Law Commission

Consultation Paper No 207

CONTEMPT OF COURT: SCANDALISING THE COURT

A Consultation Paper

Any enquiries regarding this publication should be sent to us at The Law Commission, Steel House, Tothill Street, London SW1H 9LJ

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Hon Mr Justice Lloyd Jones (*Chairman)*, Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: The offence of scandalising the court, also known as scandalising judges or scandalising the judiciary, is a form of contempt of court. It may be defined as publishing material or doing other acts likely to undermine the administration of justice or public confidence therein, and usually takes the form of scurrilous abuse of the judiciary or imputing to them corruption or improper motives.

The topic for consultation is whether there is a need for this offence.

Scope of this consultation: The purpose of this consultation is to ascertain whether respondents think that the offence of scandalising the court should be abolished, retained in its current form or replaced by a modified offence and, if so, what form that offence might take.

Geographical scope: This Consultation Paper applies to the law of England and Wales.

Impact assessment: Given that there have been no prosecutions of this offence in England and Wales since 1931, it was not considered necessary to conduct an impact assessment for this consultation.

Duration of the consultation: We invite responses from 10 August 2012 to 5 October 2012.

How to respond

Send your responses either –

By email to: scandalising@lawcommission.gsi.gov.uk or

By post to: Criminal Law team, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Availability of this consultation paper: You can view or download this Consultation Paper free of charge on the consultations pages of our website: www.lawcom.gov.uk

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THE LAW COMMISSION

SCANDALISING THE COURT

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SCANDALISING THE COURT

INTRODUCTION

1. The offence of scandalising the court, also known as scandalising judges or scandalising the judiciary, is a form of contempt of court. It may be defined as publishing material or doing other acts likely to undermine the administration of justice or public confidence therein, and usually takes the form of scurrilous abuse of the judiciary or imputing to them corruption or improper motives. It is distinct from other forms of contempt, such as:

   (1) publications likely to impede or prejudice particular proceedings;

   (2) misbehaviour in court;

   (3) breach of jury confidentiality.

2. The rationale for an offence of scandalising the court derives from the need to uphold public confidence in the administration of justice. In many ways, this need is particularly acute in a democracy, where the power and legitimacy of the judicial branch of government derives from the willingness of the people to be subject to the rule of law. In consequence, the public must have faith in the judicial system.[1]

3. Yet, in a democracy, the public also has the right to speak freely about the exercise of power, which must include the freedom to criticise the judicial system and the judiciary.[2] To this end, such criticism is regarded as "political speech" under the European Convention on Human Rights and therefore subject to the highest degree of protection,[3] although such protection is not absolute. Furthermore, in a democracy where the judicial system enjoys high levels of public confidence, there might be greater room for criticism (whether unfounded or otherwise) because displacing that confidence by such criticism is less likely. Balancing this right to freedom of expression with the importance of upholding public confidence in the administration of justice is at the heart of the debate about the offence of scandalising the court.

4. The issue of principle is whether, because of the judiciary's special role in society, there is a need for special rules to control those who unjustifiably attack and undermine either the institution generally or particular individual judges.[4]

[1] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, p 61 and 62.

[2] A T H Smith (n 1 above), p 62.

[3] *Wingrove v United Kingdom* (1996) 24 EHRR 1; *Lingens v Austria* (1986) 8 EHRR 103; *Thorgeirson v Iceland* (1992) 14 EHRR 843; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 50-51.

[4] A T H Smith (n 1 above), p 81.

5. In England and Wales this branch of contempt was described almost 40 years ago as "virtually obsolescent",[5] and the last recorded successful prosecutions were in 1930[6] and 1931.[7] The last one, *Colsey*, concerned a criticism of Lord Justice Slesser's interpretation of legislation which he had steered through Parliament when he was Attorney General: "Lord Justice Slesser, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears".

6. There have been unsuccessful prosecutions since,[8] but most of the cases reported in England and Wales since the 1930s have been appeals to the Privy Council from Commonwealth countries.[9] It appears that the offence of scandalising the court has been used more frequently in Asia and the Pacific Rim than in England and Wales.[10] It has been argued that the offence may be necessary as a means of preserving the dignity of and respect for the courts in jurisdictions where political conditions are less stable than in England and Wales.[11] On the other hand, it has been argued that prosecutions for this offence may be counterproductive, as they may be perceived, rightly or wrongly, as attempts to suppress political dissent.[12]

7. Interest in the offence in the UK[13] was revived in March 2012 when the Attorney General for Northern Ireland obtained leave to prosecute Peter Hain MP for statements in his book *Outside In*, in which he criticised Lord Justice Girvan's handling of a judicial review application.[14] At a preliminary hearing Mr Hain's counsel argued that the facts did not amount to contempt of court; he also questioned whether scandalising the court still existed as an offence and argued that the prosecution was contrary to the European Convention on Human

5 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347 (Lord Diplock).

6 *Wilkinson*, *The Times* 16 July 1930.

7 *Colsey*, *The Times* 9 May 1931.

8 *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 QB 150.

9 *Ambard v A-G for Trinidad and Tobago* [1936] AC 322; *Perera v R* [1951] AC 482 (PC); *Maharaj v A-G for Trinidad and Tobago* [1977] 1 All ER 411; *Badry v DPP of Mauritius* [1983] 2 AC 297 (PC); *Ahnee v DPP* [1999] 2 AC 294 (PC). On *Ahnee*, see J A Coutts, "Contempt by scandalising the court" (1999) 63 *Journal of Criminal Law* 472.

10 T F W Allen, "Scandalising the Court: The Impact of Bills of Rights", (2002) 10 *Asia Pacific Law Review* 1.

11 *McLeod v St Aubyn* [1899] AC 549, 561; *Ahnee v DPP* [1999] 2 AC 294, 305 and 306.

12 G Robertson and A Nicol, *Media Law* (5th ed 2007), para 7-054; O Litaba, "Does the 'Offence' of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?" [2003] *Deakin Law Review* 6; (2003) 8(1) *Deakin Law Review* 113; V Iyer, "The Media and Scandalising: Time for a Fresh Look" (2009) 60 *Northern Ireland Legal Quarterly* 245.

13 For the position in Scotland and Northern Ireland see paras 14 and 15 below.

14 For comment, see Jennifer James, "Court in the Act" (2012) 162 *New Law Journal* 590.

Rights.[15] The prosecution was later discontinued, after Mr Hain issued a statement clarifying the intention behind his remarks.

8. In the wake of this affair both Lord Lester and Lord Pannick[16] have called for the offence of scandalising the court to be abolished. Together with Lord Mackay of Clashfern and Lord Bew they have proposed an amendment to this effect in the debates on the Crime and Courts Bill.[17] The amendment was withdrawn in return for the Government's undertaking to review the matter before Report stage, which is likely to occur in late October of this year.

9. We are currently engaged in a project to review the law of contempt of court in general, in which we aim to open a consultation in the winter of 2012 and produce our final report in the spring of 2014.[18] Originally the law of scandalising the court formed part of the intended scope of that project. However, because of the Government's undertaking mentioned above, we have decided to bring forward our consideration of scandalising to feed into the Government's consideration of reform. Accordingly we are publishing this consultation paper now and would be grateful for responses by 5 October 2012. We would like to thank Professor Ian Cram of the University of Leeds and Professor ATH Smith of Victoria University of Wellington, New Zealand, for their helpful advice on this project.

CURRENT LAW

10. The first clear mention of an offence of scandalising the court was in a draft judgment of Mr Justice Wilmot in *Almon*:[19] this judgment was never actually delivered,[20] as the proceedings were abandoned, but it has been quoted with approval in subsequent cases.

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for

[15] http://www.independent.co.uk/news/uk/politics/hain-questions-legitimacy-of-charge-7676010.html. For full consideration of the position under the Convention, see para 43 and following.

[16] D Pannick, "Judges must be open to criticism to help to expose injustice", *The Times*, 24 May 2012.

[17] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0004/amend/ml004-v.htm. For details of this amendment and the debates thereon, see House of Lords debates, 2 July 2012, col 555 and following, http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120702-0002.htm#12070239000130 (para 67 and following, below).

[18] http://lawcommission.justice.gov.uk/areas/contempt.htm.

[19] (1765) Wilm 243, 97 ER 94.

