material in an archive that has to be specifically sought out ...should certainly not constitute publication to the public at large or any section of the public.

2.24 The BBC went on to say that, in order to be article 10 ECHR compliant, contempt of court should only cover contemporary publications “directed’ at users” and not online archives which require searching.

2.25 Mr Buora of British Naturism also argued that the lack of definition was problematic. He explained

I prepare a report on ongoing legal work for our national executive, about 15 people. The report may be oral, paper, email or via the

³ See para 1.33 below.

executive's private online forum. The present lack of clarity has a serious chilling effect on the ability to make decisions. Case law is not a satisfactory alternative to statute. It is largely inaccessible due to the cost of legal advice and even then mistakes are common enough to mean that the requisite confidence is lacking.

- 2.26 Dr Findlay Stark responded that the phrase "section of the public" "should be reworded so as to make the intended meaning clearer". Two other individuals also reported that the lack of definition creates problems in practice, but did not give examples.
- 2.27 Professor Alisdair Gillespie suggested that whilst he has no reason to believe that the term "a section of the public" is currently causing any difficulty in practice, he acknowledges that this position may change. He refers to individual publishers on social media who do not have access to legal advice and argues that "it would seem reasonable to ensure the law is clear as to what a section of the public means, particularly in the context of social media". He explains

The mere fact that some social media systems have privacy settings does not, it is submitted, mean that this is automatically a private communication since that person may have a large number of followers, meaning that they could properly be considered a 'section of the public'. Where the message is 'at large', ie it can be received or seen by anyone (eg a public tweet or a video on YouTube) then it is submitted that this should satisfy the requirements of section 2. If, for example, a person broadcasts information on the radio it is unlikely that the fact that very few people actually listen would be relevant to whether it was a public broadcast and the same should be true of social media. That said, where there are only a small number of followers this should be directly relevant to whether a prosecution would be proportionate.

He points out that "an argument could be made that the certainty of law required by article 10(2) would require an understanding of what 'section of the public' means and that this could, and should, be set out in statute".

- 2.28 At our symposium on contempt of court, Joshua Rozenberg suggested that communication to a single individual was clearly outside the definition of "the public at large or any section of the public" but questioned what would happen if an email was sent to more than one person, additional persons were cc'd, or an email was forwarded to more than one person. He commented that this point was not really addressed by the CP. In his own view an email to one person, even if forwarded is protected. He suggested that an email to 2 or 3 persons could possibly be protected. However, he pointed out that we should be aware that email is used as a marketing tool and sent to mass recipients.

THE TIME OF THE PUBLICATION

Do consultees consider that section 2 is correctly construed as applying to to publications commencing before proceedings were active?? [3.63 and 6.26]

Do consultees consider that section 2(3) should be amended to confirm that “time of the publication” is to be interpreted as meaning “time of first publication”? [3.67 and 6.27]

- 2.29 The members of the media who responded to the CP were generally of the view that section 2 had been incorrectly construed by the *Beggs*⁴ decision, and that section 2(3) should be amended accordingly. Other stakeholders such as the CPS, the Law Society, Criminal Bar Association, the Council of Circuit Judges and the District Judges (Magistrates’ Courts) shared the media’s view. However, this view was certainly not universally held.
- 2.30 Anthony Arlidge QC supported the decision in *Beggs*, arguing that “publication is a continuing act and can apply when the initial publication occurred before proceedings are active.” In consequence, he was not in favour of amending section 2(3). Eight other consultees also thought that section 2 had been correctly construed as applying to publications commencing before proceedings were active.
- 2.31 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) suggested that the meaning of publication adopted in *Harwood*⁵ (following *Beggs*) should be set out in statute, if it is to be adopted. They referred to the Defamation Bill:

The Defamation Bill (HL Bill 84) cl 10⁶ provides for a single publication rule (i.e. at the date of first publication). That has in practice been the rule applied at common law in relation to defences of privilege in defamation. A privilege subsisting at the time of first publication is not lost by reason of the statement being continuously available thereafter: *Gatley on Libel and Slander* 11th ed para 14.16.

- 2.32 The Society of Editors disagreed, arguing that
- contempt of court should instead be focused upon material that is published contemporaneously rather than material still available, after a search, in online archives. Media organisations already have measures in place to deal with the substantial risk of serious prejudice. There should be stronger judicial direction to jurors of the severity and likely implications of conducting their own research online. It’s also impractical to remove information from the internet once it has been published globally.

⁴ *HM Advocate v Beggs (No 2)* 2002 SLT 139.

⁵ [2012] EW Misc 27 (CC). Available at: <http://www.bailii.org/ew/cases/Misc/2012/27.pdf>.

⁶ Now the Defamation Act 2013.

- 2.33 The Newspaper Society responded that it thought section 2 had been wrongly construed, *Beggs* and *Harwood* wrongly decided and therefore section 2(3) should be amended. They explained that section 2 should not

apply to regional media companies online archives, where material has to be specifically sought out by a person proactively and possibly systematically searching for it. Such an interpretation would lead to such uncertainty about potential criminal liability for mere retention of lawful material published before proceedings became active, that local media archives could be placed at risk- with the consequent risk of loss of a rich part of our history and chronicles of local life

Local people, local names, addresses, places, events are the essential elements and vital content of the local press. It would [if *Harwood* and *Beggs* are followed] impose a huge, costly, disproportionate, unnecessary and impracticable burden upon regional media companies to deem their online archives a repository of criminal content and either risk contempt proceedings or impose a duty upon them to constantly monitor, legally evaluate and remove court reports or other material which related to someone who was the subject or otherwise involved in active legal proceedings, or perhaps someone who happened to share a similar name and address

- 2.34 Unusually for a respondent from the media, Trinity Mirror Plc took the view that “section 2 is (probably) correctly construed as applying to publications first published before proceedings were active”. However, Trinity Mirror Plc subsequently argued that there was therefore a need to change the law

so to differentiate between a new or fresh publication (which may need to be expressly defined) and an archived publication, that is to say material which is regarded for this purpose as being continuously published because it is accessible by way of a specific search of a topic or subject. There is no justification for treating historically published material which is accessible by way of a targeted search in the same way as contemporaneously published material made available or presented to the public by way of, say, a newspaper.

- 2.35 The BBC responded that section 2 had been wrongly construed and that section 2(3) should be amended. They thought that it was better to compare online archives to a newspaper library. An online archive, unlike with contemporary publications, has to be searched in order to find prejudicial material

the existence of material in an archive that has to be specifically sought out, (often using specific terms that members of the public are unlikely to consider without prior knowledge of a case) does not and should not constitute publication at all, and in any event should certainly not constitute publication to the public at large or any section of the public.

The BBC went on to say that, in order to be article 10 compliant, contempt of court should only cover contemporary publications “‘directed’ at users” and not online archives which require searching. The National Union of Journalists responded with a similar view.

- 2.36 Wiggin LLP thought section 2 wrongly construed and therefore that section 2(3) should be amended. They argued that the *Beggs* interpretation, were it to be followed,

would create real uncertainty and impose an unnecessary and disproportionate burden on publishers and content owners who published content in good faith at a time when no proceedings were active and there was no contravention of section 2. They could not know at the time of first publication what the issues might be in a future case, and it would be impossible to make an informed decision at the time of publication whether the publication contained any potentially prejudicial material. Given the very serious consequences of potentially being found in contempt of court, to interpret section 2 in the way suggested is likely to lead to a “chilling effect” on, and self-censorship by, publishers resulting in a disproportionate and wholly unwarranted interference with freedom of speech. It would also be inconsistent with the proposed changes in the Defamation Bill for a single publication rule.

- 2.37 Independent Print Limited also thought *Beggs* and *Harwood* wrongly decided, and that section 2(3) should be amended, arguing that civil law concepts should not be used to assist in the interpretation of a statute which gives rise to criminal liability. They argued that, if *Beggs* and *Harwood* were followed, in order to avoid being held in contempt “an unworkable burden would be placed on publishers to scour their archives for potentially prejudicial material whenever somebody is arrested”.

- 2.38 The Media Lawyers Association (“MLA”), like the BBC, responded that contemporary publications are different from online archives because the latter need to be searched in order to uncover prejudicial material. In consequence, they argued that online, archive publications were either not a “publication” for the purposes of the Act, or were not published “to the public at large or any section of the public”. The MLA argued that contempt should only cover contemporary publications since “in most cases a member of the public would need ‘some degree of background knowledge and persistence for it to become available’.”⁷

- 2.39 The MLA also highlighted the important social and historical role of online archives for both researchers and the public at large. They emphasised the views of the European Court of Human Rights in *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom*⁸ that the maintenance of public archives is an important function of the press in a democratic society. In consequence, the MLA argued that

It is not proportionate or necessary to require an online archive to be sanitised, (or by analogy a library to have books removed from its shelves, or a published book to be withdrawn from continued sale), on every occasion that a high profile case commences because of the risk (as opposed to the substantial risk) that jurors might choose to

⁷ *AG v Greater Manchester Newspapers Ltd* [2001] EWHC QB 451.

⁸ Application nos 3002/03 and 23676/03; [2009] EMLR 14.

access prejudicial (or even seriously prejudicial) material. The principal safeguards of the objective impartiality of the criminal court process lies in the trial process itself and the conduct of the trial by the trial judge, which includes giving a direction to the jury against being tempted to use the internet to conduct research.

- 2.40 The MLA explained that most archives “are carefully managed and practical measures are adopted to avoid linking back to material which was published before proceedings became active.” They cited the speech of the Attorney General at the University of Kent,⁹ where it was suggested that archived prejudicial material “is unlikely to present a substantial risk of serious prejudice because it is a needle buried away in the haystack of the internet.”
- 2.41 The MLA also argued against the use of civil law concepts to interpret the definition of “publication” for the purposes of criminal contempt and they were concerned, if *Beggs* were followed, about the “unworkable burden” on publishers “to scour their archives for potentially prejudicial material whenever somebody is arrested.” They were particularly concerned about the impact on the regional media “which routinely reports local courts involving local defendants, including weekly round ups of results, local crimes and investigations.” Additionally, the MLA cited “the impracticability of removing material from the internet once it is published” in that information may remain available on the internet even if removed from certain websites. The MLA therefore also supported the amendment of section 2(3).
- 2.42 The National Union of Journalists (“NUJ”) felt that “it is not practical for all archive records to be deleted, for example in relation to removing every previous reference to every defendant in proceedings.” They suggested that, since there is no expectation that libraries take books off the shelves, internet archives should be treated in the same manner. Instead, the focus should be on instructing jurors not to undertake research about the case that they are trying. The NUJ suggested that bringing “contempt proceedings on the basis of archived material would be an unnecessary and disproportionate interference with freedom of expression” and that *Beggs* and *Harwood* were incorrectly decided.
- 2.43 The Criminal Bar Association responded that the *Beggs* interpretation of section 2 is “deeply problematic and unfair” and that therefore section 2(3) should be amended

Section 2 cannot (and should not) be construed in the way it was construed in *Beggs*, despite the fact that the rise of social media and so-called “citizen journalism” means that “everyone is a publisher” now. Such citizen journalists would not have the resources or wherewithal of large news corporations or other more traditional publishers to ensure awareness of any legal proceedings that may begin, on a topic about which the person has previously written (and there is the additional problem of “intermediaries”). Whilst there is a defence (or defences) of innocent publication and/or distribution and/or EU Directives, there ought to be much greater protection from

⁹ Delivered on 6 February 2013, available at <https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet>.

the possibility of prosecution. The problem needs to be separately covered by amended legislation with the relevant safeguards in place (as suggested at 3.68 of the consultation).

- 2.44 The CPS explained that it thought section 2 should not apply to online publications first published before active proceedings. They explained that it appeared that *Beggs* was decided

without consideration of the availability of common law contempt in respect of internet publications that were originally published before proceedings were active, but not removed or archived after their prejudicial nature was brought to the publisher's attention.

- 2.45 The CPS was supportive of amendment to section 2(3), "provided that the amendment is accompanied by the provision of the powers ... to make an order to remove a publication first published before proceedings were active". ACPO responded with a similar view about the amendment of section 2(3).

- 2.46 The Council of Circuit Judges responded that section 2 had been improperly constructed and that *Beggs* was therefore incorrectly decided. The Council argued that

the analogy with the publication of a book and its continued availability clouds the meaning of the section. The act of publication takes place. A book is published. The act is complete. The book remains available to purchase, borrow etc but one cannot equate such purchase or borrowing with the act of publishing. To permit the construction suggested would mean the potential for liability could attach long before the proceedings were instituted. We consider it an improper stretch of the word to allow of a criminal penalty to be imposed in circumstances which are, at best, ambiguous.

- 2.47 The Council explained that, if they were wrong, and *Beggs* had been correctly decided, section 2(3) should therefore be amended.

- 2.48 Professor Alisdair Gillespie argued that *Beggs* was correct

The Contempt of Court Act 1981 is silent on what "at the time of publication" means. Whilst "publication" is defined, it is only defined in the context of defining what an article is and not in its usage as a verb. Alternative definitions must then be consulted. Under the Obscene Publications Act 1959 it has been held that publication takes place whenever material is uploaded or downloaded from the internet¹⁰ and the technical processes of the internet means that publication takes place whenever the material is accessed.¹¹ Admittedly the OPA definition is based on the premise that it does

¹⁰ *Waddon* (2000) (unreported) and *Perrin* [2002] EWCA (Crim) 747.

¹¹ Even if the material is only called up on a web-browser, this involves the web-browser calling for the relevant information and for it to be downloaded to the device browsing the web.

define the verb by including, inter alia, the transmission of data¹² and the same is not true of the Contempt of Court Act 1981 but in the absence of a statutory definition looking to other uses of the word in law can assist. Support can also be drawn from the case of *R v Sheppard and Whittle*¹³ which concerned an offence under the Public Order Act 1986. “Publication” is not defined in that Act either but Scott Baker LJ stated that publication meant that “material was generally accessible to all”¹⁴ and there was no suggestion that publication was a one-off activity. Support can also be garnered from the ordinary dictionary definition which makes clear that it concerns making material generally known and available.

Applying all of this logic, it seems to me appropriate to state that publication takes place when it is accessible by someone. That is to say, when the information is accessed it will be transmitted to the person (or, more correctly, their device) and this is no different than if the data was being transmitted for the first time: that specific information is still being delivered to them personally (albeit when requested).

- 2.49 However, Prof Gillespie argued that this position was not “helpful for the law of contempt” and that, therefore, section 2(3) should be amended so as to make contempt distinct from the concept of “publication” in the rest of the criminal law. He also thought that the amending section 2(3) would better comply with the European Convention on Human Rights (“ECHR”).
- 2.50 Five other consultees responded that section 2 had been incorrectly construed in *Beggs*.
- 2.51 The Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts) was in favour of amending section 2(3), explaining that “as a matter of law, we consider that when an item is ‘posted’ would be the time of first publication.”
- 2.52 Ten other consultees argued that section 2(3) should be amended, and one other thought that it should remain the same.
- 2.53 The Press Association (“PA”) described the current law on this issue as “incorrect and illogical” explaining that online publication should not be deemed a continuing act. PA explained that *Beggs* was wrongly decided for the following reasons

First, Lord Osborne [in *Beggs*] compares the situation of material on a website with that of a book on sale in a bookshop. The two are in fact the same – but the conclusion is the opposite of that which he has reached. A book is published on a specific day, after which the act of publication ceases, just as the act of manufacturing something like a

¹² Obscene Publications Act 1959, s 1(3)(b).

¹³ [2010] 1 WLR 2779.

¹⁴ [2010] 1 WLR 2779, 2789.

car ceases when the vehicle is complete. What follows afterwards is marketing and sales, not manufacture. Similarly with publication, what follows the single act of publication is marketing and sales.

2.54 Secondly,

although Lord Osborne concluded that the publication of an internet article and a book were in fact the same thing, and a continuing action, no one has ever suggested that all copies of a particular book or a back number of a newspaper or magazine deemed to contain potentially prejudicial material should be removed from bookshops or libraries. That is the logical consequence of accepting Lord Osborne's view but would also be dismissed as a ridiculous and impractical suggestion.

2.55 Thirdly,

Lord Osborne's view also conflicts with the provisions of the Limitation Act 1980, section 4A of which sets a limitation period for actions for libel or slander of "one year from one year from the date on which the cause of action accrued" – that is, from the date of first publication of the allegedly defamatory material. In terms of hard copy publications, such as paperback books, the Act is accepted as setting a one-year limitation period from the date of first publication. In terms of the internet, however, the view has the result that internet publications are exposed to endless risk of action. This is the result of finding that each time an article in an archive is accessed represents a new publication, with the courts having followed the decision in *Duke of Brunswick v Harmer*¹⁵ – a decision which was strongly criticised in the Court of Appeal in *Dow Jones and Co Inc v Yousef Abdul Latif Jameel*¹⁶. The court said the *Duke of Brunswick* case would now be struck out as an abuse of process.

2.56 PA argued that the Law Commission itself had, in 2002, supported the amendment of the one-year limitation period in relation to the internet.¹⁷

2.57 PA highlighted the different conclusions reached by Fulford J (as he then was) in the cases of *Harwood* and *R v Casburn*¹⁸, although the latter case related to a section 4(2) order. In refusing to reinstate the section 4(2) order, Fulford J held that the "determinative factor" was that the court's order would be ineffective in light of the volume of material available on websites in the UK and abroad. Making a section 4(2) order would involve "not only delaying any future reports but also cleansing the internet of the articles that are currently available".¹⁹

¹⁵ (1849) 14 QB 185.

¹⁶ [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 16.

¹⁷ Scoping Study on Defamation and the Internet.

¹⁸ (Unreported).

¹⁹ Internet material makes reporting restriction unworkable, Media Lawyer, December 11, 2012, available at <http://www.medialawyer.press.net/article.jsp?id=8843064>.

2.58 PA went on to explain that

the Consultation Paper also poses the question of whether, if *Beggs* was wrongly decided, liability for contempt should arise in relation to material published before proceedings were active but which subsequently poses a serious risk of substantial prejudice when proceedings do become active. The answer must surely be: No. It would be a remarkable concept to suggest that one could be held liable today for a contempt which was never intended or contemplated at the time, possibly years ago, that the material in question was published, and in relation to proceedings which were not active– or perhaps even being considered – at that time. No court would consider imposing liability for contempt in relation to a book published months or years before the start of proceedings in relation to which it might be held to be prejudicial. The same might be said of DVDs of investigative journalism programmes on television. Why treat material differently simply because it is in a different format which makes it that much more accessible to a larger number of people?

The Consultation Paper says: “The need for the 1981 Act to apply in such circumstances is obvious from cases such as *Harwood*.” But the PA does not accept that this is the case. The Law Commission’s approach to the issue is based on a number of assumptions, just as are the approaches of many others, the Government’s Law Officers included. It is assumed that jurors will be prejudiced by what they may have heard of read about a case. It is assumed that they will be unable to put these things out of their minds and decide the case solely on the basis of the evidence put before them at the trial. But none of these assumptions is a demonstrable truth, and none can be tested because of the current ban on virtually any form of research into how juries work and what does or does not influence their decisions.

2.59 The Law Society also did not agree that publication should be a continuing act for the purposes of section 2, and therefore that section 2(3) should be amended.

2.60 Another consultee suggested that an appropriate way of dealing with the difficulties raised by whether publication is a continuing act would be to develop a new defence, which

could be created for when a defendant published something before proceedings were active (perhaps not knowing that they would be) and then took reasonable steps to remove the material as soon as they became aware of the contempt issue. This could give individuals a “safety net” to protect them from becoming liable for contempt of court without having to take any active steps. Such a defence would also be able to take account of a publisher’s inability to remove content - not all websites which allow commenting by the public also allow removal or editing of comments. Such a defence could be in addition to, or in place of, a new offence as set out in paragraphs 3.68 onwards.

- 2.61 Dr Findlay Stark was in favour of amending section 2(3) but questioned whether there is “not also an issue if a publisher decides to ‘repost’ material once the proceedings are active” which is a different concern to the problem raised by *Beggs* and *Harwood*.
- 2.62 At our symposium on contempt of court, Keith Mathieson explained that, in his view, section 2 has been incorrectly construed. It is wrong in principle for anything put online before proceedings are active to be liable to contempt of court – section 2 is not as inclusive as this. Any other conclusion means that a publisher is under a constant duty.

We propose that the courts be provided with a power to make an order when proceedings are active, to remove temporarily a publication that was first published before proceedings became active, which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Such an order shall be capable of being made against any person who is a publisher within the meaning of the 1981 Act and failure to comply with such an order without reasonable excuse shall be a contempt of court. Do consultees agree? [3.75 and 6.28]

Such an order shall be capable of being made against any person who has sufficient control over the accessibility of the material that they are able temporarily to remove it or disable access to it and failure to comply with such an order without reasonable excuse shall be a contempt of court. Do consultees agree? [paragraphs 3.79 and 6.29]

- 2.63 Few respondents from the media were in favour of these proposals, with most coming out strongly against them. Respondents who did not represent the media had a more divided view.
- 2.64 However, it should be noted that there seemed to be some confusion amongst some stakeholders about the necessity for this power. Some took the view that section 45(4) of the Senior Courts Act 1981 already provides such a power, but this is only true if the interpretation of section 2 established by *Beggs* is correct. If *Beggs* were overturned on appeal or section 2(3) amended, the existing injunctive power would not bite (there would be no cause of action to enjoin in relation to material published prior to proceedings becoming active).
- 2.65 In addition, many consultees did not separately address the issue of the power applying to publishers and the power applying to intermediaries/those with “sufficient control”, responding instead in relation to the principle of the proposed new power.
- 2.66 Starting with the media, Society of Editors viewed the proposal as “unnecessary and unworkable” favouring “greater emphasis ... on judicial directions to the jury forbidding the research of material outside of the courtroom”. The Society expected that any order would be “ineffective given the reach of global media” and “would have no effect on similar articles published abroad that are freely available”. The Society, however,

recognised that removal or temporary suspension of online archive material may be occasionally necessary but such orders should be

extremely rare ... [and] only be made where it is clearly strictly necessary and proportionate.

- 2.67 The National Union of Journalists were against the proposals, responding that they regarded temporary removal as “an unwarranted and unnecessary restriction on freedom of expression” and that they would be “impractical”. They argued that such orders “could well lead to a proliferation of trials and possibly imprisonment of individuals” and suggested using “alternative ways of dealing with this issue”, although did not specify what these might be.
- 2.68 The Newspaper Society also disagreed with the proposal, although they explained that *Beggs* had used the power under section 45(4) of the Senior Courts Act 1981”and therefore there is no need for any new power”.
- 2.69 The Society was concerned that if the proposal were introduced,
- the power could be exercised routinely against local media companies, by the court of their own volition, or on the application of the defence and prosecution with the possibility of its use exacerbated by inappropriate use.

It therefore suggested that the focus should be on the directions given to jurors, and other “preventative measures” used during jury service.

- 2.70 Trinity Mirror Plc was opposed to the proposal for various reasons which were also echoed by the MLA²⁰ arguing that the power would be “abused” and become standard practice. They highlighted the cost of this for the court and the media in dealing with applications, the erosion of article 10 rights and the impact on socially-beneficial archives. Trinity Mirror Plc raised concerns that judges do not currently follow the stringent case law in relation to section 4(2) orders and that therefore it was likely that the same would happen with any other temporary removal order.
- 2.71 In addition, Trinity Mirror Plc considered
- that if courts were empowered to make orders as envisaged in this paragraph, such orders would become routine to the extent that the first duty of defence counsel and solicitors in any case would be to conduct a search of accessible material and make an application for such order as would be permitted by the legislation. Courts will be unlikely to want to spend much time evaluating such applications; the media will not be able to devote resources in terms of money or personnel in resisting them. The result will be that courts will, largely, take what they might regard as a prudent course and grant orders
- 2.72 Wiggin LLP was another consultee which was against the proposal on the basis that it would
- impose an unnecessary and disproportionate burden on publishers and content owners. The resources required to do this would be

²⁰ See below at 2.84.

prohibitively expensive for both large and small publishers. It would also create significant uncertainty, as they could not know what the issues would be in each case — it would be impossible to make an informed decision as to whether all prejudicial material had in fact been removed.

- 2.73 Wiggin LLP also thought that material that was temporarily removed would have to be put up again in an amended format, “resulting in edited and inconsistent newspaper archives”. They were also concerned about jurors’ access to foreign publications not subject to English law, and the fact that jurors might have been exposed to material before their case became active. They argued that liability for material first published before active proceedings would be a disproportionate interference with freedom of expression and “inconsistent with the single publication rule proposed in the Defamation Bill”. They favoured an approach of juror education

Given that it is impossible to “cocoon” jurors entirely from potentially prejudicial material, the most effective tool for reducing the risk of serious prejudice must be juror education.

- 2.74 The BBC highlighted the social and research value of online media archives and the jurisprudence of the ECtHR in the same terms as the MLA. The BBC explained that their news website is “extensive”

As well as the main indexes on the site, there are also index pages for individual regions across the UK, forty two in England, six in Scotland and five in Wales. Each of these carries crime news and court reports.

Dealing with requests to remove archived material is time-consuming. In the case of PC Harwood, for example, which had only had very limited coverage on the website prior to trial, this involved reading all of our reports — some three dozen — to ensure the material identified as being prejudicial did not feature in any of them. That case had not been extensively covered, but a more recent example, following a group of orders in Northern Ireland, necessitated the following: search terms were entered that led to around 150 reports being identified. All of these had to be read and checked to see if they contained relevant information. As a result over 125 were listed and sent to the technical team for removal. This took around 12 hours. Once the material that needed removal had been identified, a request was made to the technical staff who had to remove each page separately. Records of this activity need to be kept, so that when reports can be reinstated online this can be done, via a request to the technical team, which of course takes additional time.

