Law Commission

Reforming the law

Contempt of Court: Report (Part 1) on Liability

HC 1433

Law Com No 423

Law Commission
Reforming the law

Contempt of Court: Report (Part 1) on Liability

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The Law Commission

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

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The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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Glossary

This is not a comprehensive glossary of terms relating to contempt of court, nor is it a glossary of legal terms. It includes only terms related to contempt of court that have been used throughout this report and defines them as they are commonly understood in the contempt context.

Anti-social behaviour injunction

An anti-social behaviour injunction is a type of court order provided for in the Anti-social Behaviour, Crime and Policing Act 2014 that seeks to prevent anti-social behaviour by restraining a party from doing a specified act or compelling a party to do a specified act. See also "Court order" and "Injunction".

Applicant

An applicant is a person who has made an application to bring contempt proceedings.

Acquittal

An acquittal is a formal finding by a court that a person accused of a crime is not guilty. As contempt of court is not a crime, we do not refer to an "acquittal" in contempt proceedings. See also "Verdict", "Conviction" and "Liability".

Attorney General

The Attorney General is a Government minister who acts as the principal legal adviser to the Government. See also "Law Officers".

Attorney General's Office

The Attorney General's Office is the Government office that supports the Law Officers in the exercise of their duties. See also "Law Officers", "Attorney General" and "Solicitor General".

Breach

A breach is a failure to comply with an obligation, such as a term of a binding court order or undertaking.

Burden of proof

The burden of proof is the onus that is imposed on a party to establish (ie prove) a fact or facts. The party who bears the burden of proof will be required to prove those facts to a particular degree or "standard" which is called the "standard of proof". See below.

Civil contempt

Civil contempt is a form of contempt that principally involves disobedience of a court order and functions to enforce compliance. Civil contempt is explained further in chapter 2.

Civil Procedure Rules

The Civil Procedure Rules are rules of court governing the practice and procedure in the Court of Appeal (Civil Division), the High Court and the County Court.

Committal

Committal refers to a sentence of imprisonment, either immediate or suspended.

Common law

The common law is a body of law formed and developed by judges through binding precedential decisions of the courts.

Conduct

The conduct of a defendant, or *actus reus*, describes the external elements of a criminal offence (or a wrong in a non-criminal case), that is, the elements other than those relating to the defendant's state of mind or fault. They divide into conduct elements, consequence elements and circumstance elements. See also "Fault".

Consultee

We refer to people, representative bodies or organisations who responded to the Law Commission consultation or supplementary consultation on contempt of court as consultees. See also "Stakeholder".

Contemnor

A contemnor is a person against whom a court has made a finding of contempt. See also "Defendant".

Contempt proceedings

These are proceedings for contempt that are initiated either by a court or by application. Contempt proceedings are not a prosecution for a criminal offence.

***Contra mundum* order**

A *contra mundum* order is a court order that binds "the world", rather than just specifically named parties. See also "Court order".

Conviction

A formal finding by a court that a person accused of a crime is guilty. As contempt of court is not a crime, we do not refer to a "conviction" in contempt proceedings. See also "Acquittal", "Verdict" and "Liability".

Court order

A court order is an enforceable direction of a court either to restrain a person from doing a specified act or to compel a person to do a specified act. Court orders, and contempt by breach of court order, are explained further in chapter 3.

Court of Protection Rules

The Court of Protection Rules are rules about court procedure in Court of Protection proceedings.

Criminal contempt

Criminal contempt is a form of contempt that captures conduct that threatens the proper administration of justice and warrants punishment, such as assaulting a court officer or interfering with a witness. Criminal contempt is explained further in chapter 2.

Criminal Practice Directions

The Criminal Practice Directions are issued by the Lady Chief Justice or Lord Chief Justice and act as a supplement to the Criminal Procedure Rules. The directions govern the practice and procedure in all criminal courts.

Criminal Procedure Rules

The Criminal Procedure Rules, alongside the Criminal Practice Directions, are rules about court procedure in criminal proceedings and extradition proceedings. They apply in the magistrates' courts, the Crown Court, the High Court, and the Court of Appeal (Criminal Division).

Crown Prosecution Service

The Crown Prosecution Service, often referred to as the CPS, is the independent body responsible for prosecuting criminal offences in England and Wales, after an investigation by the police or another investigative body.

Defence

A defence may be invoked by a defendant to reduce or extinguish liability for a criminal offence (or a wrong in a non-criminal case). See also "Liability".

Defendant

A defendant is a person against whom proceedings have been brought.

Devolved tribunals in Wales

A devolved tribunal in Wales is a tribunal whose functions are only exercisable in relation to Wales and do not relate to reserved matters (that is, matters which must be decided by the UK Parliament).

European Convention on Human Rights

The European Convention on Human Rights is an international treaty between the states of the Council of Europe which protects the human rights of people in these countries.