[20] The main thrust of the judgment was that contempt by scandalising the court was an apt occasion for the use of a summary procedure, as much as contempt in the face of the court.

> the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.[21]

11. The leading authority is *Gray*,[22] where a journalist was found to be in contempt by scandalising the court for describing Mr Justice Darling as an "impudent little man in horsehair, a microcosm of conceit and empty-headedness". (The article went on to observe that "no newspaper can exist except upon its merits, a condition from which the bench, happily for Mr Justice Darling, is exempt".)[23] As in *Almon* the main thrust of the judgment was that the summary procedure, whether described as "committal" or "attachment", had always formed part of the common law, applying to all forms of contempt.[24]

12. In *Gray*, the offence of scandalising the court was described by Lord Russell of Killowen CJ as follows:[25]

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke LC characterised as "scandalising a court or a judge". (*In re Read and Huggonson*.)[26] That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.

[21] (1765) Wilm 243, 255 and 256.

[22] [1900] 2 QB 36.

[23] The full text of the article can be found at 82 *Law Times Reports* 534 and in D Pannick, *Judges* (1987) p 111.

[24] This conclusion was subsequently contested by Sir John Fox, *The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (1927, reprinted 1972), who argued that historically the summary procedure applied only to contempt in the face of the court, that other forms of contempt were only triable on indictment, and that "committal" or "attachment" in the earlier cases referred to committal to stand trial and not to imprisonment by way of punishment.

[25] [1900] 2 QB 36, 40.

[26] (1742) 2 Atk 469.

13. There is no further detailed definition in the case law. There is therefore some uncertainty about the precise elements of the offence,[27] in particular whether there is a fault requirement[28] and whether the identified defences are true defences or only examples of conduct falling outside the proscribed conduct.[29]

Jurisdictional scope

14. This consultation paper is concerned only with the law of England and Wales, though the law of Northern Ireland is similar.

15. In Scotland the equivalent offence is referred to as "slandering judges" or "murmuring judges".[30] This was formerly a statutory offence under the Judges Act 1540,[31] and is still a form of common law contempt.[32] The last reported prosecution was in 1870;[33] an unreported case, leading to acquittal, occurred in 1965.[34] As in England and Wales, criticism in good faith does not fall within contempt of court. It is recognised that:

> … disappointed litigants sometimes feel aggrieved and that some of them are ill-tempered, and that they may say or write things which are foolish and reprehensible …

and that the process of contempt of court should not:

> … degenerate into an oppressive or vindictive abuse of the court's powers.[35]

16. In the case of *Anwar*[36] a solicitor made a broadcast outside the court at the conclusion of a case attacking the prosecution and the trial process. Proceedings were brought against him for contempt, and he was acquitted: this shows that excessive public criticism of judicial institutions is still capable of being treated as contempt, even if the specific charge of slandering or murmuring is not used.[37] The court observed:

[27] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.8.

[28] Para 30 and following, below.

[29] Para 38 and following, below.

[30] *Stair Memorial Encyclopaedia*, vol 6 p 117 para 320; Gordon, *The Criminal Law of Scotland* (3rd ed 2001), para 50.03.

[31] Repealed by Statute Law (Repeals) Act 1973, Sch 1.

[32] Hume, *Commentaries on the Law of Scotland* I 406.

[33] *Robertson* (1870) 1 Couper 404.

[34] *Walter Scott Ellis*, in Gordon (n 30 above) para 29.63.

[35] *Milburn* 1946 SC 301.

[36] [2008] HCJAC 36, 2008 SLT 710.

[37] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.11

> It is quite possible to conceive of language which would be of such an extreme nature that it did indeed challenge or affront the authority of the court or the supremacy of the law itself, particularly perhaps where the integrity or honesty of a particular judge, or the court generally, is attacked. That would be true, whether or not it related to particular ongoing proceedings. For that reason, if for no others, we reject the submission of senior counsel for the respondent that there could not be a contempt of court following the conclusion of the particular proceedings in question. We believe that what we have just said is wholly consistent with the terms of art 10 of the Convention.[38]

The external elements of the offence

Conduct element

17. The conduct element of the offence appears to require:

    (1) publication in the print, broadcast[39] or electronic media;[40] or

    (2) acts akin to publication, such as carrying a placard outside the court,[41] a series of abusive letters to the judge[42] or statements to the media;[43] or

    (3) in some countries, demonstrations in court such as continued loud complaints.[44]

[38] ATH Smith, (n 37 above), para 3.14

[39] For an example of contempt by broadcast, see the New Zealand case of *Solicitor General v Smith* [2004] NZLR 540, described by A T H Smith (n 37 above), paras 3.32 to 3.40.

[40] In the main part of our project on Contempt we shall consider in detail the implications of publication through electronic media.

[41] *Vidal, The Times*, 14 October 1922.

[42] *Freeman, The Times*, 18 November 1925.

[43] *Anwar* [2008] HCJAC 36, 2008 SLT 710; for comment, see C Munro, "More Heat than Light from *Anwar*" (2009) 13 *Edinburgh Law Review* 104.

[44] *Secretary for Justice v Choy Bing Wing* [2005] 4 HKC 416 (Hong Kong). In England and Wales this would be classified as contempt in the face of the court rather than as scandalising.

18. The content of the publication must be of such a nature as to risk undermining the administration of justice or public confidence therein.[45] This appears to be the meaning of the expression "*calculated* to bring a court or a judge of the court into contempt, or to lower his authority", as found in the earlier authorities.[46] In particular the offence catches insinuations of bias or improper motive.[47] As Lord Atkin said in *Ambard v Attorney General of Trinidad and Tobago*:[48]

> No wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

19. Formerly much emphasis was placed on the distinction between respectful criticism and scurrilous abuse. Increasingly today the style of the publication alleged to constitute the offence is not considered relevant, and vigorous criticism is allowed.[49] The remarks of Lord Justice Salmon in *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)*[50] perhaps represent the turning point in judicial attitudes to the level of abuse they might expect to suffer without the conduct constituting a criminal offence:

> It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits.

Today, "reasonable courtesy" no longer seems to be a requirement. According to Mr Justice Munby (now Lord Justice Munby) in *Harris v Harris*:[51]

[45] Whether the publication actually has this effect, or is likely to do so in the circumstances, is discussed below under the heading of circumstance and consequence elements: para 22 and following.

[46] Para 10 above. In Victorian and Edwardian English the word "calculated" regularly meant "fitted, suited, apt; proper or likely *to*" (Shorter Oxford Dictionary: italics in original): it did not imply that anyone had actually calculated on achieving that result.

[47] I Cram (ed), *Borrie and Lowe: The Law of Contempt* (4th ed 2010), henceforth "Borrie and Lowe", para 11-17; R Clayton and H Tomlinson, *Privacy and Freedom of Expression*, (2nd ed 2010), para 15.99; R Clayton and H Tomlinson, *The Law of Human* Rights, (2nd ed 2009), para 15.99; *R v Editor of New Statesman ex parte DPP* (1928) 44 TLR 301; *Colsey, The Times*, 9 May 1931.

[48] [1936] 1 All ER 709.

[49] C J Miller, *Contempt of Court* (3rd ed 2000), henceforth "Miller", paras 12.43 to 12.47.

[50] [1968] 2 QB 150, 155 and 156.

[51] [2001] 2 FCR 193, 246, para [372].

> … that which is lawful if expressed in the temperate or scholarly language of a legal periodical or the broadsheet press does not become unlawful simply because expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar … Moreover, a much more robust view must, in my judgment, be taken today than previously of what ought rightly to be allowed to pass as permissible criticism. Society is more tolerant today of strong or even offensive language. Society has in large part lost its previous habit of deferential respect. Much of what might well, even in the comparatively recent past, have been considered by the judges to be scurrilous abuse of themselves or their brethren has today, as it seems to me, to be recognised as amounting to no more than acceptable if trenchant criticism.