An increase in the number of take down orders being issued would have a direct impact on the workload of the teams involved, and it is easy to see how the time and effort diverted to this could affect the range and volume of other coverage provided. If there were to be a significant increase in removal orders, it would become necessary to assign staff to collate and record them, checking that removal is duly

implemented, and then checking when a trial or retrial had finished and whether there were any circumstances which might prevent the reinstatement of the removed stories.

- 2.75 The BBC also highlighted that “there are websites which republish BBC material So removing a story from the BBC archive does not necessarily remove it from the internet”.
- 2.76 The BBC explained that they do not link to archived material when reporting about current proceedings and do not “put material on our current (front) pages that would create a substantial risk of serious impediment or prejudice to active proceedings”. Their view was that this, and the judge’s directions to jurors, are sufficient to guard against the risk of prejudicing a trial.
- 2.77 The BBC stated that the proposed new power would be unnecessary because of the one which already exists in section 45(4) of the Senior Courts Act 1981. The BBC was, however, in favour of “proper guidance” for the courts so that section 45 orders are “only ... made in exceptional circumstances.”
- 2.78 The BBC also highlighted that the requirements of article 10(2) need to account for the fact that publications are likely to remain on the internet even if removed by the mainstream media and therefore the effectiveness of an order could be called into question (a point apparently also made by Fulford J (as he then was) in *R v Casburn*).
- 2.79 If, exceptionally, an order for temporary removal of online material was necessary “ie where there is material which may pose a substantial risk of serious prejudice, which cannot be cured by jury direction and which is not replicated in material uploaded outside this jurisdiction”, the BBC explained that an appropriate procedure would be needed. This should include

Advanced notification to the relevant media organisations that the material is of concern;

Proper identification of that material (eg by reference to the media organisation and where possible specifying date, URL^[21] and headline);

Notification to be given with sufficient time before any trial commences/jury is empanelled so as to allow an adequate period of time for there to be a full consideration of the issues and to allow time for an appeal.

- 2.80 The BBC was concerned that such orders would become routine rather than rare

The Consultation suggests they will be appropriate for high profile cases, but for the regional press (both print and broadcast) any serious crime may well be high profile and we cannot see why the

²¹ The URL is the Uniform Resource Locator, which is the web address for a particular webpage. For example, the URL of the Law Commission’s webpage on the contempt project is <http://lawcommission.justice.gov.uk/areas/contempt.htm>.

courts will make such an order eg in a case involving a celebrity and not in others.

2.81 It was argued that the proposal was neither necessary nor proportionate and again, that the focus should be on the directions given to the jury by the judge.

2.82 The BBC also explained that

We are concerned that the frequent removal of material from the archive could undermine the level of trust between the BBC and our audiences. Such orders would not apply to those outside the jurisdiction and would be hard to police on sites that would wilfully disregard it. The instances of such exceptions are likely to grow significantly as the fully digital world grows. It could leave the BBC as part of an increasingly small group of publishers whose content is seen by its audiences as more heavily censored and mediated and as a less full expression of the truth that our audiences currently trust us to represent. This will be a particular problem with newer, more web-savvy audiences.

2.83 Independent Print Limited responded that they felt that first and foremost, the judge should give appropriate directions to the jury. If the judge does not consider the direction to be sufficient, there should be “provision for the possibility of an application to the Attorney General for consideration of a banning order”

In any such (exceptional) cases, the media should be given sufficient advance notice – in the form of precise information identifying the url of the material which is the subject of the application and the grounds for making the application so that the issues can be identified and contested.... Provision should be included for the media to be invited to make representations before any application is granted.

2.84 The Media Lawyers Association also argued that section 45(4) of the Senior Courts Act 1981 was sufficient and that the focus should be on jury directions. However, they explained that

what is needed is proper guidance to the courts that such orders should only be made in exceptional circumstances - when they are necessary and proportionate to achieve a legitimate aim.

In those exceptional cases where the Trial Judge (or the State via the Prosecution) believes that there is material which amounts to a substantial risk of serious prejudice, such that a take down order is contemplated, there should be an onus on the Judge / Prosecution to provide media organisations with: (i) advanced notification of the material that is of concern; (ii) proper identification of that material (by reference to the media organisation / newspaper title, date, url and headline); and (iii) notification that is given in sufficient time before any trial commences / jury is empanelled so as to allow an adequate period of time for there to be a full consideration of the issues and, where appropriate, allowing time for an appeal.

- 2.85 The MLA had concerns about the frequency with which such orders would be made, amid concerns that they would become standard and that the media would bear high economic costs for being “inundated” with orders. The MLA highlighted cases where it has been suggested that trust must be placed in the jury, and also the importance of the fade factor and appropriate judicial directions to jurors (and other similar measures). The MLA explained that this is the approach in Australia, Canada and the US.
- 2.86 In relation to intermediaries or those with sufficient control of the material, the MLA and Independent Print Limited explained that
- the Law Commission should be aware that de-caching material can be a lengthy process, and might involve orders against search engines based abroad. Without reassurances as to the efficacy and practicality of orders against search engines, jurors will still find summarised search results revealing matters which courts might consider to be prejudicial. This only serves to underline, in our view, why appropriate directions and sanctions aimed at juries are the most effective way to deal with potentially contemptuous archive publications.
- 2.87 The Press Association strongly opposed our proposals for the creation of a new temporary removal order
- The suggestions being put by the Law Commission demonstrate a regrettable lack of original thinking in relation to these first stages of the digital age.
- 2.88 The Press Association argued that our proposals were disproportionate, unworkable in practice and would cause “endless expense for publishers and internet service providers”. They argued that the proposals did not take into account the “trans-jurisdictional” nature of the internet and also raised the issue of enforceability of such orders in foreign jurisdictions. Moreover, they argued that such proposals would be time consuming and would have a chilling effect on freedom of expression.
- 2.89 On a point of principle the Press Association noted
- It is also seriously questionable whether a publisher could or should be held liable in contempt for something which presented and created no substantial risk of serious prejudice at the time it was published, but which was then held to pose such a risk as a result of subsequent events for which the publisher could not be held responsible and which it might not have anticipated. The publisher of a book or newspaper would not be held so liable, and the same should apply to online publications. The difference is not in the material or its quality or content, but only in the manner in which it is made available to the public.
- 2.90 The Press Association raised a number of practical concerns including the availability of “cached” material and enforcement in foreign jurisdictions. As well as, the fact that the internet is available from many sources outside the jurisdiction who would not be affected by the proposed orders, for example,

“Google is run by a company registered in the US state of Delaware and operated from California”. Concerns were also raised that ISPs could “find themselves bombarded” with orders to remove material

Enacting such a proposal would surely require the kind of Government-led internet control seen only in China – and even there with less than complete success – while potentially spreading liability for contempt to the ISP which do no more than provide the system over which the information in question is available.

2.91 The Press Association suggested that the focus of the proposals were misplaced

The point at which the law of contempt meets the internet and the new digital age is the point at which the serious shortcomings of the contempt law become clear. The technological changes which have taken place within the past two decades, and which are still coming at an increasing speed make it easier than ever before for the average citizen to have access to huge amounts of information which previously would have been available only in hard copy form at dedicated centres such as libraries.

The PA takes the view that there has been such a fundamental shift in technology that the very basis on which part of the contempt law works in now no longer a feasible approach.

Issues which have arisen, such as the meaning of “publication” and the question of whether internet publication is a single or continuing act, have led to illogical decisions being made in attempt to bend 19th Century concepts to match the needs of the 21st Century. A completely new approach is needed – and the PA takes the view that the Law Commission has failed to find it.

The main issue about jurors and prejudicial information is not whether information in itself is or is not prejudicial, it is whether the jurors at a specific trial have had or will have access to it. The concentration should therefore be on the jurors, and not on those who publish the information, or make it available. In an age in which information is so easily available, through so many devices, trying to stem the sources and supply of information has become a Sisyphean task.

2.92 ITN was strongly against the proposal, on the grounds of both principle and practicality. Highlighting the social and historic importance of internet archives, ITN explained that

there is an inherent wrong in rewriting history by taking down articles that are in an archive. It alters the historical record. A news organisation such as ITN relies on its integrity and independence from public authorities. The perception of changing the archive could lead to less trust in our archive as an independent source of information as to what was reported at the time ...

2.93 ITN also argued that the proposal represented a

radical shift on the onus on preventing jurors committing contempt of court. The responsibility has always been on juries and judicial directions to ensure the jury does not carry out internet searches, with reliance on jurors to perform their role responsibly consistently affirmed by the highest judicial authority. By giving courts the power to order the removal of articles - which in many cases were published months or even years before the court case and even before an arrest was made - from an online archive, the onus is fundamentally and unfairly shifted onto media organisations.

2.94 It was suggested that the focus should instead be on judicial directions. There were also concerned that the use of such orders would become “standard practice and such requests commonplace”. The use of the power becoming “the norm” “has serious practical implications for the integrity, maintenance and public access to the archives of both national and regional media”.

2.95 ITN also explained that

The powers being proposed will be limited to online archives based in the UK, therefore still leaving any jurors intent on conducting internet searches free to do so. There have been several high-profile incidents where UK media has been ordered or chosen not to publish sensitive, offensive or potentially illegal material whilst media outside of UK jurisdiction has freely published. When these images, videos or text are available on worldwide websites they can still be accessed easily by members of the public via an internet search engine, rendering the proposed powers insufficient to stop jurors who may still research their case. In addition the new orders will primarily effect major news organisations, but the “offending” information could still be available to be seen on websites run by individuals on blogs, postings and message boards. The other practical issue is that once information is posted online, it is not simply the case that the information can be taken down and the information is gone.

2.96 ITN argued that, aside from “a few recent isolated cases”, there has not previously been a problem, despite the internet having been around for years. ITN also explained that

If this power was granted to courts, it would be an arduous task for media organisations to continually remove such articles from all sites. It would involve research and dedicating technical resource that would otherwise be deployed on serving our customers and viewers. As noted above, we believe that the power would become standard practice and would therefore result in being a perennial strain on our personnel and resources.

Aside from our editorial online news sites – www.itv.com/news, www.channel4.com/news and www.ITN.co.uk – ITN also has a commercial online archive portal www.ITNSource.com. We have invested in digitising the ITN archive dating back to 1955 and now have the UK’s only fully digitised video news archive. We digitised our material to preserve it for future generations but also to make it easier

for clients to license clips through our online portal. As a result, clients can search, preview, download and purchase archive ITN news clips at the click of a mouse. If courts are granted powers to order removal of archive stories, this would impact on business-to-business portals such as www.ITNSource.com, undermine our clients' trust in the comprehensive nature of our commercial online resource and lead to ongoing new costs for legal and compliance advice and costs consequences for staffing, administration and monitoring.

- 2.97 The Media Law Resource Center ("MLRC") responded that the temporary removal power would

be an unprecedented restriction on the right to impart and receive information. In many instances orders would be counterproductive by drawing attention to the allegedly prejudicial material; or ineffective, where the material was published and remains available in jurisdictions beyond the power of UK courts. Moreover, less restrictive means to protect the right to a fair trial are available, namely clear and repeated directions to jurors on the use of the internet.

- 2.98 In particular, the MLRC was concerned about the duration of the temporary removal order in respect of lengthy legal proceedings, depriving the public of important background information, and that the power "would likely be imposed in an overbroad manner" with orders made in vague terms and too frequently. The MLRC also argued that "judges will presumably decide takedown motions under a mere balance of probabilities standard that an article will cause prejudice" rather than the criminal standard and that the proposal contained no right for the media (or anyone else subject to the order) to be heard. An additional concern related to the cost of the media in being represented at such hearings.

- 2.99 The MLRC explained that the risk of "counterproductive and ineffective orders" means that "the effort to remove an article will have the unintended consequence of highlighting the information in the article" and that orders will be ineffective if the same material remains online elsewhere, particularly if posted by publishers abroad. The Center explained that

ordering UK newspapers to temporarily scrub their archives of articles about people whose cases go to trial would hardly prevent a defiant juror from reading the same information in newspapers and websites from around the world or on a site like Wikipedia. Moreover, a news article written by a press association will frequently be available on hundreds of websites under different URLs, not to mention aggregation cites that copy and digest news articles. Draconian efforts to order UK-based ISPs and intermediaries to block links to such sites would ultimately prove futile.

- 2.100 The MLRC favoured a focus on jurors rather than the publishers as a less restrictive means to ensure a fair trial. The MLRC referred to US research in this area and noted that this research "strongly suggests that jury instructions can be used to ensure a fair trial".

Clear and repeated instructions during trial are certainly a less restrictive means to that end than censoring the historical record of what was published in the press”.

2.101 The Chartered Institute of Journalists’ explained that they

support the use of section 4 orders to prevent the media from re-publishing archived material that could create a substantial risk of serious prejudice. We oppose giving legal powers to the police, court or Attorney General to force a publisher to remove stories from online archives. Such approaches should be discussed with an editor, who should make the decision as to whether to remove material, giving due regard to the circumstances.

2.102 Joshua Rozenberg commented that

You can see why newspapers bridle at the thought of being required to unpublish things — although they frequently do so, on a precautionary basis, when someone threatens to sue them for libel. You can see why they don’t want the bother of filleting their websites; although I don’t think it would be a “huge burden” if applicants were required to identify the offending pages, as I think they should be. But if you take the view that newspapers must not be allowed to publish prejudicial material in the first place then it’s not a huge leap to saying that they must unpublish material that has become prejudicial subsequently.

2.103 However, Mr Rozenberg thought that “the real question is a much broader one. It’s whether we need to ban the publication of prejudicial material at all. After all, jurors are told not to look it up.” He compared the position in the US and argued that more trust should be placed in jurors.

2.104 Of those consultees not representing the media, the Law Reform Committee of the Bar Council was against the introduction of such a power, arguing that there would need to be “solid evidence” of a “real and continuing” fear that “the jury cannot be trusted to obey the direction not to carry out research about the case on the internet” before such a power were introduced. It was suggested that recent high-profile cases resulting in jurors being sent to prison would have a deterrent effect and jurors should be trusted to follow the judge’s instructions. The Bar Council also emphasised that

if the power exists it will in effect be a restriction on the freedom of the press. It will also limit the rights of those who have nothing to do with the trial in question but who wish to carry out research on a particular person or issue. We do not think that such a restriction is justified in light of the fact we consider the risks to be low. We question the practicality of such a proposal. What happens if the publisher is outside the jurisdiction? Can such an order be made against them? If not then the power becomes meaningless.

2.105 Peter Bartlett responded to the CP by explaining the position in Australian law with regards to similar orders. Mr Bartlett explained that “the Victorian Court of Appeal and the New South Wales Court of Appeal have overturned orders by trial

judges for the media to take down historical online articles” and cited the case of *News Digital Media Pty Ltd & Anor v Mokbel* (2010) 30 VR 248. The reason for the decision was, in summary, that juror directions would suffice and that removal was futile given the breadth of the internet. On the basis of this, Mr Bartlett explained his conclusions as follows:

Historical archived articles are not displayed on the face of the newspaper website as available and contemporaneous material.

They lay passively in the newspaper electronic archive until they are accessed.

They need a positive act of searching by a third party.

A third party would be more likely to search using a recognised search engine such as Google or Yahoo, rather than going directly to a newspaper site.

There should be proper instruction to the jurors by the presiding judge.

A statutory amendment should be introduced, similar to that operating in many Australian states, making it an offence for a juror to access the internet researching an issue relevant to a trial that the juror is sitting in.

Jurors should be referred to that statutory provision.

The court should only make orders that it can enforce. It has little power to enforce orders against online publishers that are not within the jurisdiction. The list of those engaged in the publication process in paragraph 3.34 of your Consultation Paper, cover many who are outside the jurisdiction of the UK courts.

The court should only make orders that are effective. It can order publishers within the jurisdiction to remove articles, but the order is hardly effective if after those articles are removed, many other articles remain on line.

2.106 The Council of Circuit Judges thought the proposal “highly controversial.” They hoped that they

do not underestimate the potential which access to a very large amount of information which is now available on the internet may have to affect the fairness of a trial. Accordingly, we understand that it may be considered that the powers proposed would be valuable in seeking to advance the fairness of a trial. We consider that it would be territorially bound. The internet is literally and not merely by name “world wide”. It is fallacious to assume that the material which could affect a case heard in England and Wales will have been published within those countries; it may have been published in any part of the world. We accept that in many cases the publication would have been more localised and it may be argued that as the proposed power

would assist in such cases, it ought to be available. We consider it would be very difficult to enforce in practice. Whilst a specific URL could be removed, the speed of the internet and its diversity is such that it would be like chopping off one of the serpent's heads only to find another suddenly appearing.

- 2.107 The Council was also concerned that the proposal would lead to “lengthy applications and complex investigations which could cause delay to the trial”. In light of these practical concerns “which impede this suggestion” they “concluded that the issue can only be addressed by strong directions to the jury”.
- 2.108 Some members of the Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) also had concerns about the proposal. They highlighted the approach to injuncting a strict liability contempt adopted in *Ex p HTV Cymru (Wales) Ltd* [2002] EMLR 184 para [25] and explained in the CP²² and the principles laid down by Schiemann LJ in *A-G v MGN Ltd* [1997] 1 All ER 456, 460 when establishing whether there is a substantial risk of serious prejudice. The judges also cited the words of Lord Donaldson MR in *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 at 381 to 382 where his lordship explained “why quia timet injunctions to restrain publication are rarely appropriate”

Where the contempt would consist of impeding or prejudicing the course of justice, it will rarely be appropriate for two reasons. The first is that the injunction would have to be very specific and might indirectly mislead by suggesting that other conduct of a similar, but slightly different, nature would be permissible. The second is that it is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences

- 2.109 The members of the Senior Judiciary explained that, even if satisfied that the injunction was necessary to avoid a substantial risk of serious prejudice, the injunction must still be necessary (with a different meaning) and proportionate in article 10 terms.
- 2.110 By comparison with section 4(2) orders, in *Independent Publishing Co Ltd v Att Gen of Trinidad and Tobago* [2005] 1 AC 190 it was held that

In considering whether it was ‘necessary’ both in the sense under section 4(2) of the 1981 Act of avoiding a substantial risk of prejudice to the administration of justice and therefore of protecting the defendant’s right to a fair trial under article 6 of the Convention and in the different sense contemplated by article 10 of the Convention as being “prescribed by law” and “necessary in a democratic society” by reference to wider considerations of public policy, the factors to be taken into account could be expressed as a three-part test; that the first question was whether reporting would give rise to a not insubstantial risk of prejudice to the administration of justice in the

²² At para 3.80.

relevant proceedings, and if not that would be the end of the matter; that, if such a risk was perceived to exist, then the second question was whether a section 4(2) order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; that, nevertheless, even if an order would achieve the objective, the court should still consider whether the risk could satisfactorily be overcome by some less restrictive means, since otherwise it could not be said to be “necessary” to take the more drastic approach; and that, thirdly, even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by articles 6 and 10 of the Convention.

- 2.111 The members of the Senior Judiciary thought that such tests would also have to be applied to any temporary removal order.²³ In addition, the impact of section 12(3) of the Human Rights Act 1998 would have to be considered. This states that

No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

- 2.112 The members of the Senior Judiciary cited *Cream Holdings v Bannerjee* [2005] 1 AC 253 at para [22] where it was said that

The effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success “sufficiently favourable”, the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (“more likely than not”) succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave.

²³ They referred in this regard to the Australian case of *Digital News Media Pty Ltd & Anor v Mokbel & Anor* [2010] VSCA 51 (18 March 2010) at [11] and [60]-[98]: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2010/51.html?stem=0&synonyms=0&query=mokbel>.

- 2.113 It was explained that a court would need to consider whether the substantial risk of serious prejudice could be countered by means less intrusive on article 10, before it would grant a temporary removal order. The judges suggested

One such measure might be asking prospective jurors whether they had read the material, and, if they had, then standing them down. The matter would depend on the facts of the case, and whether there is a practical solution which would avoid an interference with the right of freedom of expression.

- 2.114 Their lordships highlighted that securing compliance with a court order can be very costly and “with the financial constraints that exist for parties in the Crown Court it is difficult to envisage how a procedure for orders that material be removed from the internet can work fairly.” It was argued that in *Harwood*, Fulford J (as he then was) did not seem to have been addressed in relation to what “other measures might have been available to him or appropriate, eg asking jurors in waiting if they had read the material, and empanelling only those who had not.”

- 2.115 The members of the Senior Judiciary were also concerned that the Crown Court could be an inappropriate forum for hearing applications for temporary removal orders

Advocates in a case in the Crown Court are likely to be unfamiliar with the law on freedom of expression. Even where they are familiar with this area of the law, they will be unable properly to represent the rights of the public, because the rights of the public to freedom of expression may conflict with the interests of the defence and the prosecution.

- 2.116 The right to freedom of expression is a right “of the public at large, not just of the commercial press” but even the latter cannot afford to be represented in the Crown Court regularly.

- 2.117 Furthermore, any temporary removal order “should not be made requiring persons not personally subject to the jurisdiction to perform acts abroad.” Accordingly, the substantial risk of serious prejudice will not be eliminated where the website is abroad or where the subject of the order refuses to comply.

- 2.118 The judges also highlighted that

there are a small but significant number of individuals who are so convinced of their right to publish what they want to publish that coercive measures against them will either be ineffective, or effective only following the expenditure of time and money which is not available to parties to cases in the Crown Court (a concern Fulford J referred to at para 40 of *Harwood*). Some such people are motivated

by a conviction that they are right (and everyone else wrong), others by a desire to inflict injury at almost any price.²⁴

2.119 Accordingly, some individuals

may seek to oppose the making of the order, or to frustrate its purpose. They may find that the application for the order leads to more publicity rather than less, and to expensive and time consuming satellite litigation in the Crown Court and interlocutory appeals. Some defendants may welcome the time and costs that such applications may involve as a means of obstructing or delaying the trial.

2.120 In light of these matters, the members of the Senior Judiciary who responded felt that the proposals would “benefit from further elaboration and then discussion”.

2.121 The Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts) was “not comfortable” with the proposal for temporary removal orders. They commented

As this amounts to an offence in itself, we consider that after the fact has been brought to the attention of the “publisher” would be evidence in support. We consider that the publication should be the contempt and not the failure to comply with the order, particularly as the “publisher” made the subject of the order may or may not be able to comply easily with the order with all the attendant difficulties of third party liability.

2.122 The effect seems to favour the status quo, although the Legal Committee responded that it was in favour of amending section 2(3).²⁵ The Legal Committee also voiced concerns about whether the temporary removal power would be available in the magistrates’ court, arguing that “in the rare cases where a case before a magistrates’ court might be seen to be affected by a prejudicial publication, the application should be made to a higher court.”

2.123 Three other consultees were against the proposals in relation to publishers.

2.124 By contrast, the Law Society, ACPO and six other stakeholders agreed with the temporary removal proposal in relation to publishers.

2.125 In addition, Anthony Arlidge QC responded that “the court should have power to order a provider to take down material on their site, but they should not be obliged to ensure it is taken down from sites who have taken it from them”.

2.126 The Criminal Bar Association was in favour of our proposed power, including its extension to those with “sufficient control over the publication” in order to ensure its effectiveness.

²⁴ The members of the Senior Judiciary referred to *Cruddas v Adams* [2013] EWHC 145; *McCann v Bennett* [2012] EWHC 2876 [2013] EWHC 283 (QB); and [2013] EWHC 332 (QB) and *ZAM v CFW* [2011] EWHC 476 (QB).

²⁵ See above para 1.49.

- 2.127 The CPS was in favour of the proposals in relation to both publishers and intermediaries. In respect of the latter in particular, the CPS commented that

This would avoid the problems discussed but unresolved in the Simon Harwood judgment concerning the status of social networking facilitators, and the current requirement that they should be within the definition of “publishers”. It would also avoid the difficulty of enforcement of orders against publishers who are outside the jurisdiction, provided that the facilitator was within the jurisdiction.

- 2.128 Although Professor Barendt agreed with the *Beggs* decision, he suggested that “it might be better to introduce” temporary removal powers proposed in relation to publishers and intermediaries. However, Professor Barendt doubted that it would be necessary to amend section 2(3) of the 1981 Act.

- 2.129 The Equalities and Human Rights Commission explained that

The law provides a means to challenge restrictions on freedom of expression especially those where particular individuals or organisations (including publishers) are given notice to remove or disable access to particular pieces of information.

The Commission considers that the new proposal to allow courts to make such orders are ECHR compliant as long as the duration of the order does not last beyond the period justifiably required to interfere with freedom of expression, and as long as it is strictly restricted to that information which it is essential to remove in order to safeguard article 6 rights. The legislation should contain clear and workable criteria to enable the courts to reach conclusions that are compliant with competing ECHR rights when determining whether to use such powers in any given case.

- 2.130 The Publishers Association²⁶ responded that the temporary removal proposals were “broadly sensible” and “practical”. The Association explained that

We do not believe that most online publishers would have significant problems with complying with any court order requiring them to remove or disable such material on a temporary basis (presumably until the end of the trial), provided that time for compliance was reasonable. However, we are concerned that, while application for such an order could be made at any time by either party, without the permission of the A-G, there seems to be no provision for an innocent publisher in good faith (who might face considerable losses in disabling content) to be heard at all, unless already a party.

With other creative industries, we have considerable experience at the PA in operating (largely automated) notice and takedown systems for responding to cases of copyright infringement, and these are increasingly successful. We are concerned, though, about the risks

²⁶ This is a different organisation to the Press Association, the former representing “book, journal, audio and electronic publishers in the UK”.

(at 3.83 and 3.84) of substantial penalties, and feel very strongly that penalties on a scale of an unlimited fine and/or two years in prison would be massively unjust for any publisher who (1) had no reason to believe his material might become in contempt in a later trial, perhaps years later; and (2) who acted expeditiously to comply with any court order.

2.131 The Association was therefore concerned that there be “a right to be heard” before any order was made and “reasonable time for compliance” with “realistic advance notice”.

