CONTEMPT OF COURT: SCANDALISING THE COURT

SUMMARY OF RESPONSES

The questions

1. Consultation Paper No 207, Contempt of Court: Scandalising the Court asked the following questions.

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

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

    (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:

        (a) 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;

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

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

2. We received forty-six responses, excluding simple acknowledgments of receipt. The consultation period was originally set to end on 5 October 2012, but was extended to 19 October 2012 to allow for the long vacation.

3. Apart from the written responses listed below, a seminar involving fourteen High Court and Court of Appeal judges was held on the evening of 15 October 2012. There was general support for abolition of the offence: while some expressed concerns about the possible consequences of abolition none of them advanced a concrete alternative proposal. One judge, who was not able to attend the seminar, later emailed proposing that the offence of scandalising the court should be considered as part of the main contempt project.

The responses

Favouring abolition without replacement

4. Lord Mackay of Clashfern supported the provisional conclusion, meaning the proposal for abolition without replacement. He made one correction of fact and mentioned one incident involving criticism of magistrates for which the offence would not have provided a remedy.

5. Lord Lester of Herne Hill QC supported the proposal for abolition and repeated some of the points in the consultation paper, quoting from the major textbooks.

6. Lord Justice Elias said that the offence was too broad and out of line with modern views. Where there is an allegation of dishonesty or corruption, that is addressed by the law of defamation, and in that case truth is a defence. In most cases the allegations are too silly to be believed and there is no need for a criminal offence. If, however, the offence is to remain, perhaps to deal with cases which might appear to have some basis, there would need to be a defence of truth otherwise the perception might be that the courts were seeking to gag the exposure of judicial wrongdoing. That would hardly be designed to secure public confidence in the judiciary.

7. Lord Justice Sullivan said that he was not in favour of retaining the offence.

8. Lord Justice Toulson supported abolition of the offence for the reasons given in the consultation paper.

9. Another judicial respondent said that he was not unsympathetic to the proposal for abolition and did not favour the introduction of a new offence. At the same time, he thought that there was the need for politicians to give more public support for the judiciary or a judge who has been attacked.

10. A further judicial respondent was in favour of the abolition of the offence, but expressed concern about criticism in the course of or at the conclusion of a hearing. Under our provisional proposals this would remain as a punishable contempt, as it falls under the head of contempt in the face of the court rather than of scandalising.

11. One tribunal judge expressed concern about various forms of vilification of the judiciary that had occurred in his experience, but agreed that prosecution was a blunt weapon. Scandalising can be regarded as unnecessary if other means of control, such as press codes of conduct, can be strengthened. He drew particular attention to the position of members of tribunals.

12. One retired judge agreed that the offence should not be retained in its present form, and should not be replaced by an offence of making untrue and scandalous allegations against a particular judge. The answers to the consultation questions were 1. yes 2. yes 3. does not arise.

13. Lord Pannick QC sent a copy of his Azlan Shah lecture dated 5 September 2012, in which he gave at greater length the arguments that he had used in the House of Lords.

14. Rt Hon Peter Hain MP supported our proposals for abolition, using some of the same arguments as Lord Pannick and enclosing the relevant passages from his book that had led to his attempted prosecution.

15. Professor John Spencer QC of the University of Cambridge supported the abolition of scandalising, on the analogy of the other common law offences such as criminal libel that had already been abolished. He had some hesitation about press campaigns against individual judges, and thought that something should be done about these, though the existing offence was too antiquated to be a useful remedy.

16. Dr Findlay Stark of Jesus College Cambridge supported the proposal for abolition without replacement, pointing out that the law does not have value even as a "signal" unless it is enforced. He also considered what form a replacement offence might take, in case it should be decided (contrary to his view) that there should be one. He took the view that, should there be a replacement offence, it should continue to be a form of contempt, but be tried by the normal criminal procedure. He did not favour the introduction of a defence of responsible journalism.

17. Professor Clive Walker favoured abolition without replacement. He is due to send an email confirming his views.

18. The Association of District Judges was concerned about the ability to combat on-line comment. However, having regard to the technical difficulties they agreed with the provisional proposal for abolition without replacement.

19. The Council of District Judges (Magistrates' Courts) agreed that scandalising the court should be abolished, and expressed the view that that offence does not apply to magistrates' courts.

20. The Bar Council supported the proposals, on the grounds that no other officials were protected in the same way and it was open to judges to bring libel proceedings.