European Court of Human Rights

The European Court of Human Rights is an international court which rules on individual or state applications regarding possible violations of the rights set out in the European Convention on Human Rights.

Family Procedure Rules

The Family Procedure Rules, and supporting Practice Directions, set out the practice and procedure to be followed in all types of family proceedings, in the family court and in the Family Division of the High Court.

Fault

Also known as the mental element or *mens rea* – the state of mind necessary for a defendant to be guilty of a criminal offence or liable for a wrong in a non-criminal case. Examples of the varying degrees of fault include intention, recklessness, knowledge or belief (or the lack of it). See also “Conduct”, “Liability” and “Strict liability”.

Finding of contempt

At the end of contempt proceedings, the court makes a finding about whether the defendant has or has not committed contempt. A finding that a person has committed contempt may sometimes be expressed by saying that the person has “committed a contempt”, been “found in contempt” or been “held in contempt”.

Guilty plea

A formal admission of guilt that is made by a defendant in criminal proceedings.

Inherent jurisdiction

Inherent jurisdiction refers to powers of a court that arise from the function of the court itself (rather than being conferred upon it by a particular statute) upon which a court can draw as necessary whenever it is just or equitable to do so in order to fulfil its role as a court of law, particularly to ensure the administration of justice.

Injunction

An injunction is a type of court order that is awarded as a remedy in civil proceedings (which can be either an interim remedy or final remedy) either to restrain a party from doing a specified act or to compel a party to do a specified act. See also “Court order”.

Inquest

A public, fact-finding inquiry by a coroner (who is a judicial officer) into a person's death. It seeks to establish who the deceased was, when and where they died and how they came about their death.

Judicial College

The Judicial College provides training for judges.

Judicial review

Judicial review refers to a type of court proceeding in which a court reviews the lawfulness of a decision made by, or action of, a public body. Judicial review is explained further in chapter 8.

Jurisdiction

Jurisdiction refers to the extent of a court's legal authority or power to hear a case. It also refers to the geographical area in which a legal system operates and its laws are enforced.

Law Commission

The Law Commission is the statutory independent body that is required to keep the law in England and Wales under review and recommend reform where it is needed.

Law Officers

This term is used to refer collectively to the Attorney General and Solicitor General, who are the principal legal advisers to the Government. See also "Attorney General" and "Solicitor General".

Liability

Liability refers to legal responsibility. In non-criminal cases a person is said to be liable for a wrong. We generally refer to liability for contempt. A person who is liable for a criminal offence is said to be guilty of the offence. See also "Conviction" and "Strict liability".

Media advisory notice

A media advisory notice is a statement issued by the Attorney General's Office on behalf of the Law Officers that reminds publishers to keep contempt laws in mind when reporting on active proceedings. It warns publishers that if prejudicial information is published, the Law Officers may bring contempt proceedings.

Official Solicitor

The Official Solicitor is an individual appointed by the Lord Chancellor to ensure that those who are vulnerable due to their lack of mental capacity or young age are sufficiently protected in the justice system.

Post or posting (on social media)

A comment, image or video that is sent so as to be visible on a user's social media page or timeline (whether the poster's own or another's). See also "Social media".

Prosecution

A prosecution refers to the institution and conduct of legal proceedings, usually on behalf of the state, against a defendant in relation to a criminal charge. Contempt proceedings are not prosecutions.

Remedy

A remedy is awarded by a court to a party as a means of preventing, redressing or compensating a violation of a right.

Sanction

After making a finding of contempt, a court may impose a sanction. Sanctions are used to enforce the law, and possible sanctions for contempt include imprisonment (committal) or a fine. The imposition of sanctions in contempt matters is not formally "sentencing" (because contempt is not a criminal offence) but is often referred to as sentencing.

Sentence

See "Sanction".

Sharing (on social media platforms)

This refers to sharing as a specific tool enabled on social media platforms, defined as the broadcasting by social media users of web content on a social network to their own social media page or to the page of a third party. See also "Social media".

Social media

Websites and apps that enable users to create and share content or to participate in social networking.

Social media platform

Refers to the underlying technology which facilitates the creation of social media websites and applications. From a user's perspective, it enables blogging and microblogging (such as X), photo and video sharing (such as Instagram and YouTube), and the ability to maintain social networks of friends and contacts. Some platforms enable all of these in one service (through a website and/or an application for a desktop computer or mobile phone) as well as the ability for third-party applications to integrate with the service.

Solicitor General

The Solicitor General is a Government minister who supports the Attorney General across the range of their responsibilities. See also "Law Officers".

Stakeholder

The Law Commission uses this as an umbrella term to refer to any person or entity affected by, or simply interested in, a project. This includes, for example, individuals, charities, campaigning groups, think-tanks, academics, lawyers, and professional associations. It also includes bodies and individuals that are associated with the state, such as Government departments, independent statutory bodies or appointees, police, prosecutors, parliamentarians, as well as courts, tribunals and the judiciary. See also “Consultee”.