2.132 Internet Services Providers’ Association (“ISPA”) responded that the CP

falls short when assessing the impact on and the role of intermediaries under the proposed takedown and blocking regime. We believe that further work is necessary to ensure that the proposals are not only legally sound but also address a number of operational and technical issues. If not addressed properly, these risk undermining the effectiveness of the proposed takedown and blocking regime.

2.133 ISPA welcomed the use of court orders because of concerns that the intermediaries themselves should not be asked to decide whether certain material is prejudicial. However, they cautioned that “more thorough analysis is needed of how the rights and responsibilities of all parties involved should be balanced under the new regime” and in particular, clarity about “under what conditions an order would be made against a person other than the publisher”. It was felt that the publisher/author should be the first port of call and that orders should only be made against intermediaries “if the publisher has failed to comply with an order within a reasonable timeframe.” It was suggested that some authors outside the jurisdiction might, in any event, voluntarily comply with an order.

2.134 ISPA also raised concerns about clarifying which intermediary would be the most appropriate subject of the order. It was argued that the courts should be given guidance “to ensure that the multitude and divergent nature of online intermediaries is taken into account when decisions about the proportionality and necessity of a court order are made.”

2.135 ISPA also responded that

blocking injunctions are only very rarely applied to mere conduits. This reflects that blocking by access providers can be a crude, technically complex and potentially costly exercise. Moreover, given that a virtually unlimited number of access providers can be involved in allowing the public to access content online, it seems to be highly unlikely that making an order against an access provider can provide for an effective solution to prevent jurors and others from accessing publications that pose a substantial risk of serious prejudice.²⁷

²⁷ Even a single person may use a high number of access providers to access the Internet, eg at home, via a mobile phone, at work, via a public hotspot or at a friend’s place.

2.136 It was suggested that orders should only be

made against the person who has the highest degree of “sufficient control” over the accessibility of the material and who incurs the least amount of costs in complying with a court order. Based on our members’ experience, we believe that a court, making an order, must take into account the proximity of a provider to the publication, the control of a provider over accessibility and the proportionality of asking the provider to remove or disable access (balanced against the rights of defendant etc). The blocking of access to content should always be considered as a last resort and, as a point of principle, access providers should only be asked to block content if it has been impossible to address the accessibility of a publication via more proportionate means.

2.137 ISPA also explained that “responsible non-UK based intermediaries would give due consideration to a UK court order” so jurisdiction may not prevent the making of an order. However, ISPA highlighted that one difficulty with an order could be that, even if only temporary on its face, uploading the same material in the same location may not be possible due to the frequently changing nature of online platforms. Some providers also do not have the ability to re-upload content at all and others are concerned that re-uploading would have an impact on their status under the e-commerce Regulations and other applicable regulations (eg would they be regarded as a publisher?).

2.138 Concerns were also raised about what would happen if there was a large volume of publications from before proceedings became active and how these would be identified. It was suggested that it would be necessary to identify the URL of each publication in the request and for the court to consider each URL/publication case-by-case. ISPA responded that it was assuming there would be no obligation on the intermediary to monitor whether material which was disabled was reposted but that this should be clarified.

2.139 Professor Gillespie considered that, although he could see the rationale for the temporary removal power, there were difficulties with it in relation to jurisdiction and enforcement.

2.140 In discussing the order made in *Harwood*, he explained

Whilst that appeared to work in that limited situation I have ... serious concerns about whether it is realistic to expect that this will continue to be possible. The architecture of the internet means that material is accessible anywhere in the world and I believe that if the number of Harwood orders increase that there will be a “push-back” from certain sections of the information society and it will quickly become apparent that there is no realistic enforcement mechanism where a company based abroad hosts material abroad that is accessible in England. It is unlikely that many companies will comply, particularly in jurisdictions such as the USA where they will point to the First Amendment as a reason for not complying.

- 2.141 Professor Gillespie raised issues of jurisdiction and was concerned that such an amendment would encourage people to post material on sites hosted abroad. He explained

Where a person, for example, posts information to site x he can be said to be the publisher as well as the author. However it does not follow that he will continue to have the ability to remove material. Where site x is hosted abroad (perhaps most notably in the USA where the First Amendment to the US Constitution would provide particular safeguards) then that host site may refuse to accede to the instructions of a British judge. Presumably the author would be protected as it must be a defence to show that you cannot satisfy the order of the court but where does that leave the publisher? Are we really suggesting that, for example, the corporate directors of the (for example) American publishing site will be at risk of prosecution for contempt if they travel within the jurisdiction of the United Kingdom? Such an approach was adopted by the US in respect of online gambling but it was not a popular stance, including by the UK.

The Law Commission suggests that intermediaries could be ordered to remove material (paras 3.76-3.79) but this again raises issues of jurisdiction. Is there a danger that an amendment proposed by the Law Commission will simply encourage people to ensure that they post material on sites hosted abroad?

- 2.142 Godwin Busuttil suggested that there is a serious risk of such orders “being ineffective or ignored (eg because the publisher(s) are domiciled in the US) or deliberately flouted (cf the Giggs and Goodwin cases) and the dignity of the Court and its criminal jurisdiction being undermined”. He preferred an approach that focused on the jury rather than the internet.

- 2.143 Mr Tovey commented that the introduction of such a system

should be done with extreme care due to the potential for abuse and over blocking of material. It could easily create a culture whereby such orders are routinely sought by parties just in case they are needed. If such a system is introduced it should be as narrow and carefully controlled as possible, with orders made only where strictly necessary.

He disagreed with the proposal at 3.75 in relation to publishers but agreed with the proposal at 3.79 in relation to a person with “control” on the grounds that

A situation could occur where the original author or publisher does not have control over the work (or archived versions of it). While in such cases there may be no steps reasonably possible to take, limiting the scope of these orders to persons having control over the material could eliminate such cases completely.

However, care should also be taken to ensure that where an order is made against a party other than the author or original publisher, the author or publisher is given an opportunity to become involved in the process wherever possible (even if outside the jurisdiction). This

could reduce the possibilities of the unnecessary removal of content by third parties (such as hosting organisations) who have no interest in the matter (sic).

- 2.144 Aside from those whose views have been considered above, nine consultees were in favour of the temporary removal power for intermediaries, with two against.
- 2.145 At the Law Commission's Contempt of Court Symposium, Mr Justice Tugendhat explained that he had deep concerns about the power. Michael Hekimian from AOL explained that, whilst AOL would comply with an order and remove material immediately from their website, the process to remove it from the search engine would take days/weeks and would only apply to this jurisdiction. He argued that trying to enforce an order that no-one can comply with will only undermine the authority of the court.
- 2.146 Christina Michalos suggested that there was a difference between pure historic archived material and current material that cross-refers to archived related stories which do pose an obvious and substantial risk of serious prejudice. She also noted that we should not really be concerned about jurors using internet searches anyway because that would amount to a contempt.
- 2.147 Jonathan Caplan QC, who had been counsel for the press in *Harwood*, questioned whether, when accessing an archive, the newspaper is publishing to a section of the public, or whether the member of the public is conducting his or her own research (as if searching through a batch of old newspapers). Jurors should, he argued, be trusted: the temporary removal power would be a step too far and not proportionate to the risk. Professor John Spencer on the other hand suggested that we should not leave temptation in a juror's way and, merely because a new power would be fallible does not mean that we should not use it.
- 2.148 Keith Mathieson discussed the proposal for the new take-down power. He described this as "a pretty significant interference with editorial freedom" given that it applies to material that has been published legitimately. He was concerned that the temporary removal power could be used as a "rubber-stamping" exercise without appropriate notice being given to the publishers or proper justification and that there would need to be a proper justification on the facts of the case to make such an order. Mr Mathieson thought the proposal disproportionate, and that better judicial directions to jurors would be more proportionate. Mr Mathieson also doubted that article 6 of the ECHR has primacy over article 10 rights, given that, by comparison, article 8 does not have primacy. In general, the proposal to order removal of material is disproportionate. It would be more proportionate to give directions to the jury. He also highlighted that there has to be a balancing exercise where the judge is in possession of the full facts and the media are put on notice. He was also concerned that there tends to be a trend when courts are given powers for them to become laxer and laxer about their use as time goes on.
- 2.149 Joshua Rozenberg explained that the media was very concerned about the temporary removal take-down power. If it is to be used, then the power must require notice to be given to the media and it must be for the individual concerned to request the order. He questioned whether such a power is really necessary if

we just trust the jury system. He also highlighted that there are websites that specialise in keeping cached pages and he was not confident that it would be possible to disable these caches.

- 2.150 David Banks was concerned that removing material will create a market for the information, which will put the print media at an even greater disadvantage than they already are. He further commented on the fact that the public's use of Twitter and Facebook is different to that of journalists. Although journalists abide by the law, the public use the ordinary rules of conversation. Expanding contempt to this social media arena will result in criminalising large groups of people.
- 2.151 John Hemming MP felt that there comes a point when we have to trust jurors and that being candid with the jury is a much better way to deal with the problem than using the power of the state to stop people reading information. Mr Hemming further explained that where prejudicial information is on a webpage, then you can ask the ISP to take it down. But, online information can be moved from place to place indefinitely. The system is designed to respond to a nuclear situation and so complete removal is very difficult. In short, he advised: don't try, trust the jury.
- 2.152 Sir Anthony Hooper explained that he was sympathetic to the call of "trust the jury" but that he felt that the CP provided a formidable response to this suggestion. He highlighted that juries do not give reasons for their decisions. He also questioned why the Act was relevant in *Harwood* and why the judge could not have made an order using ordinary powers. He recalled a case where he made a request to the court, as counsel for the prosecution, for the removal of online material where the defendant had a large fan-base who had set-up numerous websites to say that he was innocent. He was worried that the material would lead the jury to an acquittal. Sir Anthony commented that a trial judge will make orders time and again if there may be a substantial risk of serious prejudice. He further explained that when he was in the Hillsborough case, he made an order prohibiting newspapers from showing pictures of the memorial monument and no-one complained.
- 2.153 Maura McGowan QC, Chairman of the Bar Council, commented that, of course we should trust the jury but the problem is that we do not know what we are trusting the jury with. In any case, we cannot know if what the jury knows is accurate. It is not a question of not trusting the jurors, it is a question of whether we can trust what they know.
- 2.154 Finally, Professor John Spencer said that he was listening with amazement to the calls for us to "trust the jury". He made three points: First, the Lord's Prayer says "lead me not into temptation". Even if we trust jurors, we should not put temptation unnecessarily in their way. Secondly, simply because the suggested new power is not infallible does not mean that we should not use it. It may work a lot of the time. Thirdly, what we are discussing here is the risk of people being convicted of crimes when they should not be and this is a very important matter to be protected against.
- 2.155 At our seminar at the Royal Courts of Justice, views on the temporary removal order were mixed. The practice of some members of the media of removing tags and links which connect new stories about active proceedings to archived stories which may be related to the new stories was highlighted. This means that a juror

would have to actively search for information they should not be searching for in order to find potentially prejudicial material – they would not be directed to it merely by reading a report of current proceedings.

- 2.156 A media lawyer at the event voiced the opinion that jurors should not be searching for or reading contemporary articles about the trial they are hearing, even though some judges seem to think this is permissible. The media lawyer concluded that the starting point should be for juries not to conduct any research at all, in order to avoid the danger of them being led into temptation.
- 2.157 A judge took the view that telling the jury not to look at extraneous material is much the same as telling children to walk past a sweet shop without looking inside. Another judge advocated a practical approach, explaining that jurors may inadvertently stumble upon potentially prejudicial material while reading the newspaper online. It is therefore a good idea to fix the problem before it arises, by virtue of an order for temporary removal.
- 2.158 One media lawyer said that the problem with *Harwood* was that there was no consideration of the practical implications. The media needed sufficient time to deal with the decision and not to be provided with a list of links with no indication where these links came from or how they had been found. Much of the material on this list would only be found by somebody searching with knowledge of information of which jurors should not be in possession.
- 2.159 Other media lawyers highlighted their concerns that the proposed power would be used on a routine basis whenever the defendant had any criminal history at all. The proposal therefore had the potential to become a delaying factor in trials. The judges present differed in their views about whether there was a risk of the power becoming routine.
- 2.160 Concerns were also raised about the article 10 proportionality of the power. Given that there may be a deluge of articles about a particular defendant, it may be neither necessary nor proportionate to target *one* publisher by asking them to remove their content.
- 2.161 A media lawyer pointed out that in *Harwood* no evidence was submitted that the jury could easily have found the material while engaged in legitimate internet usage. It was also argued that, whilst the media could challenge *Harwood*, they did not trust the safeguards built into the proposed power. The threshold of section 2 would have to be higher if the proposal is not to undermine both court reporting and the efficiency of the trial process.
- 2.162 Concerns were also raised by a media lawyer about the duration of the proposed judicial orders. Lawyers often receive “until further notice” orders and in many cases no such further notice is forthcoming.
- 2.163 One judge viewed the proposed temporary removal power as a valuable back-up for sound judicial directions to the jury. One concern, however, related to the practicalities of the parties applying for these orders. Since it was envisaged that this would take place at the plea and case management hearing (“PCMH”) stage, the PCMH forms would need to be amended and the parties instruct representation, for which there may not be funding available. It was also not clear whether the PCMH was the right time - a natural choice would be at the point at

which applications for bad character are made, but in many cases this will not be until during the course of the trial. This adds further force to the concern about delaying proceedings.

- 2.164 Another judge agreed that the proposal raised practical questions about timing. It would make most sense for any issue about prejudicial material to be raised at an early stage. However, in the last twelve years, the judge had never received any application relating to historic material. Nonetheless, the judge agreed that information which is potentially prejudicial should be restricted as much as possible beforehand. A further practical concern would be the additional costs for representatives making such applications.
- 2.165 One judge said that this was not just a question of good/bad or compliant/defiant jurors; the problem could emerge in shades of grey. In *Harwood*, the offending material came up very quickly even when the words used in the search were of an anodyne nature.

We propose that the application should be capable of being made by the prosecution or defendant without first seeking the permission of the Attorney General. Do consultees agree? [paragraphs 3.83 and 6.30]

- 2.166 The Council of Circuit Judges, CPS, ACPO, the Law Society, Professor Alisdair Gillespie, London Criminal Courts Solicitors' Association and six other individuals agreed that it should be possible for either the prosecution or defendant to make such application without first seeking the permission of the Attorney General.
- 2.167 The Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts) also thought that there should be no need for the Attorney General's permission, commenting that "The timescale involved in attempting to seek permission for the Attorney General would almost inevitable lead to the item [we assume they mean publication] remaining "live and accessible" for longer".
- 2.168 Likewise, the Criminal Bar Association favoured our proposal, commenting that this "may well expedite matters", but also arguing
- it should be open to the Attorney-General to make such an application and ... the Court should also be able to act on its own motion. Any application (and subsequent hearing) should be made on notice.
- 2.169 The Bar Council did not respond explicitly for or against the proposal, arguing that "in light of the impact of the application on a publisher we do think that the Attorney General should be consulted so as to ensure consistency of approach".
- 2.170 However, members of the media and some other consultees disagreed. The National Union of Journalists, BBC and Media Lawyers Association responded that Attorney General's permission should be sought before the application, and that media organisations should be able to make representations when the application is heard. Trinity Mirror Plc, the Society of Editors and the Newspaper Society also favoured the requirement for the Attorney General's permission, with the latter describing it as an "essential safeguard".

- 2.171 Wiggin LLP was in favour of the requirement of the Attorney General's permission, "in order to maintain consistency of approach in contempt cases". Independent Print Limited responded that

permission should always be sought of the Attorney General, given the frequent conflicts at issue between article 6 and article 10 rights, and matters cutting across both civil and criminal laws.

- 2.172 The Media Law Resource Center argued that

defendants and prosecutors will be able to initiate takedown proceedings. Unlike the discretion exercised by the Attorney General, defence lawyers are charged with zealously representing their clients' interests. They and their clients may naturally take a broader view of what constitutes serious prejudice and move to suppress any negative information accessible through any search engine. Similarly, prosecutors may seek to zealously suppress negative information about witnesses. Under such advocacy, the meaning of "substantial risk of serious prejudice", may naturally expand.

- 2.173 Three other individuals were against our proposal.

- 2.174 The Coroners' Society raised an issue in respect of the focus of the proposal on prejudice to criminal proceedings. In relation to the risk of prejudice to an inquest with a jury, they explained

It should be highlighted that there are some high profile cases where a death has occurred but the CPS has declined to prosecute and the inquest is the only active proceedings. This may pose problems for Coroners as there is no national coronial service.

- 2.175 We take this to mean that it is not necessarily clear to whom responsibility for an application in the Coroners' court would fall.

***Do consultees consider that the current maximum penalty is appropriate?
Do consultees consider that the court should have the power to impose
community penalties? [paragraphs 3.84 and 6.31]***

- 2.176 The majority of respondents indicated that the current maximum penalty was appropriate. The National Union of Journalists, ISPA and two individuals did not agree.

- 2.177 Responses were more varied on the proposal to introduce a power to impose community penalties. Many respondents agreed that the current maximum penalties were appropriate and considered that (at least in certain circumstances) the court should have the power to impose community penalties: Anthony Arlidge QC, Inspector Sumner, Criminal Bar Association, Richard Shillito, London Criminal Courts Solicitors' Association, Newspaper Society, Wiggin LLP, CPS and the Council of Circuit judges.

- 2.178 The Newspaper Society agreed that the current maximum penalty is appropriate and, on community penalties, referred to their response.

There is no need for any increase or additional sanctions in cases involving the media. Action is usually taken against media companies, rather than individuals to whom community penalties might be more appropriate.

- 2.179 Dr Findlay Stark responded that “the threat of imprisonment seems useful, and community penalties should be available”.

- 2.180 Wiggin LLP agreed that the current maximum sentences were sufficient

There is no evidence that the current penalties lack deterrent effect, and our experience is that publishers and content owners take contempt in all its forms extremely seriously. We do not believe that citizen journalists or other content owners are any different; however we appreciate that in certain circumstances a community penalty might be appropriate.

- 2.181 The CPS agreed that the current maximum penalties of an unlimited fine and/or two years imprisonment were appropriate and “would naturally be reserved for the most serious cases”. In addition, the CPS response was in favour of our proposal that the court should have the power to impose community penalties “for all matters of contempt”.

- 2.182 The Council of Circuit Judges agreed that the current maximum penalty was appropriate and that the court should be able to impose a requirement for “a contemnor to carry out unpaid work”

It would be appropriate where the behaviour constituting the contempt led to a delay in the case or other loss of court time to reflect directly the interference with the administration of justice.

- 2.183 Terence Ewing did not consider the current maximum sentence appropriate and Ursula Riniker did not consider imprisonment appropriate. Both agreed that the court should have the power to impose community penalties.

- 2.184 The National Union of Journalists argued that the current maximum sentence was “excessive” in respect of individual journalists

The current maximum sentence of up to 2 years imprisonment or an unlimited fine as well as the possibility of being ordered to pay costs, even where the serious misconduct has not constituted a contempt of court, is excessive in respect of an individual journalist. In respect of individual journalists [and companies], the sentence should reflect the seriousness of the offending conduct and the means to pay. It is not necessarily so that an individual journalist will be supported in a case by the employer, and it may well also affect freelancers who would not have the support of an employer to call on anyway. Any sentence should reflect the seriousness and any mitigating factors.

- 2.185 Independent Print Limited, Media Lawyers Association and two individuals disagreed with the proposal to introduce a court power to impose community penalties. Independent Print Limited and Media Lawyers Association agreed that

the current penalties were appropriate and argued that community penalties were inappropriate for corporate publishers.

- 2.186 ISPA noted that the current maximum penalty did not seem to be appropriate for the proposed reform “because the new contempt may apply to organisations who are not considered to be publishers under the current Act”.
- 2.187 Not all respondents commented on whether the current maximum penalty is appropriate. The Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts) considered that the penalty should be fine and/or imprisonment as there needs to be “a strong deterrent”.
- 2.188 The Law Society of England and Wales did not comment on the appropriateness of the current maximum sentence but agreed that community penalties should be an available sanction for breach of the court’s order.
- 2.189 ACPO argued that “sentencing needs to provide sufficient punitive and deterrent elements” and suggested that there is no reason why community sentences could not meet these requirements.

Do consultees think that this new contempt should be tried in the Divisional Court under Part 81 of the Civil Procedure Rules or should it be tried on indictment or “as if on indictment” as we propose to try section 2(2) contempts? [paragraphs 3.85 and 6.32]

- 2.190 Views as to the appropriate mode of trial for this proposed new contempt were divided.
- 2.191 The Bar Council, the Newspaper Society, the Media Lawyers Association, Independent Print Limited, Richard Shillito, Professor Eric Barendt, Wiggin LLP, Terence Ewing, Professor Alisdair Gillespie, Will Tovey and Ursula Riniker favoured the status quo of trial in the Divisional Court using the procedure set out in CPR 81. Trinity Mirror Plc also favoured trial in the Divisional Court but argued that “the complexity of the issues raised are such that a three judge court should be the norm.”
- 2.192 The Law Society, Anthony Arlidge QC, Criminal Bar Association and Godwin Busuttil favoured trial on indictment.
- 2.193 The Council of Circuit Judges, the London Criminal Courts Solicitors’ Association, Dr Findlay Stark and Andy Dumbiotis favoured trial as if on indictment.
- 2.194 The National Union of Journalists suggested that the procedure should stay in the Divisional Court, “though individuals if they wish should be able to elect trial by jury.”
- 2.195 Wiggin LLP were not in favour of trial on indictment or “as if on indictment”. They argued that

trying such cases on indictment or “as if on indictment” would be inconsistent with other areas of contempt which are dealt with by the Divisional Court. There is no compelling reason for dealing with this particular area differently.

They indicated concerns that such a proposal would cause delays in resolving matters and make the process much lengthier. Moreover

The Divisional Court gives reasoned judgments which can be learned from — this would not be the case if the offences were tried by a jury. There is also a concern whether dealing with this area of contempt differently would be compatible with articles 6 and 10 of the European Convention of Human Rights.

2.196 The Criminal Bar Association favoured trial on indictment

The threat of prosecution may well reinforce the order upon the publisher to remove the material. The fact that the publisher is being dealt with by trial on indictment, as opposed to being tried in the Divisional Court, ought not affect the underlying case because the offending material will either have been removed or not.

We acknowledge the resource implications for this. The matter will require a full investigation and compliance with the disclosure obligations under the Criminal Procedure and Investigations Act 1996 (as amended). In our view the Attorney-General would not be conflicted from prosecuting such cases and the cases could be investigated by a local police force. We further acknowledge that trial on indictment through the full criminal process (Magistrates' Court, Plea and Case Management Hearing, trial) will take longer than proceedings before the Divisional Court, but the new contempt is, in effect, the creation of a new criminal offence, which can be punishable by imprisonment and should be treated and recognised as such.

We have every confidence in the jury system and would not support such cases being tried by judge alone.

2.197 The Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts) suggested that the contempt should be "triable either summarily or on indictment depending on the level of seriousness".

2.198 The CPS stated that "the new contempt should be tried in the same way as section 2(2) contempts".

2.199 ACPO (including Chief Constable Trotter) did not specify a preference for mode of trial but indicated that they would support "consistent processes for all forms of contempt".

PLACE OF PUBLICATION

Do consultees consider that the absence of a definition of the place of publication creates problems in practice? Is a statutory definition of the place of publication necessary? If so, what form should that definition take? For example,

(1) should it be necessary that the publication was produced within England and Wales; or

(2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or

(3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad? [paragraphs 3.95 and 6.33]

- 2.200 There was in general more support for a statutory definition than for maintaining the status quo, although the issue was finely balanced. The Law Society, the Media Lawyers Association, the CPS, ACPO, Professor Eric Barendt and Ursula Riniker responded that either there was no need for a statutory definition, and/or that the lack of one was not creating problems in practice. Those who responded that a statutory definition is needed or that there would be benefits to such a definition included the Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat), the Bar Council, Independent Print Limited, Anthony Arlidge QC, Inspector Sumner, Dr Findlay Stark, Richard Shillito and two other individuals.
- 2.201 If a statutory definition were to be introduced, most consultees were supportive of Example 3, primarily on the basis that this definition is better directed at the mischief which section 2(2) seeks to address. Those who responded that they did not think there was a need for a definition, but if one was introduced, explained which they would prefer, have also been listed below.
- 2.202 Example 1: Only two consultees were in favour of this example. One was the Law Reform Committee of the Bar Council. The Committee responded that
- There will be real problems if there is no definition of what is meant by a place of publication. A statutory definition is required in light of the lack of clarity on the basis of the law as it currently stands. We would suggest that for criminal liability the publication should be produced within England and Wales.
- 2.203 Mr Stammers was the second consultee in favour of Example 1, commenting that “the author should be physically located here”.
- 2.204 Example 2: The London Criminal Courts Solicitors’ Association appeared to be in favour of Example 2, although even this was a tentative view
- (1) A requirement that the publication was produced in England and Wales is unduly restrictive and those producing publications just over the border in Scotland and elsewhere outside England and Wales may escape prosecution for geographical reasons alone.
- (2) Yes, it should be necessary that the publication was targeted at a section of the public in England and Wales, although it is arguable

that a publication which has as its subject matter something relevant to this jurisdiction is at least potentially aimed at the public in England and Wales.

(3) This may be a step too far but should be considered. If the test is to be this wide then the wording of the section should remain the same so that a substantial risk of serious prejudice is required to balance out the breadth of this element of the offence.

- 2.205 Mr Buora of British Naturism and Mr Tovey of the Pirate Party supported Example 2. Mr Tovey commented that a statutory definition would “provide clarity”. He explained that

contempt of court laws without a wide scope for jurisdiction would render it relatively pointless due to the cross-border nature of modern communications and media (due to the ease of circumvention), but too wide a scope could be unenforceable and involve the English and Welsh courts being seen as overstepping their bounds (as has been accused in cases involving privacy and defamation - whether or not this has been the case).