20. This more relaxed attitude is reflected in the fact that the *Daily Mirror* was not prosecuted when it published upside-down photographs of three Law Lords with the words "You Fools!" following a successful application for an injunction in the *Spycatcher* litigation.[52]

21. It is not altogether clear which courts and tribunals are protected by the offence.[53] Other forms of contempt, such as statements prejudicing proceedings and contempt in the face of the court, were held at common law to apply to superior courts of record and to some other courts such as coroners' courts, consistory courts and courts martial, but not to statutory tribunals such as local valuation courts.[54] A similar view is taken in *Badry v DPP of Mauritius*.[55]

Possible circumstance and consequence elements

22. As stated above, the publication must be such as to risk undermining the administration of justice or public confidence therein. This is primarily a description of the content of the publication, forming part of the conduct element of the offence.[56] However, the question arises whether the definition of the offence goes beyond this so as to include circumstance and consequence elements.

    (1) The current definition of scandalising might be interpreted to include a circumstance element, namely, that the circumstances in which the publication was made render it more likely that there will be an undermining of the administration of public justice or public confidence therein. This might be established by reference to factors such as the audience for the statement and the credibility of the person making it.

[52] B Tripathi, *Contempt of Court and Freedom of Speech: Exploring Gender Biases* (2010) p 68.

[53] Clive Walker, "Scandalising in the Eighties" (1985) 101 *Law Quarterly Review* 359, 364.

[54] *A-G v BBC* [1981] AC 303. A different rule is now applied to some forms of contempt by Contempt of Court Act 1981, s 19, but this does not apply to scandalising.

[55] [1983] 2 AC 297 (PC).

[56] Para 18 above.

(2) The current definition of the offence might also be interpreted to include a consequence element: that the publication had an undermining effect.

CIRCUMSTANCE

23. There is some uncertainty about the possible circumstance element. The current definition of the offence is "any act done or writing published *calculated to bring* a court or a judge of the court into contempt, or to lower his authority." On one interpretation the words "calculated to …" or "risk of …" could be read to include a requirement that the circumstances in which the publication was made, such as the targeted audience, render it more likely that there will be an undermining of the administration of public justice or public confidence therein. An alternative interpretation is that the words in the offence require an assessment of the content of the publication alone.

24. English cases on scandalising the court are few, and do not address this particular question: the term "calculated" remains ambiguous. Cases from other common law jurisdictions seem to fall into two streams.

(1) Some cases do consider the likely public impact of the statement made, given the circumstances. For example, in *Kopyto*[57] the court took into account the fact that the accused was a solicitor for a defeated client expressing dissatisfaction. In *State v Mamabolo*[58] it was held that the test for scandalising the court was "whether the offending conduct, *viewed contextually*, really was likely to damage the administration of justice".[59] In *Solicitor General v Radio New Zealand*[60] it was held that relevant factors will include "the statements published, the timing of their publication, the size of the audience they reached, the likely nature, impact and duration of their influence".[61] The statements cited above[62] about respect for the courts needing more legal protection in more vulnerable jurisdictions also reflect this approach.

(2) There is however one line of cases that holds that allegations of corruption or bias are necessarily such as to damage the administration of justice, and therefore in themselves sufficient to constitute the offence.[63] We saw, above,[64] that Lord Atkin in *Ambard* said that members of the public should "abstain from imputing improper motives to those taking part in the administration of justice". This suggests that, at least in

[57] (1987) 47 DLR (4th) 213.

[58] 2001(1) SACR 686 (CC).

[59] Emphasis added.

[60] [1994] 1 NZLR 48.

[61] One difficulty is that a statement made in court may only reach a minimal audience, but may then be more widely publicised by the media, particularly if contempt proceedings are undertaken. Some account would presumably be taken of how far the person making the statement knew or intended that the remarks would be reported: A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.20.

[62] Para 6.

[63] See n 47 above.

[64] Para 18 above.

cases where such allegations are made, it is sufficient to look at the content alone without considering its likely impact in the circumstances. For example, in *Wain (No 1)*,[65] the High Court of Singapore stated that accusations of bias are "harmful to public interest and are clearly calculated to undermine public confidence in the administration of justice and must necessarily lower the authority of the courts".[66] Similar decisions have been reported in India[67] and Malaysia.[68]

25. It would be possible to explain this distinction away as a difference between the approaches to scandalising in general in different countries.[69] However, the traditional view appears to be that allegations of bias and corruption are a special category, which require a lower level of possible concrete damage, and thus form an exception to the general principle.[70] Geoffrey Robertson has expressed the view that abusive scandalising and imputing improper motives are two separate offences.[71]

26. We argue below[72] that the narrower interpretation, that there must be an actual risk of undermining or discrediting the administration of justice, is required in order for the offence to be compatible with the European Convention on Human Rights. We therefore consider that, under section 6 of the Human Rights Act 1998, a court would be bound to interpret the offence in this way, whether or not the statements made include allegations of corruption or bias.

27. It is not certain how far this requires the court to make detailed enquiries of the likely extent of publicity of the statement, and in particular whether the test of risk should be the same as in the case of publications likely to interfere with particular proceedings.[73] For example the report of the Australian Law Reform Commission[74] proposes that, as scandalising involves undermining *public* confidence in the administration of justice, wide dissemination should logically be

[65] *A-G v Wain (No 1)* [1991] SLR 383.

[66] T F W Allen, "Scandalising the Court: The Impact of Bills of Rights", (2002) 10 *Asia Pacific Law Review* 1, 15.

[67] *E M Sankaran Namboodiripad v T Narayanan Nambiar* AIR 1970 SC 2015; V Iyer, "The Media and Scandalising: Time for a Fresh Look" (2009) 60 *Northern Ireland Legal Quarterly* 245, 254.

[68] T F W Allen (n 66 above) and V Iyer (n 67 above).

[69] T F W Allen (n 66 above) and V Iyer (n 67 above).

[70] See also Clive Walker, "Scandalising in the Eighties" (1985) 101 *Law Quarterly Review* 359, 362. *Solicitor General v Radio Avon Ltd* [1978] 1 NZLR 225, 231 rejects the view that imputation of improper motives is automatically contempt and that there is no defence of truth.

[71] G Robertson, *Courts and the Media* (1981), pp 59 to 74, takes the view that the imputation of improper motives is not a category of scandalising the court but a separate offence: R Martin, "Criticising the Judges" (1982-1983) 28 *McGill Law Journal* 1 n 64. This view is not repeated in G Robertson and A Nicol, *Media Law* (5th ed 2007).

[72] Para 54.

[73] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.44.

[74] Australian Law Reform Commission, *Contempt*, Report No 35 (1987), http://www.alrc.gov.au/report-35, para 253.

a necessary ingredient. In practice however, fairly limited communications such as a letter to a selected group of officials have been held to qualify.[75]

CONSEQUENCE

28. A close examination of the case law suggests that there is no consequence element in the form of a requirement that the administration of justice should in fact have been undermined. Among cases from around the Commonwealth, the nearest to imposing such a requirement is *Kopyto*.[76] In that case one judge (Goodman JA) described a two-stage test: that the publication did in fact bring the administration of justice into disrepute, and that this resulted in a "clear, significant and imminent or present danger to the fair and effective administration of justice". The other judges mentioned only the second requirement; and even that test represented not the scope of the offence at common law but the extent to which it had to be restricted to comply with the Canadian Charter of Rights and Freedoms.[77] In other words, with the exception of Goodman JA, those of the judges who allowed the existence of the offence at all set a high risk threshold but did not require the occurrence of any actual consequence.[78]

29. In conclusion:

    (1) the statements made must be of a nature tending to undermine or discredit the administration of justice;[79]

    (2) there must be a real and substantial risk that, in the circumstances, they will do so;[80] but

    (3) there is no requirement that, as a result of the statements, the administration of justice was in fact undermined or discredited.[81]

The mental elements

30. It seems to be generally agreed that the following mental elements need to be proved:

    (1) there must be a voluntary publication;

    (2) the publisher must know that the publication contains the allegations in question;[82]

[75] *Ex parte Attorney General, re Goodwin* (1970) 91 WN (NSW) 29.

[76] (1987) 47 DLR (4th) 213.

[77] T F W Allen, "Scandalising the Court: The Impact of Bills of Rights", (2002) 10 *Asia Pacific Law Review* 1, 19 to 20.

[78] A T H Smith (n 73 above), paras 3.44 and 3.45.

[79] Para 18 above.

[80] Para 26 above.

[81] Para 28 above.