Standard of proof

The standard of proof is the degree to which a party must prove an allegation in order for the court to find in their favour on that issue. In civil proceedings, the standard of proof is normally “on the balance of probabilities” (ie, more likely than not). In criminal proceedings, the prosecution must prove their case “beyond reasonable doubt”. Contempt applications must be proven to the criminal standard of proof, ie, beyond reasonable doubt, so the court must be sure that the elements of contempt have been made out. See also “Burden of proof”.

Strict liability

Strict liability means that liability can be established without the requirement to prove fault. See also “Liability” and “Fault”.

Undertaking

An undertaking is a binding commitment given by a party to the court in the course of legal proceedings.

Upload

The act of adding content to an internet site or platform.

Verdict

A decision at the end of a trial as to whether in a criminal case the defendant is guilty or not guilty, or in a civil case the defendant is liable or not liable. See also “Acquittal”, “Conviction” and “Liability”.

Abbreviations

AG	Attorney General
ADJ	Association of HM District Judges
AGO	Attorney General's Office
ALBA	Administrative Law Bar Association
APComm	Association of Police Communicators
ASBI	Anti-social Behaviour Injunction
CBA	Criminal Bar Association
CILEX	Chartered Institute of Legal Executives
CIoJ	Chartered Institute of Journalists
CJC	Civil Justice Council
CLSA	Criminal Law Solicitors' Association
COMBAR	Commercial Bar Association
CoP	Court of Protection
CoPPA	Court of Protection Practitioners Association
CofP	College of Policing
CPR	Civil Procedure Rules
CPBA	Court of Protection Bar Association
CPS	Crown Prosecution Service
CrimPR	Criminal Procedure Rules
CQ	Consultation Question
CTP	Counter-Terrorism Policing
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

FOIL	Forum of Insurance Lawyers
GNM	Guardian News and Media Limited
HLPA	Housing Law Practitioners' Association
JLACOS	Justices' Legal Advisers and Court Officers' Service
LiP	Litigant(s) in person
MLA	Media Lawyers Association
MoJ	Ministry of Justice
NMA	News Media Association
NPCC	National Police Chiefs' Council
PAP	Pre-Action Protocol
PIBA	Personal Injuries Bar Association
PNC	Police National Computer
RRO	Reporting Restriction Order
SCQ	Supplementary Consultation Question
SFO	Serious Fraud Office
SG	Solicitor General

Law Commission Publications

CP 262	Contempt of Court (2024) Law Commission Consultation Paper No 262
CP 269	Contempt of Court (2025) Law Commission Supplementary Consultation Paper No 269

Statutes

AJA 1960	Administration of Justice Act 1960
CA 1989	Children Act 1989
CCA 1981	Contempt of Court Act 1981
CJA 2009	Coroners and Justice Act 2009
CJPA 2001	Criminal Justice and Police Act 2001

CJPOA 1994	Criminal Justice and Public Order Act 1994
OSA 2023	Online Safety Act 2023
PACE 1984	Police and Criminal Evidence Act 1984
POA 1986	Public Order Act 1986

Chapter 1: Introduction

1.1 Our review of contempt of court commenced in 2022. The review has examined the need for reform with a view to improving the fairness, effectiveness, consistency, and coherence of the law and procedure relating to contempt of court. In July 2024, we published a consultation paper with provisional proposals for reform.[1] We published a short supplementary consultation paper in March 2025.[2] We are publishing our report and recommendations in two parts.

1.2 This document is part one of our report. It contains our recommendations for a new framework for liability for contempt. It also includes recommendations regarding matters necessarily associated with that liability framework, including who can bring proceedings and the role of the Attorney General (AG) in protecting the public interest in the administration of justice.

1.3 Part two of our report will be published in 2026.[3]

Background: the case for reform

1.4 Contempt of court law protects the public interest in the administration of justice. Where conduct interferes with the administration of justice, or creates a risk of interference, then it may constitute contempt of court.

1.5 The scope of this law is wide. Contempt may be committed in a courtroom or in the precincts of a court by, for example, disrupting proceedings, taking photographs in court, recording or live-streaming proceedings, assaulting court staff, or refusing to answer questions when giving evidence as a witness. This type of behaviour is generally described as "contempt in the face of the court", though there is no single or agreed definition of what that category of contempt contains.[4] Contempt may also be committed in other ways, including by failing to comply with a court order, or by publishing material that may risk prejudicing a criminal trial by, for example, revealing information that the jury does not know.

1.6 The rights and public interests engaged by the law are important. The public interest in the administration of justice is not the only interest at stake. The fair trial rights of defendants are critical considerations (including defendants in contempt proceedings and defendants in criminal cases that may be affected by prejudicial publications). Rights to freedom of expression and freedom of association are constant features of contempt matters.

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1 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262).

2 Contempt of Court (2025) Law Commission Consultation Paper No 269 (CP 269).

3 All our project documents and updates on publication timelines are published on our project webpage: https://lawcom.gov.uk/project/contempt-of-court/.