This change in the way communication occurs would seem to create significant practical and theoretical problems with a wide range of laws (including those identified above) and it may be appropriate for the Law Commission (perhaps in tandem with similar bodies elsewhere) to investigate a broader solution; covering jurisdiction in general, rather than as it relates to a specific offence.

- 2.206 Example 3: 11 consultees were in favour of this example. The Council of Circuit Judges explained

To adopt Option 1 would be very limiting in its scope and given that material could be published both in England and Wales or elsewhere achieve a pyrrhic victory. Option 2 does not relate to place of publication but its potential audience and presumably does not affect the place whence material comes. But one again encounters the difficulty of identifying the publishers. We would suggest that Option 3 would be the most appropriate if the proposal was pursued.

- 2.207 The Criminal Bar Association highlighted that

the harm which prohibition of contempt by publication (online and otherwise) seeks to prevent is access to prejudicial material (which tends to interfere with the course of justice), most immediately by jurors themselves, but also by the public at large, as both would impinge upon the fairness of a trial. The act which gave rise to access to such material in England and Wales may not be within the jurisdiction which makes Option (1) inappropriate.

As regards Option (2), we are of the view that the nature of online publication renders irrelevant any consideration of whether a particular publication was “targeted at a section of the public in

England and Wales". Thus, we do not think that Option (2) is appropriate.

Accordingly, Option (3) seems the most appropriate. However, the access-based approach gives rise to a jurisdictional (rather than substantive) problem in relation to Option 3, in the sense that it may entail liability for acts committed abroad.

2.208 Richard Shillito responded that this is a "difficult issue", with "no easy answers"

On the one hand, there is a risk of prejudicial material being published by parties who think they are out of jurisdictional reach. On the other hand, there is a risk that the court's authority will be diminished if it makes unenforceable orders.

In my view the technical problems associated with prohibiting or preventing internet publication should not prompt a completely hands-off approach, because

(a) the internet is large and varied and most users (certainly I suspect most jurors) only use mainstream sites/outlets;

(b) there may well be a benefit even if only those sites can be managed effectively by court order;

(c) it is impossible to predict but there is a trend suggesting that mainstream sites like Facebook wish to self-police content and/or would like to be seen as compliant with legal norms and that trend may spread;

(d) it is also impossible to know to what extent in future international co-operation may limit current, rather anarchic conduct online.

Theory and practice will have to be evaluated case by case. If in practice a particular order is going to be incapable of enforcement, for whatever reason, it should not be made at all.

I tend to think that the reforms in 6.28 - 6.29 above would need a corresponding reform to add a definition of place of publication. The mischief is material which is accessible to users in England and Wales. (If it is produced but not accessible here, or targeted but not accessible here, I do not immediately see why it should be the subject of a court order, except perhaps on a quia timet basis).²⁸

2.209 Professor Eric Barendt responded that he

would leave the courts to develop, and perhaps extend in the contempt context, the approach taken in *Sheppard*. I am not persuaded it is necessary, or possible, to define the place of publication to cope with all conceivable cases where the contempt

²⁸ The original points were numbered 1-4 but have been changed to a-d to avoid confusion with options 1-3.

power should be available. If it were attempted, I would make the following points:

(1) it should not be necessary that the publication was produced within England and Wales;

(2) there are difficulties in applying a “target” test (see the CA in the defamation case, *King v Lewis*)

(3) it is probably sufficient that material posing substantial risk, etc, is accessed here, wherever it is produced.

2.210 Godwin Busuttil was also in favour of example 3 explaining that this “is the only sensible definition”, but that there may be questions about “the desirability of going down this path.”

2.211 The Law Society, the BCC, Independent Print Limited and Inspector Sumner and one other member of the public were also in favour of example 3. The National Union of Journalists took the same position, although they explained that “there may be difficulties, however, as to enforcement out of the jurisdiction”.

2.212 Various other consultees responded with suggestions of their own, rather than favouring our examples 1 to 3, or responded without mentioning a proposed definition.

2.213 Anthony Arlidge QC explained that

Publication abroad accessible here should be publication even though it may not be possible to proceed against the original publisher. Downloading by an individual for his own purposes should not be publication but if he passes the information on to others it should be.

2.214 The CPS explained their view

The correct test is whether the material poses a substantial risk of serious prejudice in England and Wales, irrespective of the place in which the material was written, created and hosted. The place of production and any section of the public that the publication was targeted at would be relevant factors in assessing whether there was a substantial risk of serious prejudice. However, there remains a practical issue in dealing with a contempt where the publisher is outside the jurisdiction and cannot be brought within it.

2.215 ACPO agreed, arguing that

material created, uploaded and hosted abroad is clearly capable of constituting an offence. The issue remains regarding how a publisher of this material abroad is prosecuted through the jurisdiction of the courts of England and Wales.

2.216 The Legal Committee of the Council of Her Majesty’s District Judges (Magistrates’ Courts) responded that they considered that

“accessible” is the key term to be used in any definition; accessible in England and Wales even if written, created, uploaded and hosted abroad. We do not consider “accessed” [as proposed in Option 3 in the CP] is sufficient.²⁹

2.217 Ursula Riniker responded that “it should be publication within England and Wales for a finding of contempt by publication” although it was not clear from the response how this would apply to online publications.

2.218 The Society of Editors explained that it “is opposed in principle to attempts to unilaterally restrict publication on the internet for reasons of principle and practicality”.

2.219 The Newspaper Society response stated that

We would be concerned if any changes were made which increased the risk of liability for contempt for regional media with cross border accessibility or publication of print or digital media, or which created new restraints upon the content of UK based local media but relaxed those upon any of their competitors.

2.220 The Press Association explained their view as follows

The issue of whether a publication is accessible in the England and Wales or UK jurisdiction is separate from that of where the publication takes place – although in English defamation law, it is held that publication takes place where material is downloaded, not where it is uploaded on to the server.³⁰ It will, however, be relevant to whether the court is able to take any positive or practical action about a publication which takes place wholly outside the jurisdiction. In August 2010 in the United States the SPEECH – Securing the Protection of our Enduring and Established Constitutional Heritage – Act³¹ came into force, as a direct response to so-called “libel tourism” cases in England. It banned the US courts from enforcing the judgments of any foreign court in a defamation case unless the American court deemed that the protection the foreign court gave the right to freedom of speech matched that given by the US Constitution and legal system. In effect, it made the decisions of the courts in England and Wales in defamation cases unenforceable in the US.³²

The possibility is that the United States might also be willing to take similar action to defend its citizens’ – and web operators’ - rights to freedom of speech in relation to the law of contempt. US law allows

²⁹ Their footnote reads: This is in line with the CJEU judgement in *Martinez v Mirror Group Newspapers Ltd*: C – 161/10.

³⁰ *Gutnick v Dow Jones* (2002) HCA 56, considered by the Court of Appeal in *Don King v Lennox Lewis*, *Lion Promotions LLC* and *Judd Bernstein* [2005] EMLR 4.

³¹ PL 111-223, codified at 28 U.S.C. §§ 4101-4105.

³² In July 2011 a Florida court refused to enforce the judgment of a Canadian court in a libel case – see US District Court, Northern District of Florida, Tallahassee Division file as: Case 4:11-cv-00009-RH-WCS Document 18 Filed 06/20/11.

far more pre-trial publication about a case than English law, while jurors are able to discuss the case afterwards³³, and the prospect of English courts attempting to order their web operators, bloggers and other to remove material from the web might well provoke fresh legislation.

But once again, the approach is incorrect. The aim should be to stop jurors accessing material which might be prejudicial, not to block the publication of that material, simply because blocking it all would be an impossible task which would lead to the courts making unenforceable orders, bringing them and the law into disrepute.

This is not to say that the law of contempt should be discarded completely. But it has to be recognised that the historic approach focusing on publishers is no longer working or workable, and that the concentration has to be on jurors and the users of social media such as Twitter and Facebook. Jurors have to be persuaded of their duty to avoid going to the internet to seek information about trials on which they are sitting, and the general public has to be persuaded that it too must play its part in ensuring that a defendant has a fair trial. It was not, after all, the mainstream media which published the name of the young woman raped by footballer Ched Evans, or which put a photograph alleged to be of Jon Venables – and other information – on to the Twitter website.

2.221 In a similar vein, Wiggin LLP responded that

These questions highlight the practical problems with attempting to address contempt issues through editing/removal of potentially prejudicial material from the internet. It is unrealistic to assume that all potentially prejudicial material can be made inaccessible to jurors - this demonstrates clearly why the primary focus should be on educating jurors, so that when they are confronted by potentially prejudicial material, they can deal with it appropriately.

2.222 Likewise, the Media Lawyers Association explained

The practical answer to this is the absence of a definition does not matter as practically speaking only organisations/people that the UK courts have jurisdiction over are those who are based here. As pointed out earlier, it is impossible to police websites/material that is posted abroad. The reality is that any measures implemented by

³³ Notably after the end of the trial of singer and entertainer Michael Jackson on child molestation charges, when two jurors subsequently said in a TV interview that they regretted agreeing to acquit the “paedophile” – see: <http://www.today.com/id/8880663/site/todayshow/ns/today-entertainment/t/jurors-say-they-regret-jacksons-acquittal/> Last accessed on March 4, 2013.

statute are only going to bind UK publishers. Others may choose to “respect” a UK court ruling.

- 2.223 Mr Stammers was in favour of a statutory definition, and suggested that there were three possibilities in respect of a blog post

Where was the human author physically located.

Where was the hosting server physically located.

Where was the reader physically located.

- 2.224 Mr Lewis explained that any one or combination of the three examples would be preferable. He explained

Any statutory definition should carry the meaning:

If it is made accessible to people in the UK then its origin is irrelevant - there is an offence in the UK. If it was originated in the UK and made directly accessible only outside the UK then there is an offence in the UK. If a third party then made it accessible in the UK there is an additional offence in the UK by that third party.

Physical location of the offender is irrelevant as far as culpability is concerned. Whether or not penalties can be applied depends entirely on the agreements between the different jurisdictions.

- 2.225 In his response, Professor Alisdair Gillespie stated that he does “not believe that changing the law is necessarily correct and it would lead to a disparity between contempt and other aspects of the law relating to publication”. He set out a number of points in relation to the three options proposed

There is definite logic in requiring that a publication must either be prepared in England & Wales or that it was prepared with the intention of it being targeted at a section of the public in England & Wales. This covers not only those who may prepare publication in England & Wales and then seek to host it abroad or companies that seek to challenge the law of contempt in England & Wales by deliberately targeting the public within the territory.³⁴ Of course the latter still raises significant issues in respect of its enforceability. It does, however, arguably provide a signal that such behaviour is inappropriate.

The difficulty with the final suggestion – that it is enough that it poses a substantial risk of serious prejudice if accessible in England irrespective of where it was created and uploaded – is that potentially in certain high-profile cases it could target the legitimate media of other countries. It is conceivable that there could be high-profile case

³⁴ It was thought at the time of the “super-injunction” controversy that there were some people outside the United Kingdom who were deliberately naming the subjects because they believed that they were not subject to the jurisdiction of the courts.

where a prejudicial information is known to the media. Whilst it would be inappropriate for this to be given to a potential jury it could well be in the public interest for a media to inform, for example, their US audience. Is it realistic to believe that the English courts could prevent, for example, CNN from publishing this information? It would seem highly unlikely even though if the content is posted on their website that is inevitable that people in England & Wales could access it.

- 2.226 ISPA were not in favour of a statutory definition for place of publication at this point in time. They argued that

Any statutory definition would have implications that go far beyond the remit of the current consultation exercise. A separate and wider consultation would be necessary to ensure all the possible implications are considered. Each of the suggested definitions would have different implications on

- the volume of content that may fall under the new court powers;
- those who should be responsible for identifying and notifying the content; and
- the likely subjects of a court order.

For example, option (1) and (2) of section 3.95 would make it more likely that a court order can be made directly against a publisher whilst option (3) would make it more likely that orders need to be made against a person who has sufficient control over the accessibility of the material. As a result any statutory definition in the area would have serious resource implications on all parties involved. If there is little or no evidence that the law has been unable to deal with the matter at hand then issues, such as place of publication or the substantial measures test, should continue to be decided on a case by case basis.

- 2.227 At our symposium on contempt of court, Joshua Rozenberg explained that, in his view, where information is “published” abroad but is accessible here, it would be a sensible rule to say that if information is accessible here then it is published here.

CHAPTER 3 - JURORS

Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced? [4.40]

- 3.1 Again, views on the introduction of this offence were divided, although more consultees were in favour than were against.
- 3.2 Many representatives of the media were in favour of the offence (not least as an alternative to the temporary removal power), including Wiggin LLP, Independent Print Ltd, the Media Lawyers Association and the Society of Editors.
- 3.3 Other members of the media had concerns about how the offence would affect them. For example, the National Union of Journalists responded that, if such an offence were introduced, “there should be a defence to a charge of providing information to a juror that the provider was unaware that the recipient was a juror”. Likewise, the Newspaper Society was concerned that the offence

must not be framed in any way that the normal lawful publishing and journalistic activities of a regional media company or its archive retention could somehow inadvertently expose the regional media company or its staff to accusations of complicity.

- 3.4 The Criminal Cases Review Commission (“CCRC”) highlighted that “allegations of misconduct are made more frequently than they are evidenced after an investigation” and that, even where misconduct is admitted there has always been some sort of direction to the juror not to behave in that way. The CCRC explained that, in the investigations it has undertaken

By far the most common issue which arose (approximately 50% of cases) involved alleged inappropriate contact with, or prior knowledge of, a defendant, his/her family, witness etc. It is noticeable that there has always been some form of a direction/prohibition in this regard. Internet/mobile telephone use was the next most common category (approximately 20%). Approximately 13% of the cases concerned the presence of a prison officer or police officer on a jury; again, both types of juror are given instructions by their professional body to make this known to the court/jury bailiff etc. Approximately 4% of the cases involved allegations of inappropriate disclosure of jury deliberations (one via Facebook). The remainder concerned disputes about the verdicts returned, or (in one case) extraneous material not captured by internet research or prior knowledge.

- 3.5 Yet, only one case involving the internet (of those decided thus far) had resulted in the conviction being quashed with five of the cases involving inappropriate contact having the same outcome.
- 3.6 Furthermore, the CCRC found that

Where there was misconduct (eg using the internet), it appears to have occurred knowing that it was in breach of specific directions; sometimes other jurors knew, but “directed themselves” to ignore the product of others’ research. One reason for not reporting it at the time was not wanting to get the other juror into trouble, so this is a risk whether or not there is an offence of contempt or a specific offence as the Law Commission proposes.

- 3.7 Supporting many of our other proposals in relation to better warnings and explanations to jurors, the CCRC felt that, “on balance”, a new offence should be introduced

The creation of a specific offence serves to clarify the position, and underpins the seriousness of the misconduct. The experience of the CCRC has been that even legally qualified jurors have, on occasions, sought information from the internet; although there will always be those who flout directions, however clear they are and whatever the penalty, it makes sense to ensure that jurors have the clearest possible understanding that such conduct is capable of amounting to a criminal offence, with associated penalties. The primary argument against a specific offence of this type is that such an offence might discourage jurors from disclosing their own misconduct, or that of others. The CCRC’s current experience suggests that jurors may well be reluctant to make such disclosure at the time of trial even within the current framework.

The only other reservation is that any such offence must be carefully crafted to explain the misconduct in the clearest possible terms, as there is some doubt whether or not a specific offence will in fact alter behaviours, at least in the most determined of jurors.

- 3.8 The Equalities and Human Rights Commission was also in favour of a new offence, responding that “placing the common law of contempt on a clearer and precise statutory footing”, along with the warnings to jurors and other measures we proposed, would be a

much needed improvement ... to contempt of court legislation and practice that will help improve compliance with ECHR rights. The law becomes more accessible, and the consequences of breaking the law become clearer. The proposed measures in this regard are considered to be accessible, foreseeable and proportionate, containing sufficient safeguards for various competing interests....

- 3.9 The London Criminal Courts Solicitors’ Association was in favour of the offence, as was the Criminal Bar Association, the latter calling for better directions and warnings to the jury as well.

- 3.10 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) were also supportive. They argued that there was “a good case” for the introduction of a statutory offence

Firstly, it would be consistent with statutory or common law offences which criminalise other forms of misconduct by jurors. Secondly, it

would recognise the acknowledged fact that improper accessing of information may be as harmful to the integrity of the trial as other forms of misconduct. Thirdly, it would avoid the potential uncertainty which could arise under the present system where judges' instructions to a jury may take different forms and which run the risk of being misconstrued by jurors as something less than a mandatory court order.

The scope of any such offence should be broad enough to cover researching any matter relating to the trial in question. It is axiomatic that the jury must reach its verdict based on the evidence seen and heard in the courtroom, together with the judge's directions as to what the relevant law is and how to apply it. Whilst the perils of private evidential research are all too obvious, there is an equally cogent need for the jury to follow the judge's legal directions without the benefit of private research as it is solely on the basis of the judge's directions that an essential check exists as to the fairness of the trial and the safety of the conviction.

Jurors who seek external information about a case are likely to be motivated by different reasons. However, their motives should only be relevant, if at all, at the stage of considering sanction for any breach of the prohibition. Whatever a juror's motivation, the potential harm to the trial process caused by accessing external information is so great that the motivation should play no part as a potential defence to an allegation of breach.

... we consider that additional clarity may help to prevent or reduce offending. Whilst we recognise the argument that fellow jurors might be more reluctant to report a breach of which they had become aware, we think this is outweighed by the benefits of clarity. Moreover, if no statutory offence relating to the seeking of information were to be enacted, so that the matter continued to be dealt with as a contempt of court, the inevitable move towards giving jurors fuller information about what is prohibited and the potential criminal penalties for breach are likely to have a similar effect in any event.

We do not consider that such an offence would breach jurors' article 8 and 10 rights. The prohibition would be likely to be regarded as proportionate and necessary.

3.11 Oliver Sells QC responded that

The concept of contempt is itself too vague and unspecific to have real meaning to lay people today. There is real need for a clear and specific offence of jury misconduct.

3.12 Professors Fenwick and Phillipson favoured the introduction of the offence on the basis that it would

capture the mischief aimed at by the current law [of contempt by publication] much more directly. Instead of punishing the media for the effect that a publication might have on a juror, had they read it,

jurors themselves would be punished for seeking out material that might be prejudicial, directly disobeying judicial directions and breaching their core duty as a juror to try the case only on the evidence presented in court. This seems in principle an offence more directly focussed on the likely harm in question – juror prejudice.

- 3.13 They argued that the offence was article 10 compatible because of the need to protect article 6, and that Parliamentary scrutiny of the offence (unlike with contempt at common law) would enhance “the actual and perceived legitimacy of the power to punish jurors”. There were also benefits in relation to the juror’s article 5 and 6 rights.
- 3.14 The Law Society had concluded that the offence should be introduced. The Society thought that, although the offence could seem “heavy-handed”, and there was “a risk of creating a climate of distrust within the jury room” with jurors discouraged from reporting others’ misconduct, the deterrent effect and the improvements in the juror defendant’s article 6 rights outweighed these concerns.
- 3.15 Members of Doughty Street Chambers (Crime Team) were in favour of the proposal, arguing that “a clearly defined, substantive offence ... would be preferable to the use of contempt” combined with other measures such as explanations and warnings to jurors. They commented

As we understand Professor Thomas’s statistics, she did not ask her interviewees to distinguish between looking at contemporaneous news reports of the trial, and doing other research into the case. To that extent, the figures she gives may inflate the amount of objectionable use of the internet. A more detailed breakdown would be preferable, although we recognise that jurors will be unwilling to admit improper conduct, so that any statistics may give an unreliable picture of the extent of the problem. Using the internet to follow news reports of trials is no more objectionable than reading newspapers or watching TV.

- 3.16 ACPO was in favour of the proposal, although had concerns about the deterrent effect.
- 3.17 Eight other consultees were in favour of the proposal, with one arguing that statute law was more accessible to the public than the common law of contempt and another that the new offence would provide more clarity.
- 3.18 Amongst those against the proposal, the Law Reform Committee of the Bar Council responded that making a form of contempt into a new statutory offence would have “the consequence merely of a further proliferation of unnecessary criminal legislation”. The Committee doubted that a new offence would have greater deterrent effect than the existing law.
- 3.19 The Coroners’ Society had concerns about discouraging disclosure by jurors
- Coroners have reported few cases of juror research but those that have been mentioned generally involve a juror voluntarily indicating that they have received information connected to the inquest from a social network site. This report to the Coroner’s Officer frequently

comes after the Coroner has given a warning. If an offence was created then it is more likely the voluntary disclosure would not take place in the future for fear of prosecution.

- 3.20 The Council of Circuit judges was against the proposal on the basis that it was “unnecessary” and it was unclear whether it would address the problem in question. It was argued that

The present system of advice to the jury which is given before a jury is empanelled and by a judge following empanelment strikes a proper balance. Provided the reasons for the directions are given clearly, we believe that the indications from questions and verdicts show that juries do follow them faithfully. One only needs to see the reaction of a jury upon the reasons being explained to them to realise that they do understand the need to judge the case on the evidence. It will be impossible to be sure that every juror is faithful to his oath or affirmation but it is equally unclear that that creating a criminal offence would be likely to impede those who were not. We pose the question would a direction that if you seek information from the internet, you may be committing an offence punishable with imprisonment, be necessary? Given the views expressed in the Consultation we expect the answer would be in the affirmative. Is that really adding to the direction that such behaviour would amount to a contempt of court? We do not think so.

- 3.21 The CPS was also against the proposal because of a lack of evidence as to the deterrent effect. Four other consultees were not in favour of the new offence, with one arguing that it would be unenforceable. Mr Read responded that “the “offence” in these sections is a joke ... and should not exist in a free country”.
- 3.22 At the Contempt of Court Symposium, Mr Justice Tugendhat had concerns about the proposal, arguing that the relationship between the judge and jury is one of partnership and trust, and the threat of sanction undermines that relationship.
- 3.23 The Western Circuit felt that if such an offence were introduced, it would only be fair to warn jurors about the potential penalties if they undertook such research. However, the Circuit was concerned that some people “distinguish between “research” and “search” on the internet” and that therefore an offence like “in some Australian states not to ‘conduct research by searching’, may be confusing”. The Circuit thought that, rather than introducing a specific offence of juror research, the contempt jurisdiction could be replaced

A suggested new statutory offence of ‘Interference with the due Administration of Justice’ would permit clear definition of the offence, proper investigation, with safeguards for jury room confidentiality, and specified sanction.

- 3.24 Anthony Arlidge QC was concerned about deterring jurors from disclosing misconduct and suggested “a half way house ... to give the judge power to make a wasted costs order” which could have a deterrent effect.
- 3.25 Mr Nick Taylor responded that

A new offence would have significant symbolic effect, emphasising the seriousness of the proscribed conduct, as, for example, occurred in *Dallas*. Conversely, the deterrence value of such an offence has been doubted in Australia. Further, it must be a concern that creating such an offence might not deter the conduct but will make it harder to detect. Jurors might be less likely to admit their misconduct and fellow jurors, having been infused with the notion of collective integrity as explained to them by the court, nevertheless might be less willing to inform on their fellow jurors. A new offence might be supported on the grounds of enhanced certainty and transparency as compared to treating such conduct as contempt, but its value in reducing misconduct itself must be questioned.

- 3.26 Professor Alisdair Gillespie was against the introduction of a specific offence but thought that the current procedure could be altered. He explained that

there are two possibilities for dealing with juries who go beyond what they are asked to do. The first is to create a discrete offence (as discussed in para 4.40) or the second is to reformulate the directions given to the jury. In para 4.20 it is noted that some stakeholders are sceptical of the ruling in *Dallas* on the basis that judicial directions cannot be directly equated to a court order. Whilst this is true, there is no reason why that cannot be changed.

- 3.27 Professor Gillespie went on to suggest that the judge could provide a pre-printed “written court order” to jurors at the start of the trial, with generic instructions, supplemented if necessary by directions specific to that case. This “order could state quite clearly that breach of these directions would amount to contempt of court and is punishable by imprisonment”.

- 3.28 Professor Gillespie argued

The advantage of the direction becoming a written order of the court is that it is clear to all jurors what they cannot do. Indeed it will be listed in a document that is handed to them. It could be argued that, as in some universities with so-called ‘learning contracts’, jurors could be required to sign the order to say they understand but that seems overly bureaucratic and would lead to the duplication and storage of the orders. It would be far simpler for the order to be given to the jurors (for example, by the usher when the jury is sworn in), with the judge going through the terms so that it is clear that all have been put on notice.

The advantage of dealing with it as an ordinary crime is, of course, the fact that it would have the procedural steps set out in para 4.40. However it arguably suffers from the same disadvantages as was discussed in respect of contempt by publication, ie would a jury necessarily readily convict a person for doing something that they themselves are prepared to do? There is also the difficulty that it could extend the time taken to deal with errant jurors as the matter must be reported to the police, who must conduct their investigation, interview the suspect, refer the matter to the relevant prosecutor who

must then decide whether to prosecute. It is submitted that it would be simpler to leave the matter as one of contempt. If the matter was dealt with by way of an offence the jury would still need to be instructed as to what they should, or should not, do (as discussed in para 4.80) so it would seem simpler and more efficient to transform the direction into a court order (given in open court and in writing) and deal with a breach by way of contempt.

- 3.29 Peter Bartlett drew our attention to the position in Australia. He noted that the courts there had held that “unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials”.¹ Likewise, the New South Wales Court of Criminal Appeal has observed that

It has long been accepted, the juries are able to exercise a critical judgement of what they see, read and hear in the media, and to put such material out of their minds ... it must be accepted until the contrary is demonstrated that the jury accept and apply the directions given to them by the trial judge.²

- 3.30 Mr Bartlett drew our attention to the current juror research offences in Australia, which we had noted in the CP,³ and explained that

If the court considers it necessary it can exercise its discretion to order the sequestering of the jury during the hearing. It is open to the court to make enquiries of the jury as to whether any of them have viewed the internet publications about the accused.