[82] D Eady and A Smith (eds), *Arlidge, Eady and Smith on Contempt* (4th ed 2011), henceforth "Arlidge, Eady and Smith", para 5-252; *McLeod v St Aubyn* [1899] AC 549.

(3) the publisher must know that the allegations reflect on the courts.[83]

31. It is also clear that it is no excuse that the person publishing the allegations honestly believed them to be true, except as part of a wider defence of public interest.[84]

32. What remains unclear is whether the person publishing the allegations must intend or know that they are liable to undermine the administration of justice. In many cases this will be obvious from the allegations themselves, if sufficiently extreme. Outside these cases there is less consensus. Lord Atkin, in *Ambard*,[85] indirectly suggests that intention is an element of the offence by saying that critics are immune provided that they are "not acting in malice or attempting to impair the administration of justice". In Borrie and Lowe it is argued that there is no requirement of such knowledge or intention,[86] and that this reflects the position in Australia[87] and New Zealand[88] and contrasts with that in Canada[89] and South Africa.[90] A similar view is taken by Miller.[91]

33. In contrast, Arlidge, Eady and Smith concludes that it "would probably be … necessary to prove an intention to interfere with the administration of justice, and in this context that would mean the undermining of public confidence".[92] They remain undecided whether recklessness is sufficient, but cite two cases[93] indicating that the choice lies between intention and strict liability and that recklessness is not an option. The argument in those two cases largely turns on the effect of section 2 of the Contempt of Court Act 1981 on liability for publications, which does not apply to scandalising.[94] However, with the exception of one minority judgment in *Kopyto*,[95] we have seen no suggestion in any case from England and Wales or the Commonwealth that recklessness could be the test of liability in scandalising.

[83] Arlidge, Eady and Smith, para 5-253, *Perera v R* [1951] AC 482 (PC): the remarks were criticisms of rules about remand, but the critic believed that those rules were imposed by the prisons and not the courts.

[84] Arlidge, Eady and Smith, para 5-258.

[85] Para 18 above.

[86] Borrie and Lowe, para 11.25.

[87] For a survey of the Australian cases, see F Bates, "Scandalising the Court: some peculiarly Australian developments" [1994] *Civil Justice Quarterly* 240.

[88] *Solicitor General v Radio Avon Ltd* [1978] NZLR 225.

[89] *Kopyto* (1988) 47 DLR (4th) 213 (Ont CA). For a discussion of the offence in Canada pre-*Kopyto*, see R Martin, "Criticising the Judges" (1982-1983) 28 *McGill Law Journal* 1, 14 and following.

[90] *State v Van Niekerk* 1970 (3) SCA 655(T).

[91] Miller, para 12.28.

[92] Arlidge, Eady and Smith, para 5-248.

[93] *A-G v Newspaper Publishing Plc* [1988] Ch 333; *A-G v News Group Newspapers Plc* [1989] QB 110.

[94] Clive Walker, "Scandalising in the Eighties" (1985) 101 *Law Quarterly Review* 359, 369 and 370.

[95] *Kopyto* (1988) 47 DLR (4th) 213 (Ont CA), by Cory JA.

34. In the earlier cases the Privy Council, in allowing appeals against conviction, observed that there is no evidence "either that the article was written with the direct object mentioned, or that it could have that effect";[96] it is not stated what the effect would be if there was evidence of one but not the other.

35. Those Commonwealth cases that hold that there is no requirement of intention generally rely on *R v Editor of New Statesman ex parte DPP*.[97] In that case Lord Hewart CJ observed that, had intention been proved, the case would have merited imprisonment. This implies that intention is an aggravating factor but not a necessary ingredient of the offence.

36. The most recent authority on this issue is *Ahnee v DPP*,[98] a Privy Council appeal from Mauritius.[99]

> Counsel for the contemnors submitted that the Supreme Court was wrong to hold that mens rea was not an ingredient of the offence of scandalising the court.

The Privy Council disagreed with this submission, in these words:

> The publication was intentional. If the article was calculated to undermine the authority of the court, and if the defence of fair criticism in good faith was inapplicable, the offence was established. There is no additional element of mens rea. The decision of the Supreme Court on this point of law was sound.[100]

37. On balance we consider that the view in *Ahnee*[101] would prevail and that there is no requirement of intention to undermine the administration of justice, or even of recklessness. However, given that nowadays only fairly extreme and scurrilous forms of abuse seem to fall within the offence, the intention will usually be fairly obvious.

[96] *Ambard v A-G of Trinidad and Tobago* [1936] AC 322.

[97] (1928) 44 TLR 301; for the effect on Commonwealth cases see Arlidge, Eady and Smith, para 5-247.

[98] [1999] 2 AC 294.

[99] The decision presumably represents the Privy Council's view of the law in England and Wales as well as in Mauritius, though it is not binding in England and Wales.

[100] [1999] 2 AC 294, 307.

[101] [1999] 2 AC 294, para 100 above.

Defences

38. There is some disagreement among the textbooks[102] on whether it is a sufficient defence that the allegations are true. The view in Arlidge, Eady and Smith[103] appears to be that it is, though it is uncertain whether this is because there is a formal defence of justification as in libel, or rather because the basis of the offence is the making of unfounded allegations. Borrie and Lowe[104] expresses some doubt on the point, but observe that, if truth is not a defence, the offence is probably not compliant with the European Convention on Human Rights. Miller also suggests that truth is not a sufficient defence.[105]

39. One possible reason for the reluctance to expressly acknowledge truth as a formal defence is that this would tend to turn the proceedings for scandalising the court into a trial of the conduct of the judge who has been criticised.[106] This is not something that can be easily done within the limitations of the summary mode of proceeding for contempt.

40. It does appear to be a defence that the allegations form part of a fair discussion on a question of public interest.[107] As stated by Lord Denning MR:[108]

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
>
> It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not.

41. More recently, in *Ahnee v DPP*,[109] Lord Steyn said:

> The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of

[102] Also among Commonwealth cases, in particular from Australia.

[103] Arlidge, Eady and Smith, para 5-257.

[104] Paras 11-22 and 11-23.

[105] Paras 12.32 and 12.33.

[106] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf para 3.47.

[107] Arlidge, Eady and Smith, para 5-258 and following; Miller, para 12.22; *Perera v R* [1951] AC 482 (PC). See also the Salmon Report, *The Law of Contempt as it affects Tribunals of Inquiry*, (1969) Report No 35 para 421, where the same view is assumed.

[108] *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 QB 150.

[109] [1999] 2 AC 294.

> criticising, in good faith, in private or public, the public act done in the seat of justice".

42. Again it is not certain whether this is a formal defence or simply a reason for holding that the utterance in question is not the sort of scurrilous abuse that the offence envisages.[110] On either view, the present question addresses the substance and context of what is said, and not the mode of expression.[111]

THE HUMAN RIGHTS ASPECT

43. Article 10 of the European Convention on Human Rights states that

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

According to paragraph 2 of the same Article, this right may be subject to such restrictions "as are prescribed by law and are necessary in a democratic society", for the purposes, among others, of

(1) the protection of the reputation or rights of others; and

(2) maintaining the authority and impartiality of the judiciary.

44. Another relevant consideration is that of certainty. Article 7 provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

This means, among other things, that the criminal law must be sufficiently accessible and precise to enable an individual to know in advance whether his or her proposed conduct is criminal.[112] As explained in *Korbely v Hungary*:[113]

> From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The court has thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.

[110] Miller para 12.37.

[111] The question of style and language is addressed at para 19 and following, above.

[112] *G v France* (1996) 21 EHRR 288.

[113] Application no. 9174/02, judgment of 19 September 2008, para 70.

45. Some academic commentators suggest that, given the virtual obsolescence of the scandalising offence,[114] it cannot be "necessary" and that that is in itself sufficient to make the offence incompatible with the Convention:[115]

> Is it a response to a pressing social need, in the conditions current in English society? It is hard to see any pressing social need which demands general protection for the judges against public comment. Even given the sensitivity of the European Court of Human Rights to local needs, it is hard to see how the law on scandalizing could be said to be proportionate to the aim pursued. Not only is it counter-democratic, but it is also highly unlikely to achieve its purpose: in modern English conditions, the more thoroughly expression is suppressed, the more likely it is to fuel, rather than allay, suspicions about the conduct and attitudes of the judges.