4 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) paras 10-2, 10-12–10-16.

1.7 The consequences of a contempt finding are serious. It is not a criminal offence, but a person who is found in contempt may be fined, imprisoned for up to two years, or have their assets confiscated. There is a paucity of data on contempt findings and the sanctions imposed, but it is likely that more than 100 people each year receive an immediate or suspended prison sentence (formally described as committal to prison).[5] Sanctions may be imposed by civil or criminal courts.

1.8 Contempt of court laws are beset by some significant problems. The law sits on historical foundations that draw a distinction between civil contempt and criminal contempt, yet that distinction has been widely acknowledged as confusing and unhelpful. There is a lack of coherence, consistency and clarity in the law and procedure as it operates across all civil courts (including family courts and the Court of Protection), all criminal courts, and in some tribunals. There is overlap and uncertainty in its relationship to some criminal offences. The dominance of online communications in modern media – including the rise of social media – has changed the publication and information landscape. We undertook a review of some areas of the law in 2012 and some reform in specific areas followed that,[6] but the last and only major statutory reform that dealt with publications that may prejudice proceedings was the enactment of the Contempt of Court Act 1981 (CCA 1981).

1.9 When we commenced our comprehensive review of contempt of court in 2022, the above problems were clear. We met dozens of individuals and groups from across the justice system as we produced our consultation paper, and it became apparent that the challenges were complex and wide-reaching. Our consultation paper reflected that. It set out provisional proposals for reform of the framework for contempt liability, the scope of contempt protection and contempt powers across courts and tribunals, the role of the AG, procedure, legal aid, costs, sanctions, and appeals. Our supplementary consultation paper addressed a set of issues that became especially contentious in 2024 following the murders of three children in Southport, which we explain further below.

1.10 We now present the first part of our report. In this introductory chapter, we explain in more detail the scope of our review and how it was conducted. We provide a summary of the structure and content of the recommendations we make in this part of the report, and the matters that we will address in part two of the report.

Scope, timeline and project stages

Terms of Reference

1.11 The scope of our review is governed by our Terms of Reference. These were agreed between the Ministry of Justice, the Attorney General's Office, and the Law Commission. They are:

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5 CP 262, paras 1.5-1.6, 10.12, 12.15.

6 Contempt of Court (2012) Law Commission Consultation Paper No 209; Contempt of Court: Scandalising the Court (2012) Law Com No 335; Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340; Contempt of Court (2): Court Reporting (2014) Law Com No 344. A further sub-project on contempt in the face of the court was not pursued but was retained for consideration for inclusion in our future programmes of law reform. This present project supersedes that strand of our earlier work.

To recommend reform of the law of contempt, with the aim of clarifying this area of law and improving its consistency, coherence, and effectiveness.

The project will consider:

(1) codification and simplification of the law of contempt, including consideration of the way contempts of court are labelled, categorised, and defined;

(2) the extent to which certain contempts ought properly to be defined as criminal offences, including those areas where there is currently an overlap between the criminal law and the law of contempt;

(3) the responsibility for the adjudication, investigation and prosecution of contempts;

(4) courts' and tribunals' powers and protections relating to initiating and hearing contempt proceedings, committing defendants for contempt, and appeals;

(5) the effectiveness of the current provisions relating to contempt of court by publication (considered in its broadest sense) and breach of anonymity orders, including consideration of article 10 rights under the European Convention on Human Rights, and the appropriateness of the penalties for breach;

(6) the appropriateness of penalties for contempt of court more generally, and whether there are alternative and more effective means of ensuring compliance with a court order;

(7) whether problems might arise from procedure in contempt proceedings, and whether there is scope for reform or synthesis of the relevant procedure rules; and

(8) the relationship between contempt and other offences against the administration of justice.

For the avoidance of doubt, this review will not be limited to contempt in the context of criminal proceedings or to criminal contempt.

The following topics are beyond the scope of this project:

(1) Substantive law relating to reporting restrictions and anonymity orders (rather than the law relating to their breach which is, for the avoidance of doubt, within scope).[7]

[7] In determining the scope of the project, we had taken the view that section 12 of the Administration of Justice Act 1960 (publication of information relating to proceedings in private) was not within scope under the Terms of Reference. As a result, we did not address it in the consultation paper. During consultation and in several consultation responses, it was put to us that section 12 was in scope. We were persuaded by these views and address section 12 in chapter 7, below.

1.12 The scope of the review was expanded in September 2023, with a request from the Welsh Government that we consider the above matters as they apply to the devolved tribunals in Wales.[8]

Consultation

1.13 The consultation paper, published on 9 July 2024, covered a wide range of issues. As we indicated above, it provisionally proposed a revised framework for contempt liability. It addressed contempt protection and powers of courts and tribunals, the procedures used for dealing with potential contempts, legal aid, costs, sanctions, and appeals. We asked 137 consultation questions (CQs) across those areas.