Mr Bartlett did not state whether he was in favour of a new offence in the England and Wales.

JURORS DISCLOSING INFORMATION

Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice? [paragraphs 4.60 and 6.35]

- 3.31 The vast majority of respondents considered that it is necessary to amend section 8 in accordance with our proposal. Inspector Sumner, Dr Findlay Stark, the CCRC, the London Criminal Courts Solicitors' Association, the National Union of Journalists, the Newspaper Society, the Criminal Bar Association, the Press Association, Professors Fenwick and Phillipson, the Law Society of England and Wales, Doughty Street Chambers (Crime Team), the Council of Circuit Judges, Wiggin LLP, Independent Print Limited, Media Lawyers Association, Godwin

¹ Justice McHugh in *Gilbert* (2000) 201 CLR 414, 425.

² *Kanaan* [2006] NSW CCA 109.

³ The Jury Act 1979 (NSW), s 68; the Jury Act 1995 (QLD), s 68A and 69A; the Juries Act 2000 (Vic), s 78A.

Busuttil, Nick Taylor, Oliver Sells QC, Professor Alisdair Gillespie and 5 other individuals were in favour of the amendment.

- 3.32 Wiggin LLP agreed with the proposal, explaining “it is important that there should be a prescribed process for jurors to be able to raise concerns, with appropriate safeguards in place to ensure that individual cases are not compromised”.
- 3.33 Godwin Busuttil suggested that section 8 be amended to allow for a defence where there was “a genuine and reasonable belief that such disclosure is warranted”.
- 3.34 The CCRC also agreed and set out its experience of jurors assisting with their enquiries

The CCRC experience is that jurors are generally very co-operative with its enquiries (in fact the CCRC interviewers have had to stop jurors from telling them everything, even with clear warnings about s8 before/during meetings); the CCRC has always had effective interviews and been able to produce useful material for the [Court of Appeal] notwithstanding s8.

However, CCRC experience also suggests that jurors often do not understand what they can/cannot do or say, & often ask “could I be in trouble if I tell you this?”

The CCRC “does not know what it does not know”, so it is not possible to say whether or not there would have been a better interview & more useful product without the s8 restriction.

The bigger issue for the CCRC is that of self-incrimination, and whether to carry out any interview with a juror under caution (for which, in most cases, the CCRC would direct an investigation pursuant to section 19 of the Criminal Appeal Act 1995, appointing an independent police officer, an “IO”, for that purpose); it would undoubtedly be easier for the CCRC if it did not have to concern itself with this issue. In *Mplenda*, ante, the CCRC gave an assurance that as the juror was not under caution, his/her response would be unlikely to be used in any prosecution of that juror [see New South Wales provision s55D of Jury Act 1977, to the same effect, in the footnote at page 88 of consultation]. The Court of Appeal noted that the questions were being asked on their direction and did not criticise the CCRC or disapprove of this approach;

The situation would be different if other jurors incriminated one of their number, though;

The important thing is to uncover misconduct, and the CCRC could not agree that a miscarriage of justice is a price worth paying for juror confidentiality;

There needs to be a clear line of reporting. The CCRC might usefully act as one of the points of contact, as suggested, in this regard, but if a juror disclosed directly to the CCRC, it should then refer such

disclosure to the Court of Appeal. The CCRC's statutory functions as drafted mean that any investigation would need to be carried out within the framework of a s15 investigation, directed by the Court of Appeal.

- 3.35 In addition, at our symposium on contempt of court, Penny Barrett a Commissioner at the CCRC highlighted the importance of jurors having clarity about to whom they should report their concerns. She explained that there have been cases where jurors have written to counsel in the case because they did not know that they should report their concerns to the judge.
- 3.36 The Newspaper Society agreed with the proposal. It suggested that, in order to ensure that jurors can actually benefit from the defence in practice, further thought might have to be given to "the nature and subject of the disclosure and explanation of the availability and application of the defence to jurors".
- 3.37 The Criminal Bar Association presented the arguments in favour and against the introduction of a specific defence to section 8

The key question is whether the current allowance for a juror to disclose to the court any such concerns is sufficient, or whether a specific and limited defence is necessary. The clear risk of amending the statute to include a specific defence is that it may reduce the sanctity of jury deliberations by making the juror feel that their views are open to scrutiny by another body. This in turn may diminish the finality of the jury verdict.

However, where such scrutiny serves to overturn a wrongful conviction, we consider that this must be in the public interest. In addition we share the concerns expressed in Appendix B, that the law as it stands may amount to a disproportionate interference with article 10 where the disclosure seeks to uncover a miscarriage of justice. We recognise that if amended, the common law concerning the admissibility of such deliberations would have to develop or be amended in order for the statutory amendment to serve any meaningful use.

Ultimately the Criminal Bar Association agreed with the proposal stating that

The current procedure for a juror to report their concerns must be made clearer to jurors ... statute should prescribe the very limited circumstances in which a juror is entitled to report concerns by way of the suggested amendment".

- 3.38 The Press Association agreed with our proposal and argued for further amendments to enable jurors to give interviews to the media about their concerns.
- 3.39 Professors Fenwick and Phillipson agreed that such a defence is desirable from both article 6(1) and article 10 perspectives and cited Lord Steyn's dissenting

judgment in *Mirza*⁴. They agreed that it should be a specific defence and argued that it should be made clear that disclosure was

(a) Genuinely viewed as necessary to prevent a miscarriage (or, it is suggested, to prompt an investigation into impropriety); and

(b) Specifying the persons to whom it must be made. It is suggested that the juror's belief should be both honest and reasonable – in the sense that the reasonable layperson, in that situation, would have considered that a miscarriage was a genuine possibility.

3.40 In addition, they felt that if the police were to be included as persons to whom disclosures could be made, "their duty in terms of procedure should be spelt out, possibly in a Code of Practice to accompany the amendments, which could also be brought to the attention of jurors (with similar standing to the existing PACE Codes)". Finally, they considered that "the question of admissibility of evidence as to jury impropriety after the trial, not relating to extraneous influences, should also be reconsidered".

3.41 The Council of Circuit Judges responded that they would not oppose such an amendment. They noted that they would oppose any widening of the group to whom disclosure could be made

We consider that there may be real dangers if it were to include a legal representative for either party as pressures could more readily be brought by those disgruntled by an adverse verdict. For similar reasons we would also include the media.

3.42 Professor Alisdair Gillespie was also supportive of the proposed defence. Prof Gillespie explained that

there is undoubtedly a lack of clarity in this area and I do not believe that leaving it to the common law is appropriate. Given the consequences of disclosure it would seem to me appropriate that a juror is aware of whom he can contact with concerns. I believe Fenwick and Phillipson are correct to state that articles 8 and 10 of the ECHR would mean that a defence will exist to certain bodies and providing clarity as to this would be useful. Amending the statute would also allow a signal to be sent about who should not be told about deliberations even if done for the correct reason (an issue that sometimes arises in "whistleblowing" situations).

3.43 Professor Gillespie then raised some salient points about the operation of such a defence in practice

In terms of who is appropriate quite clearly this would be the court, the police and the Criminal Cases Review Commission. Questions need to be asked about whether it would also be appropriate to tell a solicitor, including the defence solicitor. Currently (as I understand it) solicitors are under a professional duty to simply direct the juror to

⁴ [2004] UKHL 2.

contact the court direct (and, if it was a letter, they will forward it to the court themselves). It is probably correct that this procedure continues to be adopted so that there is not the appearance of the defence solicitor somehow canvassing deliberations or conducting an investigation themselves.

There may be some concern about whether the police would know what to do where there is a report made to them of irregularities. There should be no perception of conflict between the police's desire to see a suspect convicted and their general responsibility to the criminal justice process. The rules of disclosure probably no longer apply and therefore it may be appropriate to define (either in statute or through a relevant policy) what the police should do when they receive a report of an irregularity (eg do they refer it to the court, to the CCRC or conduct their own investigation?).

- 3.44 Mr Boura was another consultee supportive of the proposal, arguing that “there is an unwillingness by authorities to admit to mistakes so robust mechanisms for whistle-blowers are essential”. Likewise, Mr Tovey agreed the proposal arguing that any new defence should cover cases “where there is a problem with some part of the court, and thus a disclosure to the court (permitted under the current law) could be inadequate”.
- 3.45 A number of respondents did not unequivocally agree with the proposal but agreed in part or in principle. Anthony Arlidge QC stated that the proposal “might be necessary to reassure jurors”. Professor Eric Barendt agreed with the aim of the proposal but considered whether it should be more broadly drafted so as to allow a defence for disclosure “to anyone to whom it is revealed in the genuine belief”. He could not find reason for privileging disclosure to the police as compared to a defence solicitor.
- 3.46 The Bar Council disagreed that an amendment to section 8 should be introduced in terms of “a miscarriage of justice” as this concept is “far too vague and subjective”. It agreed that there may be “merit in such a defence where disclosure is necessary to uncover a ‘material irregularity’ relating to jury deliberations, such an irregularity to be assessed on an objective basis”.
- 3.47 The CPS considered it unlikely that contempt proceedings would be brought against a juror who acted in this way. It suggested that
- If there are real grounds to suppose that jurors are deterred from disclosure to prevent or uncover a miscarriage of justice then section 8 should be amended to allow a defence of “lawful authority”.
- 3.48 ACPO neither agreed nor disagreed, suggesting that the protocol being prepared by the President of the Queen’s Bench Division (referred to at para 4.65 of the consultation paper) regarding the procedure to be followed under these circumstances “would appear to be the best place for advice on this subject”.
- 3.49 Trinity Mirror Plc had no specific view on this question apart from commenting that current restrictions made it difficult to understand how the jury system works and whether it can work better.

- 3.50 At our symposium on contempt of court, HHJ Alistair McCreath, the Honorary Recorder of Westminster raised concerns that jurors would make unwarranted disclosures because they regretted decisions that had been made in the course of their jury service. On the other hand, some relaxation of section 8 would be desirable, but the body to whom the jurors' disclosure must be robust and alive to the issue of "jurors' remorse".
- 3.51 Four respondents disagreed with this proposal. The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat), the Chancery Bar Association and two other individuals.
- 3.52 The Senior Judiciary noted that "the scale of this problem in terms of jury observance is likely to be significantly less than that relating to the seeking of information". They commented that there may be some ambiguity about the prohibition in section 8(1) on disclosing matters "in the course of their deliberations in any legal proceedings" which is undesirable and called for consideration to be given to "prohibiting disclosure [etc] of particulars of the matters referred to at any point after the empanelment of the jury"

The purpose of the statute is to maintain the integrity and privacy of matters discussed by the jury during the course of the trial and not just as they consider their verdicts after summing up. An amendment of the statute would be consistent with the need for clarity in this area of the law.

- 3.53 They felt that an amendment creating a weakening of the prohibition on non-disclosure by a juror is highly undesirable, arguing

As research shows, jurors appear to support the present prohibition and understand it. They undoubtedly derive confidence in the tasks they are called upon to perform from the fact that what they say in the jury room is to be treated as totally confidential.

- 3.54 They referred to the phenomenon of "juror's remorse" and argued that

an amendment to provide a specific defence which allows for the juror's subjective belief that such disclosure was necessary would be highly undesirable as it would loosen the present constraints and permit this to occur where there was no reasonable ground for doing so.

- 3.55 They noted that under the current law a disclosure by a juror to the court would not amount to a contempt of court and argued that provided jurors are clearly informed of their right to communicate with the court they see no reason for any statutory amendment. In addition, they do not foresee any difficulty

If the court has sanctioned disclosure in an individual case to some other body making enquiry on its behalf, for example the Criminal Cases Review Commission. Such other person or body would for these purposes be acting as the agent of the court. This is not an area of the law which is causing significant problems in the way that jurors seeking information is. We consider that the common law should be left to develop.

- 3.56 Ursula Riniker disagreed that section 8 should be amended to create a specific defence, stating

The court must ensure by a clear direction to the jury that there cannot be such a “genuine belief” because any such disclosure must be made to the judge before the conclusion of the trial, although making it after the trial would not be contempt.

- 3.57 The Chancery Bar Association also disagreed with this proposal noting that “there is no offence in reporting such matters to the Court itself in such circumstances and therefore no need for a specific defence.” In addition they commented that

Jurors are encouraged (and are directed by the Judge) to report all such matters to the court immediately, without delay, so that any impropriety can be put right, where possible, and the trial continue. Sending a message that it is appropriate to disclose such matters at a later date to the police or the CCRC runs contrary to this principle. The CCRC and Police already have appropriate powers to investigate to the extent necessary to investigate the commission of substantive criminal offences and miscarriages of justice.

- 3.58 Mr Lewis proposed an alternative reform, arguing

Section 8 should be amended such that any Juror who feels s/he has any information relevant to the case or to a possible miscarriage of justice or any other matter they deem to be important should be directed to a suitable official acting on behalf of the judge for advice and guidance. Contacting or attempting to contact any other member of the court, the police or any member of the public for discussion, advice or to impart information should be an offence.

Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research? [paragraphs 4.62 and 6.36]

- 3.59 Whilst the majority of respondents to this question agreed that section 8 inhibits research and should be amended, a number of respondents disagreed that such amendments were necessary.
- 3.60 Anthony Arlidge QC, Professor Eric Barendt, Inspector Sumner, Dr Findlay Stark, the Bar Council, London Criminal Courts Solicitors’ Association, National Union of Journalists, Newspaper Society, Press Association, Professors Fenwick and Phillipson, Professors Ellison and Munro, Trinity Mirror Plc, the Law Society of England and Wales, Chancery Bar Association, Wiggin LLP, Independent Print Limited, Media Lawyer’s Association and five other individuals agreed that section 8 unnecessarily inhibits research and should be amended.
- 3.61 Anthony Arlidge QC agreed that research should be allowed “but only where the case is concluded, the interviewee consents [and] the results are used statistically without identifying the case”.

- 3.62 Professor Eric Barendt suggested that section 8 is clearly and wrongly inhibits research, although it does not wholly preclude it (referring to Professor Thomas' research). He argued that section 8 should be amended to allow for research, subject to the consent of the Lord Chief Justice and also that anonymity should be granted to participating jurors. In addition Professor Barendt stated that he would not rule out access to the jury room "as only with such access could comprehensive research be done".
- 3.63 Inspector Sumner agreed that section 8 should be amended and suggested regulatory measures such as a regulatory body for purpose and aim, a code of conduct and anonymity of juror. Dr Findlay Stark also agreed section 8 should be amended and suggested that the "normal ethical/supervisory constraints placed on empirical research of the criminal justice system would apply".
- 3.64 The Bar Council agreed that amendment is necessary and should encompass, for example:
- acceptable purpose/s of such (legal) research;
 - the bodies authorized to conduct it, or the manner of seeking authorization to conduct research;
 - anonymity of jurors preserved;
 - authority to be obtained from a relevant body (Ministry of Justice/Attorney General) prior to research being conducted;
 - research to be defined clearly, with a specific purpose and based upon identified cases (rather than any type of roving remit)
- 3.65 The London Criminal Courts Solicitors' Association agreed with the proposal and the regulatory measures put forward in the consultation paper such as the consent of the jurors and anonymity for jurors when research is written up. They considered that "researchers who have been properly vetted and are heavily regulated should be allowed into jury deliberations in an observation role only".
- 3.66 National Union of Journalists ("NUJ"), Newspaper Society, Press Association, Independent Print Limited and Media Lawyers Association all agreed that research should be allowed. The NUJ suggested that such research should be regulated and prior permission be obtained from an appropriate body. The Press Association suggested that individual jurors and the views they express during deliberations are not identified. Independent Print Limited pointed to the first trial of *Pryce* to underline the need for research in this area.
- 3.67 Professors Fenwick and Phillipson supported the amendment to section 8 to allow for more research and referred to the clause originally proposed in the Contempt of Court Bill. They argued that
- Section 8 goes further than is necessary to serve that need in terms of proportionality; that could be addressed by amendment so long as it included certain safeguards

It is suggested that a return to the clause originally put forward in the Contempt Bill would come nearer to meeting article 10 requirements than the current position. That clause would have prevented inter alia the disclosure or publication of details of a jury's deliberations. It would thus have protected the confidentiality of jury deliberations without preventing legitimate research. It might have allowed for some anonymised reporting of jury deliberations. It could include, as under the clause as originally drafted, an exception which would allow approaches to jurors as part of academic research so long as the proceedings and jurors were not identified or in danger of being identifiable. We would support the idea of a code of conduct for jury research. It is also suggested that the models used in New Zealand and in New South Wales should be considered.

- 3.68 Professors Ellison and Munro also argued that section 8 unnecessarily inhibits research. They explained, in response to suggestions that section 8 does not inhibit most jury research, that they disagreed with that viewpoint

It is true that a measure of creativity and care in one's research design can open up avenues of enquiry that may, at first sight, have appeared blocked by the legislation. But there are a range of crucial research questions that cannot be addressed in a satisfactory and thorough manner under the current regime. It is true, for example, that section 8 does not preclude various forms of research involving actual jurors – perhaps most clearly demonstrated by the Crown Court study conducted by Zander and Henderson in the early 1990s ...^[5] which involved a 14 page questionnaire, completed by the jurors at the end of the case on which they had deliberated, asking for views on, amongst other things, jurors' confidence in their understanding and recollection of the evidence presented and/or the judicial direction, their perceptions of the performance of judge and barristers during the trial, their feelings about jury service and its impact on their working or private lives during the trial, and the perceived impact, if any, of repeat jury duty. But section 8 *does* prevent the conduct of research that examines the substantive content of jury deliberations – including the evidential factors, credibility assessments and factual assumptions that influence their outcomes. It also prevents important research into the broader discursive dynamics of the deliberations as they unfold, unmediated by participants' retrospective recollection.

Amongst other things, then, section 8 prevents research that seeks to observe, analyse and ultimately improve, the ways in which jurors discuss the evidence/'facts' of a given case, the group dynamics that structure (and potentially inhibit) that discussion, and the process of verdict construction – both individual and collective – as it plays out in the jury room. Researchers are also unable to explore jurors' responses to particular types of evidence, the ways in which their prior beliefs/attitudes impact on decision-making, the ways in which their (mis)understandings of the law impact on decision-making, the

⁵ M Zander and P Henderson, *Crown Court Study* (1993, London: HMSO).

influence of information extraneous to the trial, juror compliance with various judicial directions/warnings in the course of deliberations, and their interpretation and application of the burden/standard of proof. There is, as a result, a great deal that we do not, and currently cannot, know about the workings of the jury system. We cannot, for example, rule out the possibility that jurors struggle to understand certain types of evidence, attach too much probative value to potentially unreliable evidence, misunderstand/misapply the law, are influenced by prejudicial/inaccurate beliefs/bias/irrelevant information, or fail to understand/adhere to key judicial directions/caution warnings. Equally, in turn, we cannot exclude the possibility that some verdicts are based on a flawed understanding of the law, prejudice, misconception, a reliance on irrelevant information or an improper consideration of evidence contrary to an express judicial instruction.

Research of a sort currently prohibited by the Contempt of Court Act 1981 can assist researchers in exploring these concerns further, and can ensure that – where concerns are merited – researchers are in a better position to develop and test possible remedies that would promote more accurate, fairer and better informed juror decision-making. It is, of course, possible that some of these concerns are overstated and/or misplaced, in which case carefully conducted research could equally provide some reassurances and allay certain fears about the operation of the jury system in England and Wales.

- 3.69 Professors Ellison and Munro also examined existing methods of jury research that are permitted by section 8 and which allows “partial glimpses” into the jury system. However, they explain, to look at studies which have used these methods

and the insights they have secured ... as eliminating the need for research into the substantive content of ‘real’ deliberations would be inappropriate, since they do not and cannot provide a fully adequate substitution.

- 3.70 For example, whilst post-deliberation questionnaires can be a “valuable” method of study, questions and responses are necessarily limited by section 8 and therefore tends to focus

primarily instead on jurors’ perceptions of their own and others’ understanding of the evidence and the legal tests, etc. This entails, however, that responses are mediated through the jurors’ own interpretation, and potentially based on a recollection of discussions that took place at an early stage in the deliberation process. As a result, this may generate misleading results and be less reliable than conclusions drawn from real-time analysis of deliberations as they unfold. For example, whilst jurors may think that they, and/or their peers, understood the judicial direction correctly or accurately recalled the evidence presented, a real-time observation of the deliberations may in fact yield a very different result (as intimated in mock studies that have explored this disjunction). Moreover, the

questionnaire method *per se* has recognised limitations in terms of presentational bias where respondents will provide answers that they consider to be the most socially acceptable or most likely to be desired by the researcher, which may again inflate the positivity with which jurors' levels of understanding and engagement in the process of deliberation are reported.

- 3.71 An alternative option would be to undertake research using mock jury simulations, and this has often been done in the UK and abroad. Some of these have involved

mini-trials have been scripted in consultation with criminal justice experts, re-enacted in real time by actors and barristers in front of volunteer members of the public, and data has been collected primarily through audio and video recordings of collective jury deliberations⁶.

- 3.72 However, again whilst such studies can produce helpful results,

they are inevitably restricted by a lack of verisimilitude, as a result primarily of the restrictions imposed on the duration of deliberations, the streamlining and simplification of the trial reconstruction, and participants' awareness that, ultimately, no-one's fate hangs in the balance as a result of their verdict. In real trials, jurors get to know one another, they have to absorb a substantial amount of evidence, they may experience periods of delay and boredom between proceedings, they observe not only the complainant and defendant, but also their family and supporters in the courtroom, they experience the added anxiety of potentially sending someone to prison, etc. As useful as mock jury simulations can be, when carefully conducted, in highlighting themes or trends that may be replicated in the real jury room, the confidence with which these findings can be transferred to that 'real world' is inevitably limited; and the only way to overcome this would be with triangulation through research of a sort currently prohibited by the Contempt of Court Act 1981.

- 3.73 Professors Ellison and Munro also consider research involving shadow juries where "research participants observe the proceedings of a "real" trial alongside the "real" jury, after which they retire to deliberate towards their own verdict." Although this approach might address some of the pitfalls affecting research using mock juries, there are still difficulties which they point out.

For one thing, it is an extremely costly research method that requires a level of time-commitment from participants that may be difficult to secure, or at least to secure from a suitably representative cross-

⁶ L Ellison and V Munro, "Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial" (2010) 30 (1) *Legal Studies* 74; L Ellison and V Munro, "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 (3) *British Journal of Criminology* 363; E Finch and V Munro, "Breaking Boundaries? Sexual Consent in the Jury Room" (2006) 26 (3) *Legal Studies* 303; and E Finch and V Munro, "Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research" (2008) 35 *Journal of Law & Society* 30.

section of the population. Moreover, akin to mock simulations, shadow jurors will know that nobody's fate hangs in the balance as a consequence of their verdict, potentially mitigating the stress that may accompany 'real' deliberations, with its attendant consequences in terms of deliberation dynamics and content.

- 3.74 Finally, statistical analysis of verdicts can also be used to help researchers and the public at large better understand the criminal justice system. However, Professors Ellison and Munro argue that this method "is also the one that requires most caution". This is because,

a large number of factors can be at play in generating a verdict in any given case and without access to the substantive content of the deliberations themselves, it is impossible to reliably identify the driving rationale behind it. Reliance solely on verdicts may obscure a range of other factors and influences, generating misleading conclusions that would be immediately challenged by listening to the reasons provided by jurors in the course of the deliberations. Moreover, given the myriad contextual factors that will differ between any two ostensibly similar cases, a focus solely on verdicts gives little assistance in identifying the kind of shared themes or concerns that transcend such contextual variations.

- 3.75 Professors Ellison and Munro conclude in relation to existing permitted methods of research involving juries that,

although research to date has provided us with some intriguing hypotheses or some partial glimpses, the range of alternative methods for conducting jury research whilst complying with the provisions of the Contempt of Court Act 1981 suffer from shortcomings that ensure they will never be able to provide a complete picture. Of course, the decision to loosen section 8 restrictions would not render these forms of alternative research method obsolete. ... However, research using these [existing] methods could be triangulated in crucial ways with the lessons learned from 'real' jury deliberations both in order to improve the transferability of their own findings and to enable such research to be more appropriately targeted towards what appear to be the key areas of concern in jury decision-making. As such, a loosening of section 8 restrictions ensures a crucial source of insight that will allow researchers to assess, understand and improve the jury system.

- 3.76 They explain that

while there are undoubtedly safeguards that need to be put in place to ensure that the research in question is appropriately restricted in its focus and conducted according to all pertinent standards of ethical research, the time is now well-overdue for a change to the Contempt of Court Act 1981 to open up the jury, a symbolically and practically vital component of the justice system, to measured scrutiny, designed to ensure, through evidence-based initiatives, its improved fairness and efficiency.

3.77 Such research has already been undertaken in jurisdictions overseas “without any apparent ill effect” but the findings of such research to the English and Welsh legal system “are inevitably limited in important ways by doctrinal distinctions in the applicable rules and procedures, as well as by the unique socio-cultural dynamics that inform and frame juror interaction.”

3.78 Safeguards suggested by Professors Ellison and Munro include

the involvement of an Advisory Group comprised of members of the judiciary and legal profession, a commitment on the part of all researchers to adhere to ethical protocols regarding the gathering, holding and analysis of data, and ensuring that any identifying information regarding individual jurors or the cases upon which they served was removed through the use of appropriate coding and redaction. But such protocols are by no means unachievable, and England and Wales has the benefit of models developed in other jurisdictions to assist in their framing and application.