46. An offence of this nature has been held unconstitutional in the United States;[116] Justice Frankfurter described it as "English foolishness".[117] The offence of scandalising the court has also been disapproved as incompatible with the Canadian Charter of Rights and Freedoms.[118] These decisions are not decisive of its standing under the European Convention, as North American jurisdictions traditionally tend further in the direction of free speech absolutism than European ones.[119] In Australia, by contrast, while the value of free speech has been frequently affirmed judicially, it has no explicit constitutional protection,[120] and prosecutions for scandalising the court have continued to be brought in recent times.[121]

[114] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347.

[115] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed 2003), pp 970 and 971, cited in Arlidge, Eady and Smith, para 5-217.

[116] *Garrison v Louisiana* (1964) 379 US 64. See also *Pennekamp v Florida* (1946) 328 US 331; *Craig v Harney* (1947) 331 US 367; D C Kramer, "The Right to Denounce Public Officials in England and the United States" (1968) 17 *Journal of Public Law* 78, 89 and following.

[117] *Bridges v California* (1941) 314 US 252, 287. In *Pennekamp* (n 116 above) he observed that "weak characters ought not to be judges".

[118] By a majority in *Kopyto* (1988) 47 DLR (4th) 213 (Ont CA); Arlidge, Eady and Smith, para 5-263; R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 15.438.

[119] T F W Allen, "Scandalising the Court: The Impact of Bills of Rights", (2002) 10 *Asia Pacific Law Review* 1, finds considerable differences in the extent to which the offence has been judicially modified in different Commonwealth countries to meet the requirements of their respective Bills of Rights. But except for Canada none of them have questioned the existence of the offence in principle.

[120] Justice R Sackville, "How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary" [2005] *Federal Judicial Scholarship* 11.

[121] *Gallagher v Durack* [1983] HCA 2; (1983) 152 CLR 238; *Re Colina, ex parte Torney* [1999] HCA 57, (1999) 200 CLR 386; *Hoser and Kotabi Pty Ltd* [2001] VSC 443. C J Miller, "Some problems of contempt" [1992] *Criminal Law Review* 106, 109. The offence has also been held compatible with freedom of expression in Hong Kong: *Secretary for Justice v The Oriental Press Group* [1998] 2 HKLRD 123.

47. The French Criminal Code contains offences of abuse of courts and tribunals,[122] introduced in 1958:[123] so far as we have been able to discover, these have never been questioned on human rights grounds in Strasbourg.[124]

48. There have been several cases before the European Court of Human Rights ("ECtHR") concerning publications attacking judges.[125]

(1) *Barfod v Denmark*:[126] an offence of "insulting acts or words degrading the honour of another" was held to be compliant with the Convention. In this case the victim happened to be a judge, but that was not the essence of the offence. The main point was that personal abuse was distinct from political debate, so that restraining it was not an infringement of free speech.

(2) *Prager and Oberschlick v Austria*:[127] an offence of criminal defamation was held to be compliant, on similar reasoning. However, in a dissenting judgment Judge Martens observed:

> I agree that public confidence in the judiciary is important … but rather doubt whether that confidence is to be maintained by resorting to criminal proceedings to condemn criticism which the very same judiciary may happen to consider as "destructive".[128]

(3) *De Haes and Gijsels v Belgium*:[129] the case concerned a civil libel suit brought by three judges and an advocate general in respect of a newspaper article accusing them of bias in connection with a divorce custody application. The court observed that:[130]

[122] Articles 434-24 (abuse by sending materials to court or judge) and 434-25 (discrediting decision of court), see also P Portier, "Media Reporting of Trials in France and in Ireland" (2006) *Judicial Studies Institute Journal* (Ireland) 197 n 34 and text.

[123] E Barendt, *Freedom of Speech* (2nd ed 2007) p 319, cited by Borrie and Lowe, para 11.5.

[124] For a general comparison between laws about criticising judges in different countries, see M K Addo (ed), *Freedom of Expression and the Criticism of Judges* (2000), and M K Addo, "Are Judges beyond Criticism under Article 10 of the European Convention of (*sic*) Human Rights?" (1998) 47 *International and Comparative Law Quarterly* 425.

[125] See also *Skałka v Poland* (2004) 38 EHRR 1 (sentence of eight months for calling judges "irresponsible clowns" and "cretins" was held to be disproportionate); *Kyprianou v Cyprus* (2007) 44 EHRR 565 (offensive words addressed to bench during trial: punishment was held to be disproportionate); R Clayton and H Tomlinson (n 118 above), paras 15.380 to 15.385.

[126] Series A No 149 (1991) 13 EHRR 493.

[127] (1996) 21 EHRR 1.

[128] (1996) 21 EHRR 1, 24 at n 47; cited in I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002) ch 5.

[129] (1998) 25 EHRR 1.

[130] Para 37 of the judgment.

> The courts — the guarantors of justice, whose role is fundamental in a state based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.

However, it was held that in the particular case the publication was well researched and formed part of a serious debate, and that any inaccuracies were minor. The restraint on free speech was therefore not justified on the facts.[131]

(4) *Zugić v Croatia*:[132] a litigant entered a notice of appeal containing strongly-worded and disrespectful descriptions of the proceedings appealed against, and was convicted of "abuse of rights in the proceedings". It was held that the restraint on freedom of speech was necessary and proportionate:

> … while parties are certainly entitled to comment on the administration of justice in order to protect their rights, their criticism must not overstep certain bounds. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention.

49. Three points arise from these judgments. First, in England and Wales, it is customary to emphasise that the offence of scandalising the court exists to protect not the personal dignity of judges but the administration of justice as a process.[133] However, the offences upheld by the ECtHR are mostly offences of criminal defamation designed to protect individuals. Part of their reasoning is that attacks on individuals are less worthy of respect on free speech grounds than allegations about the justice system, which could spark a serious debate. This fits with the fact that one of the exceptions to the Convention right to free speech is that the restraint is necessary to protect "the rights or reputation of others". It is generally easier to prove that a given publication is likely to injure an individual's reputation than that it is likely to undermine the justice system. However, the judgments do mention the protection of the "authority and impartiality of the judiciary" as a secondary and indirect justification for particular proceedings.

[131] Other cases where publication was held to be allowable on grounds of public interest include *Amihalachioaie v Moldova* (2004) 17 BHRC 689 and Application 49418/99: *Hrico v Slovakia*, judgment of 20 July 2004 (unreported, but cited in A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009), para 4.10.40 n 4).

[132] Application no. 3699/08, judgment of 31 May 2011, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104933.

[133] Report of the Committee on Contempt of Court (1974) Cmnd 5794 (henceforth "the Phillimore Report") para 162; Lord Denning in *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 QB 150, 154 (para 40 above).

50. Second, the important point is to defend the courts from *unfounded* destructive attacks. Borrie and Lowe therefore doubts whether the scandalising offence is Convention compliant, in the absence of a clear defence of truth.[134]

51. Third, a criminal offence is normally drafted with a fixed set of conditions: if the conditions are satisfied, the offence has been committed, if not, it has not, regardless in either case of whether prohibiting that particular form of conduct in those particular circumstances serves the interest which the offence was created to protect. The court in the *Sunday Times* case,[135] however, held that the test of necessity[136] applies not only to the existence of the offence but also to each instance of its use. In other words, the court, or perhaps the prosecution, as well as the legislature, is bound to consider the necessity test. The ECtHR left no room for the argument that, though a particular publication may not in itself cause significant damage to the justice system, a series of such publications, or a social climate in which they are tolerated, may do so.

52. The ECtHR appears to have followed the same approach in *De Haes and Gijsels v Belgium*.[137] A restraint on defamation is justifiable in principle, and the protection of the courts from unwarranted attacks is one reason for using it. However the contents, tone and context of the publication must be taken into account in deciding whether there is a necessity for restraint in the particular case.

53. The test of necessity in Article 10 is not quite as narrow as it sounds. Protecting the authority of the judiciary or the rights of others may well be legitimate purposes underlying the existence of such an offence but there may be other ways of achieving the same ends. As soon as those alternative means of protecting against a defined harm or wrong are identified, one could logically argue that the use of the criminal offence is not "necessary" because one could use the alternative means. A more sensible meaning, consistent with the result of the ECHR cases though not explicitly laid down in any of them, would be that an offence is necessary if it is "justifiable as a way of achieving that purpose and, given the strategy chosen, no wider than is necessary for that purpose".