1.14 We ran a five-month public consultation, during which time we met with a wide range of stakeholders. These included members of the judiciary, lawyers, academics, media lawyers and journalists, Government officials, civil society organisations, and members of the public. In total, we met with roughly 450 people across over 40 consultation events, meetings and roundtables. We received 139 written responses to the consultation paper.

Contempt issues arising from the murders in Southport

1.15 After we had published our consultation paper, there was a renewed focus on liability for contempt following the murders of Elsie Dot Stancombe (aged seven), Alice da Silva Aguiar (aged nine), and Bebe King (aged six) in Southport on 29 July 2024.[9] In the days and weeks following the attacks, significant and widespread public disorder unfolded across the UK. Thousands of police officers were deployed, and violence resulted in injury to many hundreds of people, including innocent members of the public and three hundred officers, and led to hundreds of prosecutions.[10] Relevantly for our review, it has been suggested that the disorder was an indirect result of contempt of court laws: in constraining what information public authorities could disclose in relation to the defendant (such as his ethnicity and immigration status), contempt law helped to create an information vacuum into which misinformation, disinformation and counter-narratives could spread unchecked.[11] The debates raised

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8 For a more detailed explanation of this request and the scope of these matters, see CP 262, para 1.12. Issues relating to this aspect of the review will be addressed in part two of our report.

9 On 20 January 2025, Axel Rudakubana pleaded guilty to the murders, among other charges. He was sentenced to Detention at His Majesty's Pleasure, with a minimum term to be served in custody of 51 years and 190 days; see the sentencing remarks of Mr Justice Goose: *R v Axel Rudakubana* (23 January 2025). The home page of the public inquiry established to look into the circumstances surrounding the attack and the events leading up to it notes that ten other people were injured and sixteen further survivors live with serious emotional scars: see *The Southport Inquiry*.

10 See His Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), *An inspection of the police response to the public disorder in July and August 2024: Tranche 1 capacity and capability, co-ordination and mobilisation, and well-being* (18 December 2024) (HMICFRS report) pp 5-6, 11, 40. The report was published after the Home Secretary commissioned HMICFRS to conduct a rapid review into the policing response to the disorder. According to the National Police Chiefs' Council (NPCC), between 29 July 2024 and 30 August 2024, the police made a total of 1,280 arrests in connection with the disorder, and together with the CPS brought 796 charges (see NPCC, *Arrests and charges related to violent disorder continue* (30 August 2024)).

11 See, for example, the letter written by Rebecca Camber (Crime and Security Editor for the Daily Mail) on behalf of the Crime Reporters Association to the Director of Public Prosecutions (DPP): *Crime journalists concerned over official secrecy around Southport dance class killings*, Press Gazette (21 January 2025,

issues about what information could be published after a suspect had been arrested and criminal proceedings had become active under the CCA 1981.

1.16 While this was an issue we had already considered in the consultation paper, the Southport events introduced some new arguments and considerations. Given the renewed public interest in contempt laws, we were asked by the Lord Chancellor, the AG and the Home Secretary to expedite work on issues concerning liability for contempt.[12] They saw the following as issues that would benefit from the Law Commission's consideration:

(1) the ability to comment on arrests, investigations and incidents in the context of the risk of misinformation and disinformation, and the importance of maintaining public confidence in the administration of justice;

(2) whether there are particular statements that can be made publicly without creating a substantial risk of seriously prejudicing proceedings; and

(3) whether there are circumstances where, even if there would be such a risk, it would be justifiable to say more (for example, a threat of serious public disorder).

1.17 To ensure that we obtained the evidence needed to make recommendations for law reform, we published a supplementary consultation paper on 3 March 2025. The supplementary consultation paper did not introduce new consultation questions. It repeated two consultation questions and gave consultees the opportunity to respond to them in the light of the Southport events. The first supplementary consultation question (SCQ) was CQ 31, which proposed that for contempt by publication when proceedings are active, the conduct threshold should be the same as that which currently applies under the CCA 1981. That is, the applicant should be required to prove that the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. The second SCQ was CQ 40, which provisionally proposed that there should be a defence that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active. The supplementary public consultation ran from 3 March to 31 March 2025. In that period, we held several consultation meetings and roundtables, and we received 17 written responses.

1.18 At paragraph 1.44 below, we outline our conclusions and recommendations on the contempt issues arising from the murders in Southport. These matters are addressed in more detail in chapter 4.

Analysis and reporting

1.19 Following the consultation and supplementary consultation periods, we analysed the written responses. Our policy development was informed by these responses and by what we heard at consultation events and meetings. On occasion we refer to

updated 22 January 2025). This point was also raised with us by the Media Lawyers Association in their response to our consultation paper.

[12] The letter with this request (28 February 2025) is available on the Law Commission's *Contempt of Court* project webpage.

discussions at events and meetings, but we do not refer to any specific comments made by individuals.