3.79 The Law Society of England and Wales supported amendment of the Contempt of Court Act 1981 to allow for limited research. They referred to their response to the Department of Constitutional Affairs consultation in 2005 where they supported

amendment of the 1981 Act to allow for limited post-verdict research into the juror's experience as a member of the jury, and we agreed that any research must respect the principle of confidentiality of the jury process. For that reason we did not favour researchers being permitted to access the retiring room. We agreed that only research permitted by the Secretary of State, in consultation with the Chief Justice, should be allowed. We remain of that view.

In addition they noted that preserving the confidentiality of jury deliberations and juror identity is essential and any research would need to be very closely supervised.

3.80 The Chancery Bar Association agreed that there should be some academic research into the behaviour of jurors but noted that it would have to be carefully controlled to respect the important principle that jury deliberations are confidential. They referred to Professor Thomas' research which has been carried out under the current law. They commented

The possibility of journalists being able to investigate what happened in jury rooms in particular trials is anathema to the way that jury trials are conducted in this country, and if there is to be any wider qualification to section 8 it should be limited to academic research by bona fide academics in academic posts (not self-employed soi disant academics) and the project and its extent and limitations should be required to have the approval of the Lord Chief Justice in advance.

3.81 Wiggin LLP agreed that section 8 unnecessarily inhibits research “which could assist in understanding the real impact (if any) of publications at different stages of proceedings (or even prior to proceedings) on juries” and should be amended

to permit confidential research with appropriate safeguards to ensure that the role of juries and jury deliberations in individual cases is not compromised.

3.82 The Press Association also thought that

the current law places too absolute a ban on any reporting of criminal proceedings, meaning that many issues of serious public concern consistently go unreported and unexplained. The PA concurs with the views expressed in paragraph 4.53 of the Consultation Paper that there is an important public interest in subjecting the jury system to scrutiny by the media, that, in some circumstances there may be a public interest justification in allowing jurors to disclose details of deliberations, for example, if a defendant were acquitted of rape because of jurors' sexist attitudes, and that that section 8 is designed to prevent "informed criticism of the jury system, which is precisely why" it offends article 10 of the European Convention.

3.83 An anonymous respondent argued that it is important that scientists are permitted to study the methods by which juries decide cases because this would

Allow future legislation and court decisions on evidence to be based on scientifically reliable studies rather than unfounded opinions that are often scientifically incorrect.

Put the UK on a level playing field with America and other leading scientific countries for research into behaviour.

Allow advocates to present their cases better to juries.

3.84 Professor Gillespie was cautiously supportive of the proposal. Professor Gillespie explained that, in his view,

there is doubt as to whether s8 prohibits jury research and there is some logic in allowing it to be relaxed under certain circumstances. However it would be important that there is not continual jury research or that it becomes routine. The importance of the jury system to the English criminal justice system is such that there would be great interest in jury research but it is less clear that it will always progress our understanding.

3.85 He suggested that there would need to be appropriate safeguards in place if such research were to be undertaken

If section 8 is to be amended then there must be a high threshold for allowing jury research. I note that the Law Reform Commission of Canada proposed the Lord Chief Justice could authorise research. Whilst I believe the Lord Chief Justice perhaps has better things to do with his time, I do believe that it should be a senior judicial decision. One possibility would be to empower the Senior Presiding Judge to make the decision. The Senior Presiding Judge has an overview of the work of all the circuits and may be in a position to know how much impact the work would have. Another alternative would be to create a sub-committee (possibly an ad hoc one) of either the Judicial

Executive Board or the Judges' Council who could consider applications. An advantage of this approach is that they could seek to appoint an academic to the committee who could advise them on the benefits of the research and also any constraints that should be imposed.

If research is to be permitted then a code of practice should be drawn up to ensure there is clarity as to what can, and cannot, be asked/observed. It is likely that the academe could assist the judiciary in establishing this code. If my recommendation for a sub-panel (ad hoc or standing) were to be adopted then it could also act like an ethics-committee found in universities, ie scrutinising the methodologies, how the data will be protected, what issues have been considered etc.

3.86 Although not directly opposed to the proposal for amendment, the CCRC commented that its own experience of jury investigations together with Professor Thomas' research "suggests that it is possible to obtain useful information without amendment".

3.87 The Criminal Bar Association noted that opinion is divided on the matter of whether section 8 unnecessarily restricts research and that this confusion is of concern. Notwithstanding its concern, the Criminal Bar Association responded that they "do not consider that there is sufficient concern for there to be an amendment to section 8".

3.88 They explained that, if such an amendment were made, they "agree that it should be highly regulated and restricted"

We see benefit of research only being undertaken with the consent of the Lord Chief Justice, the jurors remaining anonymous and there being a strict code of conduct. Further, we see no reason why anyone undertaking such research would need to enter the jury deliberating room and this should remain prohibited.

3.89 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat), Doughty Street Chambers (Crime Team), the CPS, the Council of Circuit Judges and three individuals did not support this proposal.

3.90 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) drew attention to Professor Cheryl Thomas' research into juries and her 2010 paper "Are Juries Fair" which stated that "section 8 ... does not prevent comprehensive research about how juries reach their verdicts". They commented that this "is a very far reaching proposal with considerable implications and dangers". As such, it is a matter that "needs to be considered with great care and in considerable detail, beyond this consultation. The judiciary would wish to be involved in any such discussion".

3.91 The CPS also referred to Professor Thomas' research

We note that the Department of Constitutional Affairs response to their Consultation into Jury Research and Impropriety 04/05 supported further research into juries, but that section 8 should not be

amended to allow research unless it was clear that there are research questions which cannot be answered without legislation amendment. We understand that Dr. Cheryl Thomas has conducted research into juries and that when her research is published, this issue can be revisited and further research questions identified.

- 3.92 Doughty Street Chambers (Crime Team) acknowledged that academic opinion remains divided about the extent to which section 8 inhibits research but do “not think there is a compelling case for changing the law”.

- 3.93 The Council of Circuit Judges felt that

it would be interesting to know how a jury approaches its consideration of a case, whether it understands and follows the legal directions and to what extent, if at all, it may become side tracked, or lost in the mass of detailed evidence etc. However, we do not support permitting research into the deliberations of the jury.

- 3.94 The Council was concerned that research would be restricted by resources to a small number of cases and “from those results, there would be attempts to identify general approaches upon which comments would be based. This may not in fact reflect the true position in the vast number of cases”.

To the extent that there was found to be a basis of criticism of the jury system, such comments would be seized upon as being indicative that the system is unsuitable as a whole. In fact if carried out on a wider basis the contrary may be established. Until such time as such research could be used to evaluate between the jury system and another system which is actually proposed, we consider that research is not unnecessarily inhibited.

- 3.95 Ursula Riniker did not agree that section 8 should be amended for two reasons:

(a) such research is of limited value due to the uncertainty of whether the information obtained from jurors is indeed accurate; and

(b) where a miscarriage of justice has taken place, there are likely to be other grounds of appeal which need not rely on jury deliberations.

Juries are far from perfect, but there is no better alternative. The best way of improving a jury’s compliance with their duties is to make it absolutely clear to them what constitutes contempt/a criminal offence, and precisely what the punishment will be.

EVIDENCE AND PROCEDURE

Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury? [paragraphs 4.69 and 6.37]

- 3.96 Ursula Riniker, Anthony Arlidge QC, the Law Society,⁷ the National Union of Journalists and Professors Fenwick and Phillipson and two other individuals were in favour of trying both section 8 and any new offence of research undertaken by a juror on indictment.

- 3.97 The CCRC was also supportive of the proposal on both counts, explaining that

It underpins the seriousness of the conduct to make it a serious crime like others and it is anomalous to afford jurors who engage in this conduct less protection and/or fewer rights than the defendants whom they try. Jury trial underpins that this is a crime against society, democracy and justice, and serves to convey a clear message of its seriousness.

- 3.98 The Criminal Bar Association responded that there is “no compelling reason for treating it [a new statutory offence of juror research] differently from other offences, so that usual safeguards and procedures are applied.” The Association did not comment on the trial of section 8 contempts.

- 3.99 The Bar Council was in favour of trying section 8 contempts on indictment, provided the court was not precluded from acting on its own motion. The Council explained that

it is appropriate that a court is able to deal with contempt of its own motion in certain circumstances. However, there needs to be greater guidance and clarity on when a court should or should not deal with a contempt arising in the course of its own proceedings. Where a Crown Court does not deal with contempt in this way, a breach of section 8 should be triable only on indictment.

- 3.100 The Council disagreed with the proposal for a new statutory offence of juror research and so did not address mode of trial for this conduct.

- 3.101 The London Criminal Courts Solicitors’ Association, Godwin Busuttil and one other individual were against the proposal for both contempts, as was Professor Eric Barendt. Professor Barendt explained that

I would prefer the section 8 offence and the new offence of seeking information to be tried by the Divisional Court as now. I do understand the arguments of principle for a change to trial by indictment, but if that change were made, it should not involve a jury trial, where jurors decide the fate of other jurors. His Honour Judge McCreath made strong arguments against this during the UCL symposium.

⁷ The Law Society merely responded “yes”, which we took to apply to both questions.

3.102 Likewise, the Chancery Bar Association responded that

There are real and obvious problems in having alleged juror contempt tried by jurors. It should be dealt with by the trial judge where appropriate or by the Divisional Court, under the existing procedure (amended if necessary), in accordance with the guidance now issued by the President of the QBD. Alternatively, a new statutory provision may allow the contempt to be dealt with by another judge, sitting alone.

3.103 Independent Print Limited was also not in favour of trial on indictment with a jury, for reasons of

consistency with 6.13 and 6.14 above [trial of section 2(2) and intentional contempt]. In addition to that, it might well be problematical to expect jurors to pronounce on matters so close to their own current circumstances (sitting as jurors). A compromise might well be to adopt a trial process incorporating the protections inherent to trial on indictment, but presided over by a judge alone (as suggested at paragraph 4.70 of the consultation paper).

3.104 Trinity Mirror Plc responded “there is no need for jury trial for this offence”.

3.105 Professor Alisdair Gillespie responded that whilst the trial of section 8 using the normal criminal process was

attractive in theory it becomes difficult to implement in practice. I do not believe that it can be appropriate to “cherry-pick” elements of the criminal law and procedure. If breach is to be an ordinary criminal offence then it should be tried as an ordinary offence, ie judge and jury. If there is concern that a jury would not properly convict under such circumstances then I do not believe the answer is to introduce judge-only trials (for the reasons set out before) but to continue to deal with the matter by way of contempt.

In a previous section of this response I have suggested that clarity could be brought by turning the judicial directions into an order of the court. In para 4.80 it is suggested that juries could be issued with a written “conduct card” and there is no reason why this cannot be in the form of an order. I believe that this will address some of the procedural issues in terms of clarity and certainty. There are concerns about the extent to which contempt is dealt with quickly (and thus not allowing for suitable legal advice to be sought) but this is something that could be changed by amending the Criminal Procedure Rules to allow, inter alia, for the adjournment of consideration of contempt (with or without bail although I believe the issue of bail would require statutory changes). Legislative changes should also ensure that a person who is accused of contempt is provided with legal advice and the right to representation.

3.106 The Council of Circuit Judges considered that a statutory offence of intentionally seeking information related to the case that a juror was trying should be tried by a

judge alone as if on indictment. They did not explicitly provide a view on the mode of trial of section 8.

- 3.107 Nick Taylor's views were split – he was in favour of trial on indictment for a breach of section 8, but not for any new statutory offence of juror research.

- 3.108 The CPS favoured trial on indictment for contempt by publication. In respect of jurors, they explained

In our view, the safeguards described in paragraphs 4.69 (and in our response to para 6.13 above), particularly the availability of legal aid would benefit jurors accused of contempt. We are not convinced that contempt by breach of section 8 should be tried in a different way to other contempts.

- 3.109 The Media Lawyers Association on the other hand was against trial on indictment for contempt by publication. However, they explained in response to the question about trial of juror contempts that “procedural safeguards of jury trial on indictment [were] needed for that offence” and referred us back to their earlier response.

- 3.110 The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) thought that, if a new statutory offence of juror research were to be tried on indictment,

it is hard to see how a different conclusion would arise in relation to the section 8 offence of disclosing information. On the other hand no evidence is presented that the present procedures under section 8 do not work satisfactorily.

- 3.111 In addition, at our symposium on contempt of court, HHJ Alistair McCreath agreed that the current procedure for dealing with jurors in contempt is flawed, but was concerned about whether trial on indictment would require all the jurors from the first trial to be called as witnesses. There would be a need to establish the limits of permissible questioning of these jurors given the risk of unearthing matters related to the defendant in the first trial (on which the juror currently on trial was sitting).

Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis? [paragraphs 4.72 and 6.38]

- 3.112 Views about the merits of trial “as if on indictment” with judge alone were fairly evenly split.

- 3.113 Inspector Sumner, Dr Findlay Stark and the London Criminal Courts Solicitors' Association were in favour of the trial on indictment by judge alone. Inspector Sumner also thought that cases should be allocated by the presiding judge, case-by-case. One anonymous respondent was also in favour, explaining that the judge should be “any judge who is permitted to sit as a Crown Court judge, other than the judge of the underlying trial”.

- 3.114 The CPS also agreed that breach of section 8 should be “tried by judge alone and any trial judge should be allocated by the presiding judge on a case by case basis”. The Council of Circuit Judges took the same view about trial by judge alone but responded that such cases “should be triable by either a High Court or Circuit Judge and allocated by the appropriate Presiding Judge”.
- 3.115 The Media Lawyers Association and Independent Print Limited argued that “for consistency ... it would be best to specify the minimum level of judge in all cases”.
- 3.116 The Chancery Bar Association disagreed with the proposal to try section 8 on indictment. However, if such course were followed, they favoured trial by judge sitting alone, explaining that
- There is no reason why such cases should not be tried by Circuit Judges, though the presiding judge should have the discretion to allocate the case to a more senior judge where appropriate.
- 3.117 Those against trial by judge alone (and no jury) included the National Union of Journalists, Godwin Busutill, Nick Taylor and two other individuals.
- 3.118 In addition, Ursula Riniker thought that the advantage to jury trial would be that “juries (and therefore the public generally) would become more aware of the seriousness of interfering with the fairness of a criminal trial”.
- 3.119 The Bar Council was also against the proposal, explaining that
- in any jury trial, the defendant may or may not have features in common with members of the jury. This is no bar to trial by jury – indeed, insofar as jury trial constitutes trial by peers, it is properly consistent with it. The real issue is not the participation of a jury, but identifying those cases that require trial on indictment.
- 3.120 The CCRC also disagreed with the proposal, although they commented that “if it were to be tried by a judge only, a specific level of judge should try it (to underpin the gravity of the allegation and ensure consistency and proportionality)”.
- 3.121 Criminal Bar Association was strongly against the idea of trial by judge alone. The Association argued that
- It is a matter that the jury can properly decide and it is sufficiently serious to merit trial by judge and jury. We do not share the concerns that the jury would be unwilling to convict other jurors of such offences as they would be given judicial direction as in any other trial and the trial subject matter may only enhance the importance of adhering to such directions. It is important that in safeguarding the trial process we do not undermine or dilute the jury system. Juries are trusted to deal with the most difficult and sensitive cases and can be trusted with dealing with a citizen who, sitting as a juror, is alleged to have committed a criminal offence.
- 3.122 In a similar vein, the Law Society responded that they “are not in favour of trial by judges sitting alone solely on the basis of the nature of the offence”.

Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis? [paragraphs 4.73 and 6.39]

- 3.123 Again, views were split on the answer to the question of trial on indictment by judge alone.
- 3.124 Those against included Ursula Riniker and the National Union of Journalists. Trinity Mirror, the Criminal Bar Association, the Law Society and three other individuals disagreed with the proposal for the same reasons that they had given in relation to section 8 (see above). The CCRC was also against the proposal (for the same reasons) but explained that if it were tried in this way “there should be a specific level of judge” allocated to try it, as with section 8.
- 3.125 The CPS was also against trial by judge alone, responding that “any new statutory offence should be tried either summarily by magistrates or on indictment by judge and jury depending on the classification of the offence.” The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) also thought that a new statutory offence
- would be appropriately triable only on indictment. We see no reason to breach the general principle of trial by jury in this instance. The trial process itself should acquaint jurors with the extent of the prohibited conduct and the rationale for it and they should be trusted to try the matter just as they would any other serious case. We do not consider that there is any warrant for trial by judge sitting alone.
- 3.126 Doughty Street Chambers (Crime Team) explained that, if such an offence were introduced, they could “see no compelling reason for treating it differently from other offences, so that usual procedures are applied. We would not support a procedure for judge-only trials.”
- 3.127 One anonymous consultee explained that they were against trial by judge alone because, “this offence would be very fact-sensitive and potentially unjustly applied in a number of cases. The freedom of a jury to acquit if it considers it just to do so is essential in this type of case.”
- 3.128 The Council of Circuit Judges was in favour of the proposal. The Council explained that a new offence of juror research should be tried “as if on indictment” by judge alone as

The present arrangement involves the issue being determined by a judge and we consider that it is inappropriate for there to be trial by judge and jury. There is a considerable difference between a situation in which a person is tried for attempting to interfere with the administration of justice or witness intimidation which can be tried by a jury and requiring a jury to try someone who had been carrying out the same task as that with which they are charged.

- 3.129 London Criminal Courts Solicitors' Association and Inspector Sumner were in favour of trial without a jury, with the judge to be allocated by the presiding judge on case by case basis. Dr Findlay Stark, Professors Fenwick and Phillipson and Nick Taylor supported trial "as if on indictment".
- 3.130 Again, the Chancery Bar Association disagreed with the proposal to create a statutory offence but, if such course were followed, they favoured trial by judge sitting alone, explaining that

There is no reason why such cases should not be tried by Circuit Judges, though the presiding judge should have the discretion to allocate the case to a more senior judge where appropriate.

- 3.131 Again, the Media Lawyers Association and Independent Print Limited argued that "for consistency ... it would be best to specify the minimum level of judge in all cases".

If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in Dallas be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected? [paragraphs 4.74 and 6.40]

- 3.132 Three consultees favoured trial by judge alone. The Chancery Bar Association responded as follows

Yes, if the question raised is whether or not the offence should be tried by judge alone or judge and jury. The offence is sufficiently defined as a contempt by virtue of the orders made by the judge at the start of the trial not to conduct research and that disobedience to such a direction is a contempt of court. The court hearing the contempt application has sufficient powers to enable disputed questions of fact to be investigated, by hearing oral evidence where necessary.

- 3.133 The Council of Circuit Judges also favoured this procedure, explaining that such cases

should be tried by a High Court or Circuit Judge allocated by a Presiding Judge. We would expect that it should be defined to expressly prohibit deliberately obtaining or seeking to obtain information in connection with the trial or any witness or alleged victim or the defendant. A contemnor's rights could be better protected by ensuring the precision of the charge, and the grant of free legal representation.

- 3.134 The Media Lawyers Association also thought that trial by judge alone would be preferable.

- 3.135 The Law Society and two other individuals were against trial by judge alone.

- 3.136 Some consultees did not specify whether trial by judge alone (as opposed to a two-judge Divisional Court) should be used. The Bar Council explained their views as follows

The requirement is for a means of identifying those cases in which a contempt is dealt with by the court in which it arises, if this is possible and appropriate, and those in which it should proceed on indictment. Inevitably, it will be dealt with by a judge alone when the court deals with a contempt during or immediately after proceedings. Defining the contempt with precision is possible by identifying what jurors are not to do, explaining why they are not to do it, and the potential consequences if they ignore these directions [see consultation paper paras 4.5 to 4.14]. The likely consequences of the contempt, particularly as to the nature of the penalty, would be one guide as to the manner of trial. However, article 6 requirements must be satisfied whatever the nature of the alleged contempt and the extent to which this is possible in any given case may be material in identifying whether it is suitable for trial on indictment, rather than by the court in which, or in connection with which, the contempt arises.

- 3.137 The CPS took “the view that however the contempt is tried, the alleged contemnor has the protection of article 6 ECHR, and this is sufficient to safeguard their rights”.

- 3.138 The Criminal Bar Association favoured trial by jury for both types of contempt. However, they explained in response to this question that

We do not consider that there are any grounds to distinguish between the way section 8 contempt proceedings are tried and common law contempt proceedings are tried. The same level of protection should be afforded to the alleged contemnor in each case.

The case of *Dallas* goes some way towards providing clarification as to the law. It may assist if the judicial direction to be given by Crown Court judges to the jury not to undertake their own research is regularly reviewed by the Judicial Studies Board (now the Judicial College) to ensure that there is conformity as to the content of the direction.

Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8? [paragraphs 4.75 and 6.41]

- 3.139 The general view of consultees was that the current maximum sentence under section 14 of the 1981 Act (an unlimited fine and/or 2 years’ imprisonment) was appropriate. Those who held this opinion included the Bar Council, Trinity Mirror Plc, the CPS, the Law Society, the Chancery Bar Association, Wiggin LLP, the Council of Circuit Judges and six other individuals.
- 3.140 The CCRC also agreed that the current maximum sentence is appropriate, explaining

Given the onerous nature of jury duties, and the fact that jurors are drawn from ordinary citizens who have little/no choice but to serve, a sentence of imprisonment is in itself very harsh punishment, without increasing the current maximum. More serious conduct, especially in collusion with defendants or their associates, could be reflected by prosecution for conspiracy to pervert the course of justice, etc.

- 3.141 The Criminal Bar Association was also content to leave the maximum at two years' imprisonment but "doubted if it would be appropriate to pass a prison sentence for the offence unless there were wholly exceptional circumstances."
- 3.142 The London Criminal Courts Solicitors' Association agreed with the current maximum "provided that there is a defence for jurors who disclose details of deliberations to an appropriate person and with good intentions". In a similar vein, Professors Fenwick and Phillipson thought the current maximum appropriate "since the likelihood that the offence is incompatible with article 10 ECHR would be increased if the sentence was raised. If suitable defences were introduced, however, that argument would have less force".
- 3.143 Dr Findlay Stark thought that "the threat of imprisonment is useful" but had no view on the appropriate maximum term.
- 3.144 By contrast, the National Union of Journalists and Professor Eric Barendt responded that the current maximum sentence disproportionate. Professor Barendt argued that the maximum should be reduced to 1 year.
- 3.145 There was significant support for the introduction of community penalties. Those in favour included the Criminal Bar Association, the Bar Council, the London Criminal Courts Solicitors' Association, the Chancery Bar Association, Independent Print Limited, the Media Lawyers Association, the CPS and eight other individuals.
- 3.146 The CCRC was also supportive of community penalties in this context
- There is a huge breadth of misconduct in this type of offence, and the intention with which it is committed (eg an intention to be a "better" juror) and consequences (eg no actual damage to trial/outcome), plus the attitude of the offender (revealing the offence, early plea, obvious remorse) - is wide. However, the current alternative to imprisonment, a fine, does not reflect the chief characteristic of the offence, which is against the integrity of the criminal justice system; a community penalty might better serve to underpin this.
- 3.147 The Council of Circuit Judges favoured the addition of community penalties arguing that
- the court should be able to impose a requirement for the contemnor to carry out unpaid work. It would be appropriate where the behaviour constituting the contempt led to a delay in the case or other loss of court time to reflect directly the interference with the administration of justice.

- 3.148 Professors Fenwick and Phillipson were in favour of the imposition of a community penalty “where in the particular circumstances, no adverse effect on the administration of justice in the circumstances was probable”.
- 3.149 ACPO thought that “sentencing needs to provide sufficient punitive and deterrent elements. There is no reason why community sentences could not meet these requirements”.
- 3.150 Only Wiggin LLP was against the introduction of community penalties for breach of section 8, “given that it would be an intentional contempt, and the current penalties reinforce to jurors the gravity of the offence”.

Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years’ imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)? [paragraphs 4.76 and 6.42]

- 3.151 There was general agreement that the current maximum sentence was acceptable if a new offence were introduced, and that community penalties should be available to the sentencing court.
- 3.152 Those in favour of the existing maximum under section 14 included the CCRC, the London Criminal Courts Solicitors’ Association, the Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat), the Criminal Bar Association, the Law Society, the Chancery Bar Association, the CPS, Wiggin LLP, the Council of Circuit Judges and eight other individuals.
- 3.153 Doughty Street Chambers (Crime Team) also thought that the maximum should remain at two years’ imprisonment, but doubted that “it would be appropriate to pass a prison sentence for the offence unless there were wholly exceptional circumstances”.
- 3.154 The National Union of Journalists, by contrast, viewed the current maximum sentence as “excessive”. One anonymous consultee preferred “a fine, community order or up to one years’ imprisonment”.
- 3.155 Again, there was also near unanimous support for the introduction of community penalties. Those agreeing with this proposal included the National Union of Journalists, ACPO, Doughty Street Chambers (Crime Team), Independent Print Limited, the Media Lawyers Association and seven other individuals.
- 3.156 The Council of Circuit Judges also favoured the addition of community penalties arguing that
- the court should be able to impose a requirement for the Contemnor to carry out unpaid work. It would be appropriate where the behaviour constituting the contempt led to a delay in the case or other loss of court time to reflect directly the interference with the administration of justice.
- 3.157 The London Criminal Courts Solicitors’ Association argued that

The full range of sentencing options must be available to deal with the wide spectrum of potential juror misconduct, from those whose curiosity gets the better of them and feel they must research the case in order to leave no stone unturned in reaching the correct verdict to those who deliberately seek out witnesses, defendants either on social networking sites (as in the *Fraill* case) or elsewhere.

- 3.158 Likewise, the Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) explained that

the option of a community penalty should be available, to reflect different levels of gravity in offending. Moreover, jury service is a service provided to the community by the members of the jury and some forms of community order may in an appropriate case be particularly apt in requiring service to the community as a penalty for such offending.

- 3.159 Again, Professors Fenwick and Phillipson agreed with the use of community penalties “where in the particular circumstances, no adverse effect on the administration of justice in the circumstances was probable.”

- 3.160 Only Wiggin LLP was against the proposal on the basis that the current “penalties under section 14 should be imposed to reinforce to jurors the gravity of the offence”.