21. The Law Society supported the proposals, repeating some of the arguments in the consultation paper.

22. The Justices' Clerks' Society agreed with the proposal for abolition without replacement.

23. The Crown Prosecution Service repeated the arguments about the uncertainty of the offence and the possible breach of Article 10 and supported the abolition of the offence without replacement. It went on to say that, should the offence be retained, it should be modified to include defences of truth, public interest and responsible journalism.

24. Bruce Houlder, the Director of Service Prosecutions, agreed that the offence should be abolished and that it should not be replaced with a new offence. He commented in detail on the changed expectations on the press and on the perceived unfairness of judges being able to punish attacks on their own body.

25. One respondent representing a police authority supported the proposal to abolish the offence without replacement, and gave reasons including the fact that the offence had not been used for decades, that it appeared incompatible with the ECHR and that other remedies were available.

26. The Society of Editors supported the proposals, in the interests of freedom of expression.

27. The Newspaper Society supported abolition, arguing that there were many other legal constraints upon publication relating to legal proceedings.

28. Guardian Newspapers supported the abolition of the offence. They mentioned the uncertainties surrounding the offence and the importance of free speech.

29. 6 King's Bench Walk submitted a response divided into two parts, a majority and a minority opinion. The majority opinion was in favour of abolition without replacement, giving detailed reasons on the same lines as those in the consultation paper.

30. Anthony Edwards agreed with the proposal to abolish the offence, saying that an allegation of scandalising is likely to receive more publicity than the original statement. If retained, it should be modified to include a defence of subjective belief in the truth of the statement. It should not be replaced by a statutory offence, as the difficulty of drafting this would be disproportionate to the need.

31. One respondent representing a local authority supported the abolition of the offence without replacement, citing its uncertainty, human rights concerns and the availability of other remedies. His answers to the consultation questions were therefore 1. yes 2. yes 3. does not arise.

32. David Iwi agreed with the proposal for abolition without replacement, and illustrated with a hypothetical series of events concerning an allegation of judicial bias.

33. Richard Jarman said "the existence of the offence is itself a scandal" and agreed with proposal 2 (abolition without replacement).

34. Vaughan Bruce said: "This offence should be abolished without being replaced since it is not required in any democratic society" without further comment.

35. An anonymous response described the abolition of the offence as a step in the right direction and proposed a series of further reforms to court procedure.

Favouring retention

36. Mr Justice Barling expressed the view that the time was not right for abolition. For the moment, the offence should be retained as a form of contempt at common law, and the various uncertainties should be clarified judicially. In the longer term, it could be replaced by a civil mechanism involving financial sanctions and the power to make an injunction.

37. Alec Samuels argued that abolition would be untimely and send the wrong signal. He did not advocate modification or replacement, though he said that defences should be spelled out in any new legislation.

38. Lord Gill wished the corresponding Scottish offence to be retained.

Favouring a replacement offence

39. The Council of Circuit Judges, in their collective response, agreed that scandalising the court was unacceptably uncertain in its current form, but did not want it either to be abolished without replacement or replaced by a normal criminal offence. They suggested that there should be a revised extension of the law of contempt, including the power to impose injunctions, or failing that a procedure modelled on the ASBO procedure.

40. Mr Justice McCombe favoured the abolition of the offence in the context of the overall review of contempt, and recommended replacing it "along the lines of the 1979 Commission suggestion" or "what is suggested in 3(1)". Some websites went beyond intemperate criticism and contained incitement to violence: abolishing the offence without replacement would send the wrong message.

41. District Judge Ian Murdoch said that the offence should not be abolished, as even if not used it gives an added protection to the constitutional role of the courts which is unique. However, it should be made a separate criminal offence and not retained as contempt.

42. The Attorney General for Northern Ireland favoured codifying the existing offence, and incorporating a defence of honest and reasonable belief in the truth of the statement made.

43. Sir Sydney Kentridge QC argued that scandalising the court should be retained as a form of contempt, but modified to make clear that truth and public interest are defences and that criticism as such is not an offence.

44. The minority opinion from 6 King's Bench Walk proposed a codified offence of strict liability contempt, subject to defences of truth and fair comment, and with a threshold requirement of substantial risk of serious harm. (For the majority opinion, see para 29 above.)

45. Findlay Stark (para 16 above), while not favouring the introduction of a replacement offence, made some suggestions about what form such an offence might take if it were to be introduced. John Spencer (para 15 above) thought that something should be done about press campaigns against judges, but did not make any concrete suggestion.

Summary

46. Out of forty-six responses, thirty-two are in favour of abolition without replacement (nineteen giving detailed reasons). Two favour retention, and another (the Lord President) may be interpreted as favouring retention, though confining itself to Scotland; two favour a replacement offence and four a revised form of contempt. The remaining responses express no view on the proposals.