1.20 Written responses were directed towards the two types of consultation questions included in the consultation and supplementary consultation papers:

(1) provisional proposals, in which we presented proposals for reform and asked consultees whether they agreed; and

(2) open questions, in which we did not present proposals for reform, but instead asked consultees for views on what the law should be, or for evidence on issues on which we had been unable to reach conclusions.

1.21 Throughout this report, we refer to the number of consultees who agreed or disagreed with our provisional proposals for reform. Some consultees neither agreed nor disagreed, but gave a response categorised as "other". We also refer to these responses, sometimes alongside those who agreed or disagreed where the substance of the responses aligned.

1.22 As the body of the report demonstrates, we have carefully considered the evidence and arguments from consultees. Where responses included comments on a single consultation question but were relevant to other questions and issues then we considered them against the issue to which the comment was relevant and cite them that way. Throughout this report, references to consultees' comments are generally references to their formal consultation responses.

1.23 We are grateful to the many individuals and organisations who engaged with the consultation, giving their time, energy, experience and expertise.

The final report: parts one and two

1.24 Following the request from the Lord Chancellor, the AG, and the Home Secretary to expedite work on issues concerning liability for contempt, we decided to report in two parts.

1.25 As we indicated above, this part of the report contains our recommendations for a new framework for liability for contempt. It also includes recommendations regarding matters necessarily associated with that liability framework, specifically matters relating to the role of the AG in protecting the public interest in the administration of justice.

1.26 An overview of the recommendations in this part of our report is provided below.[13]

1.27 Part two of the report will consider and make recommendations on issues including: which courts, tribunals and other bodies should have contempt protection and powers; some further aspects of the role of the AG and the investigation of contempts; procedure; legal aid and costs; sanctions; and appeals.

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[13] Paras 1.40-1.49 below.

Legal terms

1.28 The glossary at the start of this report explains some of the legal terms we use. We draw attention to the meaning of some terms here as they are particularly important and are sometimes used in different ways depending on the context. Throughout the report, and in the same way we did in our consultation paper,[14] we use the following terms in the ways described here:

- "Contempt proceedings": with respect to proceedings, which are commenced by application or of the court's own motion, we generally refer to these simply as "contempt proceedings". We use this term irrespective of the type of contempt involved, and regardless of who institutes the proceedings. We generally use "prosecution" only in reference to criminal offences. We do not refer to "prosecution" for contempt except when it has been used in a case, consultation response or other source.

- "Applicant": we generally use the term "applicant" to refer to a person who has made an application to bring contempt proceedings. On occasion we use the term "claimant", but generally only where an application is made under the Civil Procedure Rules (which use the term "claimant") and it is necessary or helpful to refer to a claimant rather than an applicant.[15]

- "Contemnor": we use the term "contemnor" only to refer to a person against whom a court has made a finding of contempt.

- "Defendant": we use the term "defendant" (rather than "alleged contemnor") to refer to the person who is the subject of contempt proceedings. We use this term whether the proceedings arise from a contempt application made against the person or whether a court has instituted proceedings of its own motion.

- "Finding of contempt": where a court is empowered to make a finding that a person has in fact committed contempt of court, or has made such a finding, then we generally refer to a finding of contempt or say that a person has been found in contempt, has committed a contempt,[16] or has been held in contempt.[17]

- "Committal": we use the term "committal" to refer to a sentence of imprisonment, whether the committal is to be immediate or suspended.[18]

1.29 The Law Officers are the AG and the Solicitor General (SG), and both have powers to institute contempt proceedings.[19] In discussing them we take the same approach we

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14 CP 262, para 1.16.

15 Civil Procedure Rules (CPR), r 81.2.

16 See, for example, CPR, rr 81.4, 81.5, 81.

17 See, for example, CPR, r 81.2.

18 In our consultation paper we provided a detailed explanation of terminology regarding sanctions and sentencing in contempt: CP 262, para 10.8. Sanctions and sentencing will be addressed in part two of our report.

19 Under the Law Officers Act 1997, "any function of the Attorney General may be exercised by the Solicitor General" and "anything done by or in relation to the Solicitor General in the exercise of or in connection with

took in the consultation paper.[20] For convenience and consistency, we refer only to the AG (rather than referring to "the Law Officers", or "the AG and the SG") unless the context requires the use of the collective or separate terms. Where we cite cases in which the AG or the SG is a party then we avoid the variation that appears in original citations and, for consistency and clarity, cite them as "Attorney General" and "Solicitor General".

Consultation responses

1.30 We refer to those who responded to the consultation as "consultees". Generally, we cite consultees by the name they provided us with when submitting their response, sometimes using a shortened form for convenience. Our consultation policy permits consultees to request anonymity and, where we have agreed to this, we may refer to anonymous responses.

1.31 Unless specifically attributed to an organisation, the views expressed in this report are to be read as those of individuals only, and not representative of the institution to which they may belong.