54. Part of the definition of scandalising the court is that the publication in question poses a risk of undermining the process of law or public confidence therein. As stated above,[138] it is uncertain whether this means only that that is the tendency of the publication given its content or also that there must be an actual risk given the circumstances. It is arguable that the latter interpretation is necessary if the offence is to comply with the Convention requirement that the restraint must be necessary on the facts. This would reflect the finding that the "serious risk of substantial prejudice" test[139] was considered necessary in order to make the strict liability rule compliant with the same requirement. As a court deciding whether a particular publication scandalises the court must interpret the common law taking

[134] Paras 12-22 and 12-23. See also Miller, para 12.51.

[135] *Sunday Times v United Kingdom* 2 EHRR 245 (judgment of 26 April 1979).

[136] Para 43 above.

[137] Para 48(3) above.

[138] Para 22 and following.

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

account of the Convention test, we consider that the test of actual risk is the one that now applies.[140]

55. It seems unlikely, therefore, that the ECtHR would declare the existence of the offence to be incompatible with the Convention. It is much more likely to look into the facts of the particular case in order to decide whether restraint was necessary in the circumstances, as in the *De Haes* case.

56. However, the effect of this could be to reduce the scope of the offence considerably.

    (1) Given its conclusions in *De Haes,* the court is likely to hold that the necessity for abridging freedom of speech only arises where the attack is wholly unfounded: if there is any possible truth in it, the public interest arguably requires that it should be openly discussed. This would in effect create a defence of truth.

    (2) There is also a risk that the offence would be found incompatible with Article 7 on the ground that it is insufficiently certain,[141] if the prosecution has not proved an intention to undermine the administration of justice. The law lacks sufficient certainty on this element with the three major textbooks disagreeing whether such an intention forms part of the offence.

    (3) As explained above,[142] the ECHR Article 10 necessity test must be applied to the individual publication without regard to the wider context. In other words, the individual publication, taken by itself, would have to pose a risk of undermining the course of justice or public confidence therein. For example, an attack on a particular judge might meet this criterion, as it may make potential litigants and defendants uncertain whether they will obtain justice if they appear before that judge. This would in effect reduce the scope of the offence to one of criminal libel on judges, like the Continental offences.

RETAINING, ABOLISHING OR MODIFYING THE OFFENCE

57. The choice appears to be between retaining the offence in its present form, abolishing it without replacement, modifying it or replacing it with a new offence, which would not necessarily be a form of contempt. Previous proposals include the following.

[140] And for this reason, we so conclude at para 26 above.

[141] Para 44 above.

[142] Paras 51 and 52.

(1) The Phillimore Report[143] recommended that scandalising the court should be replaced by a new and strictly defined criminal offence, constituted by the publication, in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. There should be a defence of justification, but this would apply only if the allegations were true and publication was for the public benefit.[144]

(2) The Law Commission, in its 1979 report on "Criminal Law: offences relating to interference with the course of justice",[145] recommended the creation of an offence of publishing or distributing a false statement alleging that a court or judge is or has been corrupt in the exercise of its or his functions. It did not mention whether this would entail the abolition of the offence of scandalising the court, but the reform was presented as a modification of the recommendation in the Phillimore Report.

(3) The Australian Law Reform Commission, in its 1987 Report,[146] recommended that the whole of the law of contempt be codified. Scandalising the court would be replaced by an offence of "publish[ing] an allegation imputing misconduct to a judge or magistrate in circumstances where the publication is likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity".[147]

(4) A similar offence was recommended by the Western Australia Law Reform Commission in 2003.[148]

None of these recommendations has been implemented.

Retention

58. There is an argument for retaining the offence in its current form, on the ground that it is aimed at safeguarding the authority of the judiciary, which is a legitimate aim under the European Convention on Human Rights. The offence does not go further than required for that purpose, as it exists at common law and judges applying it are bound to interpret it in the light of the Convention.[149] It could further be argued that, if one of the purposes of the law of contempt is to create a sanction for publications which interfere with the administration of justice, this should apply equally whether or not the interference impinges on particular proceedings.

[143] Phillimore Report para 164.

[144] Phillimore Report para 165. The purpose of this was to prevent every prosecution for the new offence from turning into an investigation of the judge's private and judicial life: para 39 above.

[145] (1979) Law Com No 96.

[146] Australian Law Reform Commission, *Contempt*, Report No 35 (1987), http://www.alrc.gov.au/report-35.

[147] Para 460 of the report.

[148] Report on Review of the Law of Contempt, Project No 93 (2003), http://www.lrc.justice.wa.gov.au/2publications/reports/P93-R.pdf, pp 114 to 116.

[149] See paras 26 and 54 above.

59. The two main arguments for abolition, considered below,[150] are that its use is unjustified in principle and that it is obsolete. As against these, Miller argues:[151]

> Much more controversially, it may also be a contempt to "scandalise the court" and thereby undermine public confidence in the integrity of the judiciary. Although this form of contempt is an easy target for criticism, it has not been used in England for many years. Nor does it seem to have stifled what is often stringent criticism. Should it be abolished either because its use is unjustified or because it has fallen into disuse? I have my doubts on both counts. For reasons which I do not claim to understand, Australia has seen a number of cases of scandalising the court in recent years. In one a term of three months' imprisonment was imposed in respect of much publicised suggestions by a trade union official that a particular decision had been reached only because of pressure exerted by a demonstrating rank and file.[152] I do not think that it is fanciful to suggest that public confidence in the administration of justice is undermined by such assertions from a powerful interest group.

60. We consider that there are several respects in which the offence could be impugned on the grounds of uncertainty.

(1) One is whether there can be liability for scandalising the court if the statements made are true. Even apart from the objection of uncertainty, there is an argument, following Borrie and Lowe,[153] that the limitation on freedom of speech entailed by this offence is not "necessary" except when the statement made is unfounded.

(2) Another is whether there is a requirement of intention to undermine the administration of justice. Here the sole objection is on the ground of uncertainty: strict liability offences are not intrinsically objectionable from the human rights point of view.[154]

(3) A third is whether it is sufficient that the content of the statements has the tendency to undermine or discredit the administration of justice or whether the circumstances need to be such that there is a substantial risk that the administration of justice will in fact be undermined or discredited. This is objectionable on the ground of uncertainty. In addition, it is strongly arguable that if there is no requirement of actual risk the offence is wider than necessary from the human rights point of view.[155]

[150] Para 63 and following.

[151] C J Miller, "Some Problems of Contempt" [1992] *Criminal Law Review* 106, 109.

[152] *Gallagher v Durack* (1983) ALR 53 (Australian High Court) see also *A-G for New South Wales v Mundey* [1972] 2 NSWLR 887 (NSW Sup Ct).

[153] Para 50 above.

[154] *G* [2008] UKHL 37, [2009] 1 AC 92.

[155] Para 54 above.

61. For these reasons we do not think that the offence should be retained in its current form.

Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.

Abolition

62. Another possibility is to abolish the offence without replacement, as proposed in the amendment recently introduced in the debates on the Crime and Courts Bill.[156] It may be necessary to clarify that the abolition of this offence does not affect liability for behaviour in court or conduct that may prejudice or impede particular proceedings. Liability for other offences, such as the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour to cause harassment, alarm or distress,[157] would of course be unaffected. One advantage of this course would be that prosecution for these offences will follow the normal criminal procedure, rather than the summary procedure used in contempt cases, and would be perceived as fair and impartial.[158]

Arguments for abolishing the offence

63. Some arguments for abolishing the offence are as follows.

(1) As it has not been used successfully since 1931, any attempt to revive it, such as in the case of Peter Hain,[159] is likely to be controversial.

(2) The law is not enforced at present; for example, there exists a great deal of scurrilous internet material attacking judges in family cases. This does not appear to have significant adverse consequences, except for promoting the impression that the law can be flouted with impunity: in general, a law should be either enforced or abolished.

(3) In some cases attempts to enforce the law to safeguard the reputation of particular judges would only provoke further ridicule.

(4) Some defendants would welcome the opportunity to appear in person when prosecuted for scandalising, in order to continue attacking the judges in public.