PREVENTATIVE MEASURES

Education and pre-trial information

Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service? [paragraphs 4.78 and 6.43]

- 3.161 The vast majority of respondents were in favour of this proposal. Dr Findlay Stark, Professors Fenwick and Phillipson, Godwin Busuttil, Nick Taylor, the Bar Council, the Newspaper Society, the London Criminal Courts Solicitors’ Association, the National Union of Journalists, the Law Society, Independent Print Limited, the Media Lawyers Association and six other individuals supported the proposal.

- 3.162 The CCRC commented that

Teaching should encompass a better understanding of the criminal justice system, including the role and importance of jury service. The CCRC has sometimes encountered jurors who were at best ambivalent towards jury service, and at worst resented it. Not all jurors seem aware that jury service is an important public duty and in many senses, a privilege. However, without more, education is unlikely comprehensively to address the issues which are contemplated here.

- 3.163 The Criminal Bar Association was also in favour, explaining that

The benefit of greater education as to the role and importance of jury service would assist in instilling greater understanding of the role of the juror within the justice system and the importance of jury service to society. It is hoped that such understanding would result in increased compliance with judicial directions, and greater respect for the juror's role and the jury system as a whole.

3.164 Doughty Street Chambers (Crime Team) "strongly agreed" with the proposal, adding the suggestion that "the MOJ encourages journalists and media commentators to reach a better understanding of court processes by offering seminars or information packs".

3.165 The CPS explained that they

worked with the Ministry of Justice to produce an interactive website called "Your Justice Your World" to provide young people aged 7 to 16 with an understanding of criminal, civil, family and administrative law and court proceedings. The website was launched in July 2009 and was linked to the Citizenship and PSHE [Personal, Social and Health Education] modules for GCSE. Although highly regarded, the website has now been archived, but if revived, the section on Crown Court juries could be reviewed to emphasise the role and importance of juries.

3.166 ACPO responded that the

inclusion of such issues through Citizenship and Personal Social and Health Education (PSHE) lessons with the aim of increasing understanding and preventing offending is supported and should be combined with teaching on social media and safe and legal use of the internet.

3.167 The Council of Circuit Judges explained that they "support any steps which will better inform the general public about the role of the courts, its work and the role which they play. This is increasingly important for children".

3.168 Wiggin LLP argued that juror education "is of primary importance"

Given that it is impossible to "cocoon" jurors entirely from potentially prejudicial material, the most effective tool for reducing the risk of serious prejudice must be juror education.

3.169 The Chancery Bar Association also favoured the proposal although explained that this was "for many reasons, but not specifically for the reason that it would tend to reduce the incidence of jury impropriety".

3.170 Only Andy Dumbiotis and Anthony Arlidge QC responded that they were against the proposal, although they did not provide reasons for their views.

In-trial procedures and judicial directions

Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do? [paragraphs 4.83 and 6.44]

- 3.171 We proposed that all jurors should be told clearly, specifically, repeatedly and consistently that they must not undertake research or seek out information about any matters related to the trial. Jurors should also be told why this is so. Likewise, jurors should be told that they should not disclose information related to the case, in accordance with the requirements of section 8, and the reasons for this. The warning should be regularly updated in order to take account of technological developments and in a manner which is detailed and gives specific examples in order to help jurors to understand the boundaries of acceptable conduct. Jurors should also be told that failure to adhere to the warnings could result in them being imprisoned. Additionally, jurors should be informed of “what to do about improper behaviour, including when and how to report it”⁸ and that jurors have a duty to report such conduct by their fellow jurors.
- 3.172 The appropriately drafted warning to jurors should be delivered:
- In the guide sent to jurors with their summons;
 - In the jury video which is shown on the jurors’ first day;
 - In the speech by the jury manager on the jurors’ first day;
 - On eye-catching, memorable and well-designed posters situated around the court building and in the jury box, assembly area and deliberating room;
 - On conduct cards which jurors should carry with them to use as a reminder.⁹
- 3.173 We also proposed that the terms of the warning should be repeated in directions given by judges to jurors, covering both undertaking research and disclosing deliberations. The rationale for the prohibitions should be explained. The warning should be technologically up to date, give detail *and specific examples*, and warn of the potential criminal consequences for failure to abide by the prohibitions. Again, jurors should also be informed about their obligation to report concerns about their fellow jurors, and about appropriate mechanisms for doing this. We considered that judges should issue this warning at the start of the trial and then repeat it in summary at the end of every court sitting day for the duration of the trial.
- 3.174 The Bar Council, the London Criminal Courts Solicitors’ Association, the National Union of Journalists, Trinity Mirror Plc, the Law Society, the Chancery Bar Association, ACPO, Wiggin LLP, the Newspaper Society, Inspector Sumner, Dr Findlay Stark, Godwin Busuttil, Nick Taylor and six other individuals all agreed with our proposals.

⁸ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

⁹ *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.

3.175 The CCRC agreed with the proposals, adding that

jurors should be asked to sign a declaration to the effect that they have had the relevant matters explained, and have understood them, and that they will try the case only according to the evidence and in accordance with their oath (which could be set out in writing for them, as well as it being given orally by a juror in court on empanelment). The CCRC uses a similar process when it interviews jurors, and it gives them the opportunity to raise questions if they do not understand anything they have been told or have more general concerns.

3.176 The Criminal Bar Association strongly agreed with the use of “a standard direction”, adding that “packs should be made available for jurors which explain their duties and provide clear warnings as to the dangers of research”.

3.177 Doughty Street Chambers (Crime Team) agreed with our proposals. They also suggested

that the judge gives a formal direction at the start of the trial that any form of research by the jury is forbidden that goes beyond merely using the internet to access contemporaneous news reports. Although this goes beyond the terms of the present consultation, we believe that juries would be assisted generally if judges gave directions about the basic procedures and legal principles, such as the burden and standard of proof, at the start of the trial as well as at the end. This would include a direction that the jury must only consider the evidence presented to them in Court, and would readily accommodate a warning about improper research.

3.178 Professors Fenwick and Phillipson also supported the proposals, arguing that “jurors are less likely to feel at ease during the trial and confident in their role if they are uncertain as to what they are and are not permitted to do”.

3.179 The BBC agreed, responding that

what jurors are or are not permitted to do should be clearly and unequivocally set out to jurors with any legal terms, definitions or jargon, explained so far as possible in everyday language.

3.180 The Media Lawyers Association also agreed, suggesting that

A statement read to the jury which they are required to sign along with a printed sheet of instructions of what not to do (and the consequences of ignoring the directions) may also be helpful.

3.181 The BBC and the Media Lawyers Association both cited the words of the Lord Chief Justice in *Thompson* [2010] EWCA Crim 1623 where it was said that

the use of the internet is so common that some specific guidance must now be given to jurors ... what matters is that it should be explicitly related to the use of the internet. We recommend a direction in which the principle is explained not in terms which imply that the

judge is making a polite request, but that he is giving an order necessary for the fair conduct of the trial.

- 3.182 Independent Print Limited thought the proposals “essential” and suggested that they could

take the form of a written “agreement” clearly setting out the expectations of juries and the rules, and the penalties for their infringement. This could include a specific undertaking not to research. It would be akin, for example, to the “Home-School” Agreements which are routinely signed by secondary school children and their parents on admission to many schools. It should also, needless to say, be clearly explained that criminal sanctions may be applied to serious breaches. The emphasis should certainly be on juries’ being properly instructed and informed.

- 3.183 The CPS was also in agreement. They responded that

Any written material should also be translated into the first language of any jurors whose first language is not English. We agree that the judge should give the direction to the jury daily, perhaps at the same time that reporting restrictions are dealt with. This would reinforce the principle that the court’s directions must be complied with to facilitate the administration of justice and to ensure that the defendant has a fair trial.

- 3.184 Ursula Riniker supported the proposals, highlighting that

Prohibitions without reasons don’t work. Particular emphasis should be placed on the reasons for the prohibition and also on information about the possible consequences of a failure to comply and the wasted costs.

- 3.185 The Coroners’ Society also favoured the proposals, suggesting that the Chief Coroner provide guidance on implementing these proposals for coroners’ courts.

- 3.186 The only elements of disagreement came from three consultees. The Senior Judiciary (Lord Justice Treacy and Mr Justice Tugendhat) responded that they

welcomed the practical focus of this section of the consultation paper. Whilst the potential for juror misconduct has always been present, the advent of the internet and other immediate means of accessing, communicating or exchanging information have greatly multiplied the opportunities for misconduct to take place.

There is a strong need given the exacerbation of potential risks to the integrity of a system of trial by jury in this respect for a very clear focus to be brought on what constitutes juror misconduct. Improved measures need to be taken in relation to pre-trial information given to jurors, as well as the instructions given by the judge presiding over the trial.

There needs to be clarity about (a) what is prohibited, (b) why it is prohibited, (c) the potential consequences for the trial in terms of cost, delay and integrity of the process, (d) potential consequences for breach by a juror, (e) the principle of collective responsibility and (f) the need for reporting wrongdoing and the processes for doing so.

If jurors are to face criminal consequences for failing to adhere to their duties, clarity is essential. The desirability of fairness to a potential juror defendant is one benefit, but it is likely that added clarity around the topic will have the effect of reducing breaches.

3.187 In addition, the members of the Senior Judiciary explained that it is

important to bear in mind that jurors are being required to give their time and efforts in serving as jurors compulsorily. Nothing should be done in a way which is unduly minatory as it is unlikely to foster cooperation.

The steps at paragraph 4.80(1) to (3) are plainly necessary. Suitable notices, without overkill, in the jury assembly area and jury room would be appropriate, but the issuing of “conduct cards” seems to be a step too far. We are aware that some judges provide the jury with printed copies of the directions given to them at the start of the case about their role in the trial, which the jury then keep with their case papers. This appears to us to be a good practice.

Whatever is said or done pre-trial by others, we regard the role of the trial judge as essential in drawing matters appropriately to the jury’s attention during the trial. Clear guidance from the Judicial College and/or the Lord Chief Justice is therefore appropriate. Such guidance will no doubt reflect modern conditions and would focus on the matters highlighted earlier in this section.

3.188 Similarly, the Council of Circuit Judges responded as follows

Essentially we agree with these proposals which to a large extent reflect present good practice. However, we do consider that they include some elements which are unnecessary. The provision of a card would be unlikely to have much if any effect. Repetition of warnings even in summary form at the end of every day is unnecessary. It has the danger of becoming a mantra which all ignore. To give it in a long case where the jury are expected to remember evidence over weeks if not months highlights the point. To give it in a short case suggests a lack of confidence in the jury.

3.189 Anthony Arlidge QC was in the favour of the proposals, with the exception of point (4) in respect of the posters.

3.190 No other consultees disagreed with our proposals, or any aspect of them.

3.191 Professor Alisdair Gillespie took the view that all jury managers should “supplement the warning regarding social media with a warning about conducting research on the internet”.

- 3.192 One consultee emailed to explain to us her experience of undertaking jury service. She wrote

During the two weeks of the case the judge was very clear in his instruction at the end of each day that we were not to discuss the case or use the internet. The judge left us in no doubt that we were to follow these instructions. During the course of the deliberations I believe that no juror brought in any information they had found on the internet but can not be absolutely sure of that. Therefore we were depending on each juror following the judge's instruction. In the Guide to Jury Service on page 5 it states "that you DO NOT discuss the evidence" At this point I wonder if it should also be stated clearly that you are not to use the internet etc to research/look up any aspect of the case you are involved in. It may be splitting hairs but it would be more instructive if the distinction was made. As we are so used to having information at our finger tips and getting rapid answers to any queries we may have, I can see that it is still too easy to fall into "contempt" in all innocence.

- 3.193 As we explained in the Consultation Paper, the issue of jurors' use of the internet and social media is not limited to this jurisdiction. The Media Law Resource Center highlighted that "this is a serious issue of concern in the US as well". They identified that

In 2011, the Federal Judicial Center, the education and research agency of the United States federal courts, surveyed all 952 district court judges in the country on jurors' use of social media during trials and effective strategies to curb such behaviour. Based on 508 responses, the FJC Survey concluded that use of social media by jurors was not common, but it does occur. Ninety-four percent of the judges reported that they cautioned jurors about the use of the internet and social media, using model instructions (or their own variation). Judges were also asked to suggest ways courts could prevent inappropriate use of social media by jurors during trial and deliberation. The most common suggestion was to give frequent reminders to jurors throughout the trial. Other suggestions included 1) giving a detailed explanation of how refraining from social media use can promote a fair trial; 2) explaining the consequences of violations during trial, such as mistrial and wasted time and money; and 3) using plain English instructions.

- 3.194 Following this survey, in June 2012 the Judicial Conference Committee on Court Administration and Case Management issued revised Model Jury Instructions on The Use of Electronic Technology to Conduct Research on or Communicate about a Case. At the start of a case, jurors should be warned as follows

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet,

websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

3.195 At the close of the case, jurors should be warned

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

- 3.196 The MLRC also highlighted that a survey has been undertaken to assess the effectiveness of the Model Jury instructions. 140 real federal court jurors were questioned, each of which had received the Model Instruction. The survey concluded that “a well-crafted social media instruction is effective because, simply put, jurors listen.”¹⁰
- 3.197 Peter Bartlett wrote to alert us to the position in Victoria, Australia. He explained that the Juror’s Handbook states

You must not act as an “amateur detective” by performing your own investigation. You must not visit the scene of the alleged crime or any events mentioned in the case, conduct any experiments, or consult any books or other sources (including other people) for more information. If the judge thinks the jury should visit a place connected with the trial, he or she will arrange for this to happen. Sometimes you will have read or heard something about the case through newspapers, radio or television — but you must decide the case only on what you see or hear in the courtroom, not from anything you read or hear in the media. It is also important that you do not allow anything you have seen in films or on television about court cases to play any role in your decision-making.

- 3.198 Mr Bartlett explained that, although there is no specific reference to the internet, jurors are warned that they are not permitted to undertake their own research. The Criminal Trial Courts Bench Book created by the Judicial Commission of New South Wales¹¹ has “suggested words that the judge should use when directing juries on the prohibition against making enquiries outside the courtroom”. It states

Prohibition against making enquiries outside the courtroom

It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom [if applicable: or at an inspection of a scene]: that is; the evidence, the addresses of counsel and what I say to you about the law. You must not, during the course of the trial, make any enquiries outside the courtroom about any matter relating to any of the issues arising in this trial. In particular you are not to use any aid, such as legal textbooks, to research any matter in connection with your role as a juror. It is a serious criminal offence for a member of the jury to make any enquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person; conducting any research using the internet; [if the judge considers it appropriate add: That includes Googling for information or using sites such as Facebook, Twitter, blogs, MySpace, LinkedIn, You Tube and other similar sites].

¹⁰ A St. Eve and M Zuckerman, ‘Ensuring an Impartial Jury in the Age of Social Media’ 11 Duke Law & Technology Review 1.

¹¹ Available here: <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html>.

You cannot view or inspect any place or object or conduct any experiments. You are not permitted to have someone else make those enquiries on your behalf.

The reason why you cannot make such enquiries is that you must be true to your oath or affirmation. This means that you are required to give a true verdict, that is one determined solely by reference to the evidence presented in open court, the submissions of counsel and, of course, the directions of law that I shall give you at any time during the trial.

If you were to make enquiries outside the courtroom you would change your role from that of an impartial juror to an investigator. You would be taking into account material that was not properly placed before you by the Crown or the defence. It is the parties that present evidence to the court, not the judge and not members of the jury. It would be unfair to both the Crown and the accused to use any material obtained outside the courtroom because the parties would not be aware of it and, therefore, would be unable to test it or make submissions to you about it. Some experiments may require particular expertise to carry them out and to report on the findings of the experiment for that evidence to be of any use to you.

Yet the result of your enquiries could be misleading or entirely wrong. For example, you may come across a statement of the law or of legal principle that is not applicable in this State. The criminal law is not the same throughout Australian jurisdictions and even in this State can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to determine the issues before you. Similarly you could obtain factual material that may be irrelevant to your consideration of any issue before you, or that might be misleading or could be erroneous.

Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud? [paragraphs 4.84 and 6.45]

- 3.199 Views on amending the oath were more divided than in respect of some other questions.
- 3.200 Of those in favour of both proposals that the oath be amended and be reproduced in a written declaration were the London Criminal Courts Solicitors' Association, Wiggin LLP, Independent Print Limited, the Newspaper Society, Inspector Sumner, Dr Findlay Stark, Nick Taylor, and three other individuals.
- 3.201 The Law Society agreed with the proposals, suggesting that this "would reinforce and remind the jury of their obligation not to consult outside sources of information in relation to the trial".
- 3.202 The NUJ was also supportive, although they commented that the oath

should be available in several languages. Some jurors may understand and speak English sufficiently but may not be able to read and write, whether or not English is their first language.

3.203 Professors Fenwick and Phillipson were also in favour of both proposals. They thought that the oath could be amended “so long as simple language was used, and the oath was kept as short as possible commensurate with conveying the key information in question”. They also explained that one advantage of a written declaration would be that “more explanation as to the meaning of s8 could ... be given”.

3.204 Doughty Street Chambers (Crime Team) agreed with our proposals, suggesting that the oath be amended to state

I swear [etc] that I will faithfully try the defendant and give a true verdict according to the evidence presented in court, and only according to that evidence.

3.205 Five consultees were wholly against both proposals. The Senior Judiciary explained that they “see no need to reform the oath or to require a signed written declaration at that stage”. The Council of Circuit Judges was also against both proposals, arguing that the written declaration for jurors would not “add in any way to their commitment”. However, they added that “the understanding by the juror of English” requires considerations as this “is an increasingly serious problem in some of the larger cities”.

3.206 Anthony Arlidge QC thought these proposals were unnecessary. The Bar Council was also against the proposals, for two reasons:

(1) The oath is directed to the evidence and the verdict. These should be foremost in any juror’s mind when taking the oath. Particulars about internet access, Facebook, mobile phones etc will distract from the focus of the oath. The oath relates to the relationship between the juror, the evidence and the verdict. Matters relating to contempt, however important are secondary to and consequent upon this oath;

(2) What happens when a juror refuses to enter into a “contract” as to (for example) internet use during the trial – for good or bad reason? Is the judge going to deviate from the proceedings to spend time identifying what can and cannot be done or what may or may not arise? Is the judge going to seek to identify specifically the multiplicity of circumstances which may or may not be triggered by internet use during the course of the trial, defined possibly by the circumstances of particular jurors? It is sufficient that consequent upon the oath having been taken, jurors are directed by the judge as to their obligations re not seeking further information and the possible consequences of doing so, and that they are reminded of this during the trial.

3.207 The Chancery Bar Association disagreed with the proposals on the basis that “the terms of the oath are wholly appropriate”

The idea of a written declaration is at best unnecessary and at worse likely to lead to problems. What will the court do if a juror declines to

sign a declaration. Release him or her from serving on a jury? Punish him or her for contempt?

- 3.208 The rest of the responses illustrated a mixed view of the two proposals, although in general there was more support for amending the oath than for reproducing it in a written declaration. The Criminal Bar Association responded

We do agree that the oath should be amended to include jurors' understanding that they are not permitted to conduct their own research and the requirements set out in section 8. Whilst it would take marginally more time at the start of the trial, it would mean that each juror is required to specifically address their mind to what exactly they can and cannot do. It may also initiate further questions from the juror where there is misunderstanding or uncertainty and thereby increase the overall understanding as to the requirements of the juror.

We disagree that the oath should be written as well. The oral oath is delivered in very formal settings; it is witnessed and assessed by all parties (and, crucially, given in front of the other jurors) and is recorded on the transcript. It is not thought that there is any need for it to be in writing. In addition this would create a distinction between the oath taken by witnesses and that taken by jurors. This may serve to undermine the oral oath taken by witnesses in the mind of the juror.

- 3.209 Trinity Mirror Plc's response argued that

it is not necessary for the spoken oath to be amended, considering that it is desirable for the oath to be as simple, clear and concise as possible and not to purport to cover all facets of a juror's duty. There is, however, a case for adding to the current wording of the oath as follows: "..... and give a true verdict according to the evidence *adduced in this trial*" [Trinity Mirror Plc] considers that a separate, longer written declaration may be worthy of consideration if accompanied as a matter of routine by appropriate directions from the trial judge.¹²

- 3.210 The BBC thought that

consideration should be given to amending the oath to include a specific undertaking not to undertake research. This would help jurors focus on the importance placed on the jury trying a case only on the evidence before it. This could be re-enforced as in certain Australia states with the introduction of a specific statutory offence.

The BBC did not mention in its response the possibility of having the oath reproduced as a written declaration.

- 3.211 In a similar vein, the Media Lawyers Association responded that

¹² Emphasis added. Words in italics are those added to the existing oath.

consideration should be given to amending the oath to include a specific undertaking not to research. The oaths or appropriate written directions should make clear exactly what jurors are and are not allowed to do for example distinguish between reading their emails, reading online newspapers but not actively searching against a defendant's name or researching him or her. The MLA believe that it would help jurors focus on the importance placed on the jury trying a case only on the evidence before it. This could be re-enforced as in certain Australian states with the introduction of a specific statutory offence.

3.212 The CPS response was divided in respect of this issue

We agree that a minor amendment to the oath to forsake internet research may help jurors to understand the meaning and extent of the oath. However, there may be a risk that frequent warnings not to undertake internet research may be counterproductive and raise suspicion amongst jurors that there was information available on the internet that they would want to consider in order to discover the truth and deliver their verdict.

We do not think it necessary to require jurors to sign a written declaration. This assumes literacy levels in the English language that jurors are not required to possess in order to try a case. Jury members may sign the declaration irrespective of their understanding of its meaning and significance; and may be too embarrassed to admit their difficulties.

3.213 Likewise, ACPO explained that

adding a reference to not undertaking internet research as part of the existing oath may enhance a juror's understanding of their obligations. A written declaration may introduce issues regarding literacy and language skills of jurors that are not required to sit on a jury but may be required in order to understand a written declaration. Jurors should also be made aware of a process for reporting any concerns regarding fellow jurors potential misbehaviour in a confidential manner.

3.214 Conversely, the CCRC argued that the oath should not be amended

The current oath is simple and clear, and, if reinforced by the measures set out previously, serves to underpin the nature of the juror's task. The danger of starting to include prohibitions as to one form of misconduct in the oath (eg researching information on the internet) is that a juror might therefore assume that other conduct which might be just as damaging to the trial process (eg carrying out experiments, talking to witnesses, visiting the scene etc) is allowed, or at least viewed less seriously.

3.215 However, the CCRC was in favour of reproducing the oath as a written declaration. In addition to "the words of the oath/affirmation being given in a juror

“package”, distributed and discussed on being called to Court, with DVD etc. They should sign a declaration.”

3.216 Professor Alisdair Gillespie did not favour amendment of the oath

I would prefer the judicial direction on, inter alia, communication and jury research to take the form of an order. If that were to occur then there would be no need for the oath to be amended as they would simply be expected to obey the court order in the same way that anyone else is.

3.217 Four other individuals favoured amending the oath but those same four were against reproducing it in a written declaration. One other person was against amending the oath but in favour of having a written declaration.

3.218 In addition, Mr Tovey responded that

amending the oath or affirmation may be needed, but it might be more appropriate to include a general statement about confidentiality, rather than specifying any current technology or service (such as social networks).

Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so? [paragraphs 4.85 and 6.46]

3.219 The London Criminal Courts Solicitors’ Association, the National Union of Journalists, the Media Lawyers Association, Doughty Street Chambers (Crime Team), Trinity Mirror Plc and ten other individuals were in favour of this proposal.

3.220 Dr Findlay Stark commented

If the Vicky Pryce debacle has taught us anything, it is that jurors should be encouraged to tell the judge about any questions that seem to be having a serious impact upon their deliberations. This is necessary so that confidence can be maintained in the safety of convictions returned after jury trials.¹³

3.221 The CCRC was also in favour, pointing out that “it is plainly preferable that any queries/concerns should be raised during the trial process, which gives the best opportunity for them to be addressed”. The Criminal Bar Association agreed, arguing that “this should be explained in detail, including setting out the most obvious practicalities of how to ask questions and of whom”.

3.222 The Law Society agreed with the proposal. Their response explained that,

Yes, although we are not aware of there being any reluctance amongst jurors to ask questions. In our experience, trial judges do not usually say very much about the jurors’ ability to ask questions, so it assumed they are given instructions about what to do if they wish to

¹³ We assume this to be a reference to the jury in the first trial of Vicky Pryce, which asked a variety of questions during deliberations and was ultimately discharged by the trial judge.

raise a query by the jury managers, the jury video and/or the written guides to jury service.

However, as cases in which a jury member has conducted their own research appear to be increasing, it seems reasonable to infer that this is happening, at least partly, because they feel that they are being given limited information or are seeking further clarification. Therefore, any course of action which makes the instruction to the jury clearer, and encourages questions during the proceedings, should be supported.

- 3.223 The Chancery Bar Association favoured the proposal, although responded that jurors

should not be encouraged to ask questions about the course that the evidence is taking, only about impropriety that happens outside the courtroom. Unless this is made clear to jurors, experience shows that the course of the trial is repeatedly interrupted by notes written from the jury box asking why such and such evidence has not been called, or why a particular question has not been asked. What jurors need to understand better is that the evidence is what is put before them in court, and the ability to raise questions does not take the place of researching the case outside court. If a judge's directions of law are not clear then naturally the jury should be encouraged to ask for further explanation.

- 3.224 Wiggin LLP supported the proposal in the belief that jurors should be educated so that "they have a full understanding of their duties and responsibilities". Independent Print Limited also agreed, responding that

it should be ensured that juries clearly understand that it is preferable for most questions and misunderstandings to be resolved during proceedings as and when they occur, rather than during their deliberations (see *Pryce*).¹⁴

- 3.225 The CPS was in favour, responding as follows

We agree that jurors should be given clear instruction on how to ask questions, and that jurors should be reminded of this at the beginning of each day in court. There should also be an opportunity for jurors to be able to report in private any concerns, including misbehaviour by another juror, without alerting that juror to the fact.