1.32 It may be helpful for readers to have more detail about the following responses we received and how we cite them.

1.33 We received over 15 responses from judicial working groups or leadership judges from courts and tribunals in England and Wales. These included a response that we cite throughout as a response from "the judiciary, on behalf of the courts of England and Wales" and in short form as "the judiciary". The status and content of the response was explained in the following terms:

> This document is a high level response which attempts to identify the principal issues which the judiciary wishes to address. It is prepared with the support of the Lady Chief Justice and the Heads of Division. It does not seek to prevent separate responses by jurisdiction specific working groups. It has evolved from discussion with judges nominated by the Heads of Division to support this exercise. It has also involved consultation with the Chief Coroner and the Chief Magistrate. … This document is presented on behalf of the courts of England and Wales of which the Lady Chief Justice is President (s7 Constitutional Reform Act 2005).

1.34 A response from the Family Division of the High Court was "submitted by the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and from the senior judge of the Court of Protection".

1.35 Other judicial responses came from the Association of His Majesty's District Judges, the Chief Coroner, the President of Welsh Tribunals, chambers of the First-tier Tribunal, and other tribunals. We also received a response from the UK Supreme Court. We received several individual responses from judges and magistrates.

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a function of the Attorney General has effect as if done by or in relation to the Attorney General": ss 1(1) and 1(2). Accordingly, the SG has the power to bring contempt proceedings, exercising the functions of the AG in doing so.

[20] CP 262, para 1.18.

1.36 We received two policing responses that had National Police Chiefs' Council (NPCC) involvement but which, as separate responses, we cite separately. The first was a joint response from the NPCC, College of Policing (CofP) and Counter Terrorism Policing (CTP). The second was a joint response from the Association of Police Communicators (APComm) and the NPCC.

1.37 We received a response from the Attorney General's Office (AGO), which is the ministerial department that "provides legal advice and support to the Law Officers".[21] This response was sent with the agreement of the Law Officers.

1.38 Appendix 2 has a full list of those who responded.

Sources

1.39 Where we provide links to online sources these were current in November 2025.

Overview of recommendations

1.40 The recommendations in this part of our final report are presented in chapters 2 to 8.

1.41 In **chapter 2**, we introduce our recommended new liability framework that is comprised of four forms of liability:

(1) contempt by breach of court order or undertaking;

(2) contempt by publication when proceedings are active;

(3) contempt by disrupting proceedings; and

(4) general contempt.

So that there is no doubt about the relationship between these, we recommend that a defendant may be liable on the basis of any one or more of the four forms of contempt in the new liability framework (though could not be found liable for contempt more than once for the same conduct). Although ordinarily a case would proceed on the basis that the applicant is seeking to prove only one form of liability, an applicant may be able to prove liability on more than one basis. Before turning to each form of liability in the following chapters, we look at the existing liability framework and explain the departures from that framework. We examine the distinction between civil and criminal contempt and recommend that this distinction ought not to form part of a new framework for contempt liability. We also conclude that contempt should not be a criminal offence. We recommend that the term "kindred offences" should no longer be used and that where conduct falls within any such offences then it should simply be described as contempt.

1.42 In **chapter 3**, we set out the elements of **contempt by breach of court order or undertaking**. We recommend that breaches of all court orders and undertakings should be within the scope of this form of contempt (subject to their being formally sealed or accompanied by a contempt warning). Certain elements will have to be proven by the applicant, including that the defendant was properly served with the

[21] AGO, *What we do* (2025).

order (or was present or legally represented in court in the case of oral orders). We then recommend three defences to this form of liability. A person will not be in contempt if it is proved on the balance of probabilities that: (i) the conduct constituting the breach was accidental ("accident"); (ii) because the person had made an innocent mistake of fact, they did not realise that they were breaching the order ("mistake of fact"); or (iii) where the order was made when the defendant was not present in court, or where the order was made against the whole world (and not just against one of the parties in litigation), that the person did not know of the order ("lack of knowledge").

1.43 In **chapter 4**, we set out the elements of **contempt by publication when proceedings are active**. To establish this form of contempt, we recommend that an applicant must prove that the defendant published material which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. As is the case under the current law, liability for this form of contempt will arise only where the proceedings in question were active at the time of publication. However, we recommend reform of the points at which certain types of proceedings become active and/or cease to be active for these purposes. Notably, we recommend that criminal proceedings should be considered active at the point of charge, rather than from the point of arrest as is currently the case. We also recommend that an applicant must prove that the defendant was at fault. This will be established where they were reckless as to whether proceedings were active. In this chapter we also consider the need for a public interest defence to this form of liability. We recommend that a public interest defence in the form of section 5 of the CCA 1981 be retained, but that the phrase "merely incidental" should be clarified so that it is clear that the question of whether a publication is merely incidental depends on how closely the subject matter of the publication relates to the specific legal proceedings. We reject a broader form of public interest defence, whether on the grounds of public interest explicitly or on the narrower grounds of public safety or national security.