64. A further argument, mentioned above,[160] is that prosecutions for scandalising are counterproductive, as they give the impression that the judicial establishment is trying to stifle criticism. As argued by Justice Black:[161]

[156] Para 8 above.

[157] Public Order Act 1986, s 5.

[158] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.40.

[159] Para 7 above.

[160] Para 6 above.

[161] *Bridges v California* (19410 314 US 252, 271 and 272.

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.[162]

65. Another argument is that, given the summary nature of contempt proceedings, prosecutions for scandalising are inherently at risk of being perceived as self-serving.[163] This however could be remedied by changing the procedure rather than by abolishing the offence.[164]

66. Robertson and Nicol[165] argue:

> Scandalising the court is an anachronistic form of contempt. … The danger of leaving such a crime on the books is well illustrated by recent contempt prosecutions in other countries that have inherited the common law … In certain Commonwealth countries there does exist an unhealthy relationship between the judges and the Government that appoints them and scandalising the court is a crime that has been invoked as an instrument of oppression, to silence honest criticism of biased judges.
>
> It is to be hoped that the Privy Council will in due course reconsider the dicta in *Ahnee* and rule that a criminal offence of criticising judges is incompatible with freedom of expression … . The history of contempt by scandalising the court, both in Britain and especially in the Commonwealth, argues strongly for its abolition.

67. Lord Pannick, in the debate on his amendment to the Crime and Courts Bill, argued as follows.[166]

> This bizarre episode[167] has damaged the reputation of the legal system in Northern Ireland and resulted in far more publicity for Mr Hain's book than it would otherwise have received, or indeed merited. Whatever the merits or lack of – I take no position on this – in Mr Hain's critical comments, surely a former Secretary of State, or indeed any citizen, should be able to express his views about a judge without being threatened with a prison sentence. If the Attorney General for Northern Ireland is going to revive this otherwise

[162] Cited by D Pannick, *Judges* (1987) p 131.

[163] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.72.

[164] Para 90 below.

[165] G Robertson and A Nicol on, *Media Law* (5th ed 2007), paras 7-054 and 7-055.

[166] House of Lords debates, 2 July 2012, col 555 and following, http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120702-0002.htm#12070239000130.

> moribund branch of the criminal law, Parliament should kill it off before it does any further damage. There is simply no justification today for maintaining a criminal offence of being rude about the judiciary – scandalising the judges or, as the Scots call it, murmuring judges. We do not protect other public officials in this way. Judges, like all other public servants, must be open to criticism because, in this context as in others, freedom of expression helps to expose error and injustice. It promotes debate on issues of public importance. A criminal offence of scandalising the judiciary may inhibit others from speaking out on perceived judicial errors.
>
> I would be surprised to learn that this view was not shared by the vast majority of serving judges …
>
> Since the Attorney General of Northern Ireland has woken up this pitiful legal animal, we should take this opportunity to put it finally to sleep.

68. Most of the other participants in the debate (Lords Bew, Goldsmith, Carswell and Beecham) agreed with these arguments, and Lord Borrie, while regretting the disappearance of the offence on sentimental and antiquarian grounds, concluded:

> Sad though I am that this crime may disappear, I cannot argue against the substantive arguments that have been raised. I shall be surprised if the Government can produce any against, and although I have teased the noble Lord, Lord Pannick, somewhat, he has made out a substantial case and I hope that the Government will react positively.

69. The suggestion was made[168] that the matter could be left for the Law Commission's review of the law of contempt. As however that review is due for completion in 2014, and the proposers of the motion wished to move more quickly, it was agreed that the Government would review the matter before report stage, considering whether abolition of the offence would leave a gap in the law and consulting the devolved administrations of Scotland and Northern Ireland. That undertaking having been given, the amendment was withdrawn.[169]

Arguments against abolishing the offence

70. The argument for retaining the offence in some form is that:

[167] The Peter Hain case, para 7 above.

[168] Lord McNally, col 563.

[169] Col 564.

> It is important to the determination of legal disputes that those deciding them should not be cowed or subjected to unjustified ridicule by a sometimes hostile (and possibly misinformed) press.[170]

71. Venkat Iyer,[171] like Robertson and Nicol,[172] argues that the offence has been over-used in Asian and Pacific Rim jurisdictions, and that this over-use amounts to political repression. However, he observes that there are a few recorded cases in which its use was thoroughly justified, making abolition undesirable. He cites the following examples.

    (1) In *Wong Yeung Ng v Secretary of Justice*[173] a newspaper was held guilty of contempt for describing some judges as "dogs and bitches", "scumbags", "public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong", "British white ghosts" and "pigs", and threatening to "wipe [them] all out".

    (2) In a then unreported case in South Australia,[174] a radio presenter discussing a story about a magistrate invited his listeners to "smash the judge's face in".[175]

    The common feature of these two cases are that the abuse, while strong, was too generalised to support an action for defamation. Taken literally, the language used would amount to the offence of encouraging any of a range of offences of violence.[176] If contained in a communication to the judges themselves, it could be prosecuted as a public order offence.[177] The question is whether there ought to be sanctions for such conduct even if the language is intended and understood as mere rhetorical exaggeration and vulgar abuse: if so, the abolition of scandalising the court might indeed leave a gap in the law.

72. According to Iyer, it would therefore be undesirable to abolish the offence; also, it is politically unlikely that most Commonwealth governments would be prevailed upon to do so. It would be better for the offence to be clarified so that it would not impose liability on publications forming part of a discussion on matters of public interest: the test should be one of "responsible journalism". (Our own view is that such a test would be unjustified in principle and too vague to be workable in practice.)

[170] A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.70.

[171] "The Media and Scandalising: Time for a Fresh Look" (2009) 60 *Northern Ireland Legal Quarterly* 245.

[172] Para 66 above.

[173] [1999] HKCA 382.

[174] Now reported as *DPP v Francis (No 2)* [2006] SASC 261.

[175] Iyer (n 171 above) p 255 n 65.

[176] For "encouraging" offences in general see Serious Crime Act 2007, Part 2.

[177] Para 62 above.

73. It could also be argued that the correlation between the use of the scandalising offence and political repression is not complete. In particular, the argument advanced by Robertson and Nicol, Allen and Iyer does not appear to explain the fairly frequent use of the offence in Australia.[178]

The effect of abolishing the offence

74. In the end, no conclusive argument can be drawn from similarities and contrasts between England and Wales and other jurisdictions. Whether the scandalising offence is used in another country because it is needed, or as an unwanted mechanism of oppression, the question for us remains whether the abolition of the offence would leave a gap in the law.

75. Many instances of scandalising would be covered by civil actions for defamation or by public order offences.[179] Insulting remarks to judges in court would continue to be covered by "contempt in the face of the court". Serious criticisms, political or otherwise, are probably excluded from the scope of the offence anyway, for human rights reasons.

76. There remain attacks of the extreme type found in the examples in Iyer's article.[180] We may think that, given the general habits of British journalism, these are unlikely either to occur or to be taken seriously, and that the few examples that do occur will be covered by other offences.[181] If so, there is an argument for abolishing an offence so unlikely to be used. On the other hand, there is an argument for retaining it as a signal that society does not wish the standard of journalism to fall to a state where such attacks are possible. Further, in modern conditions, where the facility of making widely publicised comments on public affairs is no longer confined to professional journalists, the argument that publishers are likely to be restrained by a professional ethos no longer holds.

77. It has been argued that there is no need for judges to have a special protection that is not extended to other persons of prominence such as the monarch and Government ministers.[182] As against that, the view taken in the cases is that the offence exists to protect not the judges as individuals but respect for the rule of law. It is also argued that the judges are in a unique position in which their ability to answer back is limited. In *Prager and Oberschlick v Austria*[183] the court observed:

> Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed state, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect

[178] The same point is made by A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.27.

[179] Eg the offence under Public Order Act 1986, s 5, para 62 above.

[180] Para 70 above.

[181] Para 70 above, last paragraph.

[182] M K Addo, "Are Judges beyond Criticism under Article 10 of the European Convention of (*sic*) Human Rights?" (1998) 47 *International & Comparative Law Quarterly* 424.

[183] (1996) 21 EHRR 1; see para 48(2) above.