- 3.226 In a similar vein, ACPO explained that "the opportunity to remove any potential "defence" or excuse of ignorance or misunderstanding of their obligations by a juror would be welcome".

- 3.227 The Coroners' Society seems to have taken the view that this proposal might be more relevant to criminal rather than coroners' juries. The Society responded that

¹⁴ We again assume this to be a reference to the jury in the first trial of Vicky Pryce.

During an inquest, the jury is already given guidance about asking questions of a witness once the coroner and any interested parties have done so. This is a normal part of the inquest process and jurors frequently do ask questions. The coroner must keep close control to ensure that only relevant and proper questions are raised. The Coroners Bench Book contains some guidance on this subject and can be provided if it would assist.

- 3.228 Four consultees disagreed with the proposal. The Senior Judiciary responded that they understood that jurors

are already made aware of their ability to do this. We see no need to emphasise this further. It raises false expectations since many questions cannot properly be answered or may hamper the efficient progress of the case. Moreover, to encourage questions and then not to answer them because they relate to inadmissible background or irrelevant matters is unsatisfactory.

- 3.229 The Council of Circuit Judges thought that this issue could

be dealt with adequately in the “housekeeping” directions. We consider that there are real dangers in encouraging questions. It may lead to some jurors feeling obliged to ask questions and they may not be sensible or relevant. It may lead to issues being raised which are peripheral or cannot be answered by admissible evidence. At present juries do ask questions and frequently they are very pertinent. We do not see any need for encouragement. Provided the jury know it may ask questions that should suffice.

- 3.230 The Bar Council was also against the proposal

Trial by jury continues to be an adversarial process in which the prosecution seek to persuade the jury of the defendant’s guilt so that they can be sure of it. It is not a factfinding exercise. The jury are not investigators or questioners, nor should they be encouraged to be so. This is for good reason. If they occupy themselves with how best to raise questions and pursue their own lines of enquiry, jurors are unlikely to be concentrating upon their function as judges of fact. Furthermore, there will invariably be good reasons why certain lines of enquiry are not pursued. To encourage a jury to pursue them of their own volition risks a distraction from material issues and the introduction of issues that have no admissible function. Encouraging jurors to ask questions, and then refusing to provide them answers is unlikely to be a helpful exercise. In any event, juries are able to ask questions when they want to do so, and experience demonstrates that they do so regularly.

- 3.231 Godwin Busuttil also disagreed.

Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court? [paragraphs 4.87 and 6.47]

- 3.232 In general, there was widespread support for this suggestion. The London Criminal Courts Solicitors' Association, the Senior Judiciary, the National Union of Journalists, Trinity Mirror Plc, the Chancery Bar Association, Doughty Street Chambers (Crime Team), Independent Print Limited, the Coroner's Society, the Media Lawyers Association and 12 other individuals agreed with our suggestion that internet-enabled devices should not automatically be removed from jurors throughout their time at court.
- 3.233 The Bar Council supported the proposal on the basis that automatic "removal would be too great an interference with article 8 and 10 rights." The CPS and ACPO also agreed, highlighting that "all other persons in court are permitted to retain internet enabled devices, despite the risk of misuse" and that therefore "jurors should not be treated differently to other court users in this respect".¹⁵ The Council of Circuit Judges was also in favour, responding that "there is often time when the jurors are waiting and it is reasonable for them to expect that they will be able to use their computers to take advantage of such time".
- 3.234 The Criminal Bar Association was also in favour, although they commented that
- it should be made clear from the outset the basis on which they [the jurors] are entitled to retain such devices (ie in order to assist with the day to day running of their lives as necessary). This should be incorporated in to the advice as to warnings as to using the internet to research matters relating to the case.
- 3.235 The Law Society agreed with our proposal, highlighting that
- These items are predominantly used for legitimate purposes, and it would cause great inconvenience, and no doubt resentment, if there were to be a blanket removal of all such devices when jurors are present at court and from the jury room.
- 3.236 Wiggin LLP also agreed, pointing out that "if jurors are properly educated about their responsibilities" an automatic ban "should not be necessary".
- 3.237 The BBC did not express an opinion on what the general policy should be, but noted that "if jurors are to be permitted to retain such devices we consider that specific guidance should be given about appropriate internet usage".
- 3.238 The Newspaper Society responded that
- There might be circumstances where it might be appropriate for exercise of a discretion to ask jurors to surrender internet enabled devices throughout their time in court or for any period during it. Presumably this would be in exceptional circumstances and appropriate safeguards would have to be put in place and sensibly applied in the individual circumstances of any particular juror.

¹⁵ Former quote from CPS, latter from ACPO.

We took this response to mean that they were not in favour of automatic removal but supported the proposal, considered below, that judges be given a discretionary power to order removal at appropriate times.

3.239 The CCRC was

firmly of the view that internet-enabled devices (and mobile telephones, whether or not they are internet-enabled) should automatically be removed when jurors are in the courtroom listening to evidence, or deliberating on their verdicts.

Individual Commissioners and others, however, expressed differing - albeit equally strong - views as to whether such devices should be removed throughout jurors' time at court.

Those in favour of removal throughout jurors' time in the court building emphasised that physical removal of devices serves to emphasise the prohibition against using such devices to carry out research or make inappropriate contact about the case, as well as removing the temptation to be distracted from the task in hand by outside influences. In addition, see eg *Morris & Ashworth* [2011] EWCA Crim 3250, where removal of such items would have prevented what proved to be an inaccurate suggestion that a juror accessed the internet via mobile telephone during the proceedings.

The contrary view, that such items ought not to be removed throughout a juror's time in the court building, but only when listening to the evidence or actually deliberating, stemmed from concern that jurors might be waiting for a considerable period to be called upon, or while matters of law/admissibility are discussed, or PII applications are heard, and regularly spend long periods in a holding room. Numerous/long breaks without their devices might mean people cannot run their businesses, study, deal with child or parental care issues etc, and the concern about this might distract them from their core role as jurors. Some considered such blanket removal of devices to be a disproportionate intrusion on jurors' lives, and an artificial restriction, as it is almost impossible to police what jurors do away from court. The key issue is to ensure that jurors understand the prohibitions on research etc, and the underlying reasons for the same.

Whatever happens, the CCRC is clear that there should be consistency of approach; different courts' practices are very different.

3.240 Only two consultees were against the proposal. Ursula Riniker thought that "there should be a lockable safe in the jury room, where jurors would be required to deposit their mobiles and internet-enabled devices for the duration of their time at court." Likewise, Dr Findlay Stark responded that removal should be automatic

except in exceptional circumstances (eg an ill relative – though perhaps a juror should be excused in these situations). I fear (perhaps because I am – like many people – an iPhone addict) that

the temptation to check the internet for information about the trial the juror might be/is sitting on is too great.

Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices? [paragraphs 4.88 and 6.48]

3.241 The London Criminal Courts Solicitors' Association, the BBC, Independent Print Limited, the Media Lawyers Association, the Council of Circuit Judges, the Coroners' Society, Doughty Street Chambers (Crime Team), and nine other individuals agreed with this proposal. In addition, the Criminal Bar Association was supportive, commenting that such power would be "particularly necessary in relation to the surrender of such devices in the deliberating room where they should be prohibited". The Newspaper Society was also in implicit agreement.

3.242 The Senior Judiciary argued that

There should be clarity about a judge's power to require jurors to surrender their internet enabled devices, and that should include a residual power to require them to surrender them at any time when they are in the court building.

3.243 Professor Alisdair Gillespie believed

that judges almost certainly already have the right to order the removal of devices but I can see the logic in clarifying this by ensuring that there is an express power to do so. It is likely that any order to surrender internet-equipped devices could engage article 8¹⁶ and article 1 of Protocol 1 [peaceful enjoyment of possessions] of the ECHR. Whilst this is not problematic in that both are qualified rights, it does suggest that there should be certainty over the power to order removal and therefore, for the sake of clarity, I would support the proposal to clarify that judges do have the power.

3.244 Various consultees were in favour of the power in principle, but wanted limits on its use and appropriate guidance. The Law Society agreed

that judges should have the power to require jurors to surrender their internet-enabled devices when are they present at court whether in the deliberating room or in the court room itself, in appropriate cases. It is important that the exercise of this power should be proportionate. It should only be exercised when a specific risk has been identified and should go no further than is necessary to meet that risk.

3.245 The Chancery Bar Association also agreed, but thought that the power should only be exercised

for particularly good cause. The judge's directions about use of internet should be given explicitly and should be obeyed. Jurors are

¹⁶ Footnote in original: In that this applies to arbitrary interferences by the state (*Hokkanen v Finland* (1994) 19 EHRR 139) but also to the respect for his communications and the most common internet-enabled device a juror is likely to have is a mobile telephone.

perfectly entitled to make use of internet otherwise for personal needs.

3.246 Wiggin LLP supported the proposal but recommended that “clear guidelines must be established to ensure that the power is fairly and consistently exercised”. Likewise, the National Union of Journalists was in favour of the power but with its use “only in very limited and defined circumstances”.

3.247 The CPS supported the proposal. They explained that

There may be occasions when the opportunity to access the internet should be restricted in order to preserve the integrity of the trial process and to reduce the risk of injustice to the defendant. The judge should also have the power to direct jurors not to use their internet enabled devices.

3.248 ACPO was also in favour, commenting that removal “should be down to judicial discretion and the presumption should lean towards jurors being able to retain devices”.

3.249 The CCRC did not say whether it favoured the power or not, but pointed to a “need for consistency in all courts. If devices are to be surrendered, there should be very clear guidelines for judges as to when this power should be exercised”.

3.250 The Bar Council responded that they were against such a power on the basis that it would be “too great an interference with article 8 and 10 rights” but we consider that they may have misunderstood that the question related to whether there should – in principle – be such a power, given that they were supportive of removal of internet-enabled devices whilst the jury was deliberating.

3.251 Trinity Mirror Plc responded that they considered “that this would be an aggressive power likely to achieve nothing in respect of the quality of jury decision making”. Three other individuals were against the proposal.

3.252 One anonymous consultee responded that

The ability of a judge or public authority to confiscate or detain the property of a juror would be an unnecessary infringement of liberty and potentially incompatible with the European Convention on Human Rights, in particular:

-article 5: it would be a potential infringement of a juror's liberty to remove their access to the internet.

-article 6(2): it removes the presumption of innocence. Jurors must be assumed to comply with the law, unless proved otherwise.

-article 8 and Protocol 1, article 1: the State cannot simply confiscate or detain a person's property.

It may also discourage people from responding to jury summons.

Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room? [paragraphs 4.89 and 6.49]

- 3.253 There was general support for this proposal from consultees. Some responded that this was already the practice in the Crown Courts, although we have heard from some stakeholders that this is not universally so.
- 3.254 The Council of Circuit Judges, the CCRC, the Senior Judiciary, the London Criminal Courts Solicitors' Association, Independent Print Limited, Doughty Street Chambers (Crime Team), the Media Lawyers Association, the Coroners' Society, Wiggin LLP, Dr Findlay Stark,¹⁷ Anthony Arlidge QC¹⁸ and five other individuals were in favour of this proposal.
- 3.255 Professors Fenwick and Phillipson agreed, arguing that
- while this may be of largely symbolic value (since jurors would remain able to conduct internet-based research at weekends or in the evenings) it would serve as a strong reminder of the necessity of deciding the case only according to the evidence presented in court.
- 3.256 The Bar Council and the Criminal Bar Association also supported the proposal, "subject to the court being in a position to relay important personal information to any juror".¹⁹ As the CBA identified,
- there may be circumstances where there is need for emergency contact of a juror. However, in all such circumstances, it should be possible for an alternative system to be put in place that does not require internet enabled devices to enter the deliberating room.
- 3.257 The National Union of Journalists made similar points about the need for arrangements to be made to enable jurors to be contacted in cases of personal urgency.
- 3.258 The CPS was also in favour. Their response stated that
- There will be cases in which prejudicial material is available on the internet that would, if accessed by at least one jury member, create a seriously arguable ground of appeal. Warnings are not always heeded and it would reinforce the warning against improper use of the internet at home by removing the opportunity to access the internet in the deliberating room. The absence of internet enabled devices in the deliberating room would also prevent improper contact, including threats and inducements to jurors.

¹⁷ Although Dr Stark was in favour of automatic removal of such devices for the entire time that a juror is at court.

¹⁸ Anthony Arlidge QC also argued that devices should be removed when jurors are in court (by which we assume he means in the courtroom with the trial proceeding, rather than merely when the jurors are in the court building).

¹⁹ Quotation from the Bar Council.

- 3.259 Professor Alisdair Gillespie also agreed the proposal. He explained that removal of such items from the jury room,

will not, of course, prevent them from conducting research since they could do so at home or whilst travelling to or from work but it is likely to demonstrate the importance of not doing so. Were a juror to conduct that research and report back to other members of the jury, the fact that their devices were removed from the jury would serve as sufficient notice that they should not listen to such talk and should report the matter to the judge (via the usher).

- 3.260 Of those who were against the proposal, the Chancery Bar Association explained that

This is not a straightforward question. In principle, jurors when they retire should be concentrating on reaching a verdict and nothing else, but e-mail communication is such an accepted way of living in the modern world that we suspect that jurors could have real difficulties (eg in communicating with children at school, elderly persons in their care) without access to such devices. The jury chairman or foreman could perfectly properly adjourn deliberations for 15 minutes for jurors to make calls, send e-mails, etc. It also gives rise to problems with custody of such devices. We do not consider that such devices should routinely be removed.

- 3.261 ACPO also disagreed with the proposal, responding that

This should remain at the discretion of the judge. Alternatively deliberating rooms could be modified so that internet enabled devices are blocked in the deliberating room and so the need to remove devices become irrelevant. It is recognised this may be an unnecessarily costly option.

- 3.262 The Law Society, the Newspaper Society and the BBC also thought the matter best left to judicial discretion (on which, see below). Five other individuals were against the proposal.

Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge? [paragraphs 4.90 and 6.50]

- 3.263 In general, there was broad support for this proposal. The Council of Circuit Judges, ACPO, the London Criminal Courts Solicitors' Association, the Criminal Bar Association, the Chancery Bar Association, the BBC, Independent Print Media and six other individuals were all in favour.

- 3.264 The CPS also agreed with the proposal, explaining that "this would enable the judge to take immediate action if it was necessary to prevent a contempt of court".

- 3.265 Doughty Street Chambers (Crime Team) agreed as well, arguing as follows

Provided that jurors can be easily contacted by family members in the case of an emergency, there is no good reason for them not to be separated from their phones/internet-enabled devices while they are on duty at court.

3.266 The Newspaper Society argued that

With reference to the particular circumstances of the trial and the individual circumstances of the juror, the judge presiding over the relevant trial should have the discretion to require jurors to surrender or remove such devices for the duration of their time in court, or in the deliberating room, or for such periods during those times as he considers appropriate.

3.267 The Media Lawyers Association also thought the judge

best placed to make their own assessment as to the likelihood of risk and may depend on factors such as the notoriety of the facts of the case and whether there have been previous media reports.

3.268 The Law Society agreed that this issue “should be left to the discretion of the trial judge”, adding that “consideration should be given to providing secure locker facilities to enable jurors to store their devices securely”.

3.269 Professor Alisdair Gillespie responded that

Whilst it is undoubtedly acceptable to remove internet-enabled devices from the jury room when deliberating it is likely that any order to remove the devices at other times will require more careful balancing. ... it is likely that this would engage rights under the ECHR [article 8 and article 1 of Protocol 1, peaceful enjoyment of possessions] and thus the proportionality of any removal will need to be carefully balanced. Realistically it must only be the judge who can make this decision, admittedly with the benefit of submissions from counsel for both the prosecution and defence, and so I would support the proposal that this is let to the (trial) judge.

3.270 The Senior Judiciary agreed with the discretionary power but sounded a note of caution, they explained that “removal of such items, save for the time when the jury are in their deliberating room, should only occur when necessary, proportionate and justified”. Likewise, the National Union of Journalists supporting the proposal for judicial discretion “only in very limited and defined circumstances”. Wiggin LLP too agreed with the proposal

subject to appropriate guidelines being established to ensure that discretion is exercised consistently, and so that jurors understand why it is being exercised in a particular case.

3.271 The CCRC, for reasons explained above, was against the proposal. Dr Findlay Stark also disagreed explaining that

The default position should be that these devices are surrendered for the duration of their time at court, with the trial judge having the power to allow a juror to retain the device in exceptional circumstances.

- 3.272 The Bar Council again thought that there would likely be an unlawful “interference with article 8 and 10 rights” and that the proposal would

lead to inconsistent treatment of juries, thereby undermining the objective basis of such interference. Furthermore, inconsistent treatment of juries in this way would be likely to lead to a level of dissatisfaction that could interfere with the proper performance of their function.

- 3.273 Five other individuals disagreed with the proposal.

- 3.274 Anthony Arlidge QC responded that such devices “should be removed whilst in court and whilst deliberating”. It is not clear whether this meant that the devices should be removed only at that time.

Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns? [paragraphs 4.91 and 6.51]

- 3.275 There was widespread support for this proposal. The London Criminal Courts Solicitors’ Association, the National Union of Journalists, the Newspaper Society, the Law Society, the Chancery Bar Association, Independent Print Limited and 11 other individuals all voiced their support.

- 3.276 The Criminal Bar Association agreed

that it should be made as easy as possible for jurors to report their concerns. This includes there being greater explanation from the outset as to how to report such concerns and what their duties are.

- 3.277 Professors Fenwick and Phillipson were also in favour, arguing that this could help avoid “unlawful disclosures”, where jurors disclose to parties outside the court (in breach of section 8) in ignorance. The Media Lawyers Association and the BBC responded that “there should be a clear procedure with named and identifiable people in every court”. Likewise, Wiggin LLP was also supportive, explaining

that it is vital for juries to be able to report concerns through a secure channel with appropriate safeguards. This will ensure that concerns are properly addressed and jurors properly understand their role and obligations without the risk of compromising criminal proceedings.

- 3.278 The CPS also agreed that “there should be a procedure to allow jurors to make a report in private of suspected misconduct by a fellow juror” with ACPO commenting that “jurors need to have confidence in a process that allows reporting but protects their identity in doing so”.

- 3.279 Professor Alisdair Gillespie supported

the belief that there should be ways in which jurors should be able to raise concerns. Trials, particularly Crown Court trials, are quite

imposing particularly with everyone sitting in their robes and a judge presiding. A juror, who may not have had any contact with the court system before being summoned to a jury, may well be unclear as to how he reports allegations and to whom. Guidance to jurors should emphasise that it is their duty to report breaches of judicial directions and that it is not being an “informer” or “telltale” but rather it is an essential safeguard in the criminal justice process.

- 3.280 However, some consultees responded with a note of caution. The Coroners’ Society was in favour of the proposal, but remarked that “to whom, when and how is difficult”. Likewise, the CCRC highlighted that, although in agreement with the proposal,

it is easy to see that such mechanisms might make it easier for a “rogue” juror, whether acting alone or at the behest of another, to derail a trial. Most important is how the judge deals with any issues raised. The CCRC experience suggests that, at least in the first instance, jurors must be given the opportunity to give information without other jurors knowing, as jurors can be reluctant to “break ranks” (which might be one reason why jurors wait until a trial is over before raising matters that concern them). A possibility would be for the type of procedure that currently arises at the behest of the Court of Appeal on an application for leave to appeal or in the context of an appeal (“s15” direction to the CCRC to investigate) might take place during trial. The trial judge could contact the Court of Appeal, who would direct the Commission then and there to investigate. This would be a rarely exercised power, and would require statutory amendment to the CCRC functions, but in an appropriate case might prevent a lengthy, complex trial being aborted.

- 3.281 The Bar Council responded as follows

Potentially. However, it is suggested that what jurors most desire is assurance as to how their concerns will be met and their confidentiality preserved.

- 3.282 The Council of Circuit Judges was the most reluctant, explaining

Provided the jurors are told that they should bring any matter or problem which concerns them to the judge’s attention and that they should do so in a note, we see no reason for such measures as drop-in boxes. If a juror has an opportunity to drop a note into the box we find it hard to believe the same juror could not hand it to the jury bailiff whilst en route to court.

Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be? [paragraphs 4.92 and 6.52]

- 3.283 Those in favour of the telephone helpline included Ursula Riniker, Inspector Sumner, Professors Fenwick and Phillipson and Doughty Street Chambers (Crime Team). Inspector Sumner, Professors Fenwick and Phillipson and Doughty Street Chambers (Crime Team) also supported the idea of an email

helpline. Ursula Riniker, Inspector Sumner and Doughty Street Chambers (Crime Team) were in favour of the suggestion for a website with frequently asked questions which jurors could consult for guidance.

3.284 The Criminal Bar Association responded that they agreed

that it should be made as easy as possible for jurors to report their concerns. We see the merit in a phone line or email address as it allows reports to be made away from the pressure of the presence of the other 11 jurors. However, in order for such methods to serve any useful purpose, there must be timely and regular checks made for any messages relating to that day or the next days' trial, so that they can be dealt with at the most relevant time.

3.285 In a similar vein, the Law Society was of the view that

frequently asked questions on the HMCTS website could be an option. A helpline may be useful, although it may be quite resource intensive, particularly in view of the fact that the judge, and court ushers, are present at court and available to any juror member who has a question during the course of the trial.

3.286 The Chancery Bar Association responded that they were

persuaded by the idea of an out-of-court-hours helpline, and there should be a designated person (jury manager?) present and identified as such in the court building for any juror with problems about a trial to be able to approach although we suspect that the latter represents existing practice at Crown Courts in any event.

3.287 Dr Findlay Stark also thought that a helpline was "a good idea" but did not specify whether this would be telephone, email or both.

3.288 The Council of Circuit Judges responded

This proposal may be an advantage. It could include the questions suggested. It should include a direction that it is usually better to bring any concern to the attention of the judge in case of misunderstanding of the FAQ.

3.289 The London Criminal Courts Solicitors' Association responded that

A website would be helpful but a helpline for jurors would inevitably cause jurors to have discussions with a person outside the jury room which would be very likely to stray into problematic areas.

3.290 The Newspaper Society did not seem to propose anything beyond what had already been suggested in the CP. The Society explained that it agreed that

other preventive measures should be put in place to assist jurors before during and after their jury service (which would obviously have to be compatible with any directions as to the non-use of internet enabled devices or their surrender and removal). Strong directions by

judges to focus solely on the evidence given in court, not to search for other information by any other means, including by way of internet enabled devices and from online sources including the media, not to discuss the case with others, what to do in the event of misconduct, reinforced by guidance, oaths, posters and other written material and assistance from court staff.

- 3.291 Other consultees made suggestions for alternative preventative measures. The National Union of Journalists argued that the “use of plain English” would assist jurors. Independent Print Limited suggested that “as well as a booklet sent to them in advance” jurors could benefit from “in-court training prior to empanelment with the opportunity to ask questions” and “an ethics helpline”.

- 3.292 The Media Lawyers Association supported our suggestion for better posters. They explained that there should be

posters in jury rooms reminding jurors of their duties; explaining the importance of not researching or contacting those connected with the trial and of the consequences of doing so; explaining/reminding jurors of the burden of proof and the vital importance of trying the case only on the evidence presented in court.

- 3.293 The CPS stated that they were “not aware of a need for further preventative measures to assist jurors” but added that it

may be helpful to include information on asking questions and reporting concerns in the guide sent to jurors with their summons and in the jury video shown on the jurors first day, and possibly in the other methods of communication referred to in paragraph 4.80 [jury manager’s speech; posters; conduct cards].

- 3.294 ACPO suggested that

Arrangements could be put in place to block internet signals in certain parts of the court. The removal of the capability may be sufficient to deter the majority of jurors from temptation in areas such as deliberating rooms.

- 3.295 The Senior Judiciary explained that

The jury bailiff or usher is the means of contact between judge and jury. It should be made clear to jurors in the pre-trial information and by the judge himself at the start of the trial that that is the appropriate mode by which a juror may report concerns in writing. Since questions or difficulties are usually fact specific, we doubt the value or wisdom of a hotline. Only the judge should give advice or a response to a particular query.

As an additional preventative measure, consideration could be given to putting a question to the jury at the end of the summing-up, seeking confirmation that they have properly fulfilled their duties and that they have discharged faithfully their oath to return a verdict solely in accordance with the evidence. The judge would need to emphasise

that the jurors were under a continuing duty in this respect until verdicts had been delivered. While this could provide a final opportunity for any misgivings to be mentioned or considered, and operate as a formality which could deter juror remorse, there is a danger that it may lead to jurors raising issues that cause difficulties or confusion. Careful consideration would need to be given to the advantages and potential disadvantages of such a proposal.

3.296 Godwin Busuttil argued that jurors

should be treated like adults at all times, not like sheep/children. People treated like children tend to behave like children, eg disobediently. Jurors need to have properly explained to them what they are being asked to do and why, ie with proper reasons. The days of judges barking orders to jurors without proper explanation of why such orders are being given should already be behind us. If explaining things properly takes time (and thus money), so be it. That's the price of a jury system.

3.297 Mr Lewis thought that other measures could be put in place but he was "not sure what". He argued that

There is clearly too much of a barrier between "the court" and "the jury". This is perhaps one reason why jurors seek to get information for elsewhere. It will be impossible to block all internet type communication for the duration of anything but the shortest trial. If jurors are dissatisfied with the information they get in the courtroom then instead of blocking their attempts to get more information it would make better sense to assist them in doing so.

3.298 The Bar Council, the CCRC, Wiggin LLP and three individuals responded that no further preventative measures (beyond those listed elsewhere in the CP) were necessary.

3.299 Two other consultees raised concerns, beyond the scope of this CP, about the lack of openness in some court proceedings.