> such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

78. In the House of Lords debate, Lord Pannick replied to these arguments as follows:

> The justification often given for retaining this offence is that we need to prevent public confidence in the administration of justice from being undermined. The irony is that public confidence in the judiciary is undermined far more by legal proceedings that suggest that the judiciary is a delicate flower that will wilt and die without protection from criticism than by a hostile book or newspaper comment that would otherwise have been ignored.
>
> The other argument often presented in favour of this category of criminal offence is that judges cannot answer back. They can and they do. Lord Justice Sedley was the most recent judge to sue for libel, winning an apology in the High Court last year after bringing proceedings in respect of false statements in the Daily Telegraph about his conduct of a case.

79. Judges were formerly discouraged from making public statements by the Kilmuir Rules,[184] so called after the Lord Chancellor who set them out in a letter to the Dirctor General of the BBC. These were not binding rules, but an explanation of the then attitude of the judiciary. They were relaxed in 1987, and the then Lord Chancellor, Lord Mackay of Clashfern, in his 1993 Hamlyn Lectures, expressed the view that communication with the public was a matter which judges should decide for themselves.[185] Judges have since then taken advantage of this freedom.[186]

80. Ian Cram[187] observes:

> In the past, defenders of scandalising in England and Wales pointed to the fact that judges were precluded from replying under the Kilmuir Rules.[188] In recent times, however, there has been a move away from

[184] See n 188, below. The original text is set out in A W Bradley, "Judges and the Media: the Kilmuir Rules" [1986] *Public Law* 383, 384.

[185] Lord Mackay, *The Administration of Justice* (1993). See also A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, para 3.60; Lord Neuberger's 2012 Holdsworth Lecture, http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf.

[186] For example in 1996 Mr Justice Garland wrote a letter to the New Law Journal and won an apology from Channel 4 for statements made in its *Trial and Error* series: Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (2002), ch 5 n 37; A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, n 87.

[187] Ian Cram, above (n 186).

[188] In a letter to the Director General of the BBC written in 1955, the Lord Chancellor had said:

> the model of judicial reticence endorsed therein. Increasingly, judges are being encouraged to engage with the media in an effective manner in order to communicate with the public. Thus, the Lord Chancellor's Department in England and Wales issued guidance in 1997 to judges on speaking to the media in order to avoid media misreporting of sentencing matters.[189]

81. Cram also notes that judges are now less reluctant to bring defamation actions in appropriate cases.

> Thus in 1992 Mr Justice Popplewell successfully sued the *Today* newspaper for suggesting that he had fallen asleep during a murder trial.[190]

82. Given all these developments, we think there is no longer the same force in the argument that "the judges cannot answer back", whether in the form of general public statements or of actions for defamation.

83. It could be argued that to abolish the offence in the expectation that judges will bring defamation actions is to shift the burden of enforcing respect for the processes of law from the public purse to the judges' private resources. However, given the virtual disuse of the existing offence, any burden so shifted is likely to be small.

84. On balance we take the view that the offence is redundant and that abolishing it would leave no gap in the law. The absence of any successful prosecution since 1931[191] is in itself strong support for the view that it is unnecessary.

We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.

A modified offence

85. A third alternative would be to consider creating a modified version of the offence. Several models might be adopted. It would seem that the minimum changes that would be necessary to ensure ECHR compatibility and to avoid the uncertainty of the present law are:

(1) to clarify that the offence is only committed where there is a substantial risk of serious harm to the administration of justice;

> … the overriding consideration … is the importance of keeping the judiciary in this country insulated from the controversies of the day. So long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable; but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism …

[189] Press Notice 57/97 issued on 26 March 1997.

[190] This action was reported by *The Times*, 22 and 24 July 1992.

[191] Para 5 above.

(2) to provide that the offence is only committed when the statements are untrue;

(3) to clarify whether it is an offence of strict liability or whether intention or recklessness is required;

(4) to clarify the defence of fair comment on a matter of public interest.[192]

These changes could be made either by statutory limitation, analogous to the approach of the 1981 Act to the strict liability rule, or by the creation of a new offence.

86. The question is whether the offence, once narrowed as much as that, is worth retaining (particularly if a requirement of intention is incorporated). As argued above,[193] the remaining scope would be somewhat similar to that of a specialised form of criminal libel. However, the common law offence of criminal libel was rarely used over the last century, and was abolished in 2010.[194] Prosecutions for scandalising the court have been even rarer, the last successful examples in England and Wales being in 1930 and 1931.

87. Another possibility is a limited offence, not called contempt or scandalising, targeting specific accusations against the judiciary, as mentioned above.[195] Such an offence might be hard to monitor and enforce, given the scale of public comment that takes place through modern media. However, this difficulty equally impinges on the law of defamation and existing offences such as contempt by publication and is not in itself a conclusive reason for not making the attempt.

88. As mentioned above,[196] we made a similar recommendation in 1979 in the context of a review of offences against the administration of justice. We did not specifically recommend the abolition of scandalising the court, but the offence then proposed, of publishing or distributing a false statement alleging that a court or judge is or has been corrupt in the exercise of its or his functions, would largely supersede it. For the reasons given above, in particular the greater social freedom for judges to make public statements or bring actions for defamation, we no longer propose this as our preferred option. Nevertheless if it is considered that scandalising the court should be replaced by a statutory offence this remains a possible model.

[192] V Iyer, "The media and scandalising: time for a fresh look" (2009) 60 *Northern Ireland Legal Quarterly* 245.

[193] Para 56(3).

[194] Coroners and Justice Act 2009, ss 73 and 182(2)(a). We recommended the abolition of criminal libel in our report of 1985 (*Criminal Law: Report on Criminal Libel*, Law Com No 149; Cmnd 9618), which also recommended replacing it by a more limited and specific offence. This last recommendation was not followed.

[195] Para 57.

[196] Para 57(2).

89. The Australian Law Reform Commission's 1987 report[197] considered the reasons for and against an offence of scandalising the court at great length.[198] In particular, it noted that no other common law country had abolished the offence. After public consultation it concluded that there was a special need for the protection of judges which was not adequately met by civil defamation proceedings.

> The overall effect of this [proposal] was to confine the scope of scandalising to falsehoods which are known to be false, or uttered or published with reckless indifference as to truth or falsity, and which impute judicial misconduct of an especially serious nature. The "outer edges" of the existing offence would disappear, so that there would be no liability (for instance) in respect of vague, misguided allegations of susceptibility to external pressures on the part of the courts, and no liability in respect of specific allegations of misconduct which were shown to have a basis in fact or to be honestly believed to be true. The chief function of the offence, as thus redefined, would be to fill any gap in legal protection against serious and unwarranted public denigration of the judiciary which results from the practical unavailability, and theoretical unsuitability, of civil defamation claims by judges.

The Western Australia report of 2003[199] agreed, but did not give any reasons other than the fact that equivalent statutory protection existed for members of Parliament.[200]

90. A further question is whether it is appropriate for scandalising the court to be dealt with by the summary procedure at present used for contempt, or whether it should be prosecuted according to the normal procedure for other criminal offences.[201] If the latter is preferred, it would be possible to achieve this either by piecemeal modification of this branch of contempt or by replacing it with a new statutory offence, which would not be described as "contempt".

If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:

(1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;

[197] Contempt, Report No 35.

[198] Paras 422 to 461.

[199] Report on Review of the Law of Contempt, Project No 93 (2003), pp 114 to 116.

[200] Page 116 of the Report.

[201] T F W Allen, "Scandalising the Court: The Impact of Bills of Rights", (2002) 10 *Asia Pacific Law Review* 1, 11 argues that "a case could be made for finding that scandalising the court remains a legitimate limitation on the right to freedom of expression, but that the summary jurisdiction over scandalising is not a legitimate limitation on the right to a fair trial".

(2) whether a new offence should be created separate from contempt, and if so how it should be defined;

(3) in either case, what the mode of prosecution and trial for the offence should be.

QUESTIONS FOR CONSULTEES

1. Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.[202]

2. We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.[203]

3. If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:

(1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;

(2) whether a new offence should be created separate from contempt, and if so how it should be defined;

(3) in either case, what the mode of prosecution and trial for the offence should be.[204]

[202] Para 61 above.

[203] Para 84 above.

[204] Para 90 above.