1.44 The **recommendations in chapter 4** are particularly relevant to **the contempt issues that arose following the murders in Southport**. Our recommendation that the point at which proceedings become active move from the arrest to charge will be relevant, especially where charge does not quickly follow an arrest, but it should be noted that general contempt (explained below) will still apply prior to charge. Once proceedings are active, our recommendation to retain the current threshold will be relevant. That is, the current test would be unchanged: liability would be established where a publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. We say the following in chapter 4:

> The legal test for contempt must set a clear threshold rather than rely on categorical exclusions or presumptions. Its application will necessarily be context-specific and fact-sensitive.
>
> Guidance that identifies categories of information as generally safe to publish serves an important operational function. It provides clarity and consistency for police forces and media organisations, enabling them to make informed decisions quickly. However, such guidance must be understood as indicative rather than determinative, given the legal requirement to assess risk in context.

We agree with consultees that the publication of certain details – such as the name, age, nationality, and ethnicity of a suspect – is generally unlikely to create a substantial risk that the course of justice will be seriously impeded or prejudiced. This approach is reflected in recent interim guidance from the College of Policing (CofP) and the National Police Chiefs' Council (NPCC), which recommends releasing such information in "high profile or sensitive investigations or operations" where there is, for example, "a policing purpose" or a "related risk or impact on public safety".[22]

While such guidance is operationally useful, the legal test for contempt must be context-dependent and cannot be reduced to fixed categories. Attempting to define certain types of information as always safe to publish would risk creating false certainty that a substantial risk of serious impediment or prejudice would not arise.

For example, although a suspect's immigration status may not usually meet the conduct threshold, it could potentially do so where the arrest concerns immigration offences and the immigration status is central to the case. In such instances, publication could prejudice the course of justice in the proceedings. Similarly, a suspect's religion may, or may not, meet the threshold depending upon the factual context.[23]

1.45 In **chapter 5**, we set out the elements of **contempt by disrupting proceedings**. Disruption is most often managed by judges without recourse to formal measures. However, the courts must have the necessary tools to control proceedings to ensure the effective and efficient administration of justice, and it should be expected that all users of the courts and those involved in the process will not act inconsistently with the administration of justice. Proceedings for this form of contempt will typically be instituted by a court on its own motion. We recommend that the court must be satisfied beyond reasonable doubt that the following conduct, circumstance and fault elements have been established: the defendant's conduct was abusive, threatening or disorderly behaviour that resulted in the disruption of proceedings; the defendant's conduct was witnessed by the judge or a court official (for example, it was seen or heard); and the defendant intentionally did the conduct and was aware at that time that legal proceedings were in existence. We make a recommendation regarding "contempt by disrupting proceedings" rather than with reference to "contempt in the face of the court" because the former can be more clearly delineated, giving courts and the public greater clarity and certainty about what will be caught by this form of contempt.

1.46 In **chapter 6**, we set out the elements of **general contempt**. Our recommendation is that to establish general contempt an applicant must prove that the defendant's conduct interfered with the administration of justice in a non-trivial way or created a substantial risk of such an interference, and that the defendant had an intention to interfere with the administration of justice. We do not recommend any time limit on

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22 NPCC and CofP, *Interim guidance relating to ethnicity and/or nationality of suspects* (11 August 2025) p 1. That interim guidance has been incorporated into draft guidance published by the CofP on 5 November 2025, on which the CofP is currently consulting: CofP, *Media and communications: Authorised professional practice (APP) – consultation* (November 2025); CofP, *Media and communications – have your say* (5 November 2025).

23 Paras 4.64-4.69 below.

when general contempt can apply. That is, it may apply before proceedings have commenced and after proceedings have concluded. Our recommendations on the elements have consequences for related laws. First, we recommend changes to some statutory provisions so that the law of contempt is coherent and to avoid overlaps with the criminal law. These include recommendations to repeal specific provisions relating to the powers of the County Court and magistrates' courts to deal with insults and disruption as contempt; these should instead be dealt with as forms of contempt under our recommended liability framework. Secondly, we recommend changes that modernise the law. These include recommendations that the Government consider reviewing some criminal offences to ensure that photography, video recording, and transmission or live-streaming of audio or video are captured, and that there is consistency in the application of contempt to in-court and remote proceedings. Thirdly, we recommend that the procedure rule committees consider the development of an authorisation process to enable the responsible and secure audio recording of proceedings by accredited journalists.

1.47 Having set out our recommended liability framework, we then turn to some of the issues that arise from or are associated with those recommendations.

1.48 **Chapter 7** considers whether the new liability framework necessitates reform of section 12 of the Administration of Justice Act 1960. Section 12 imposes contempt liability for publishing information from private proceedings. The issue is not whether such publication should ever attract liability, but whether a distinct form of contempt is needed, given the broader framework we recommend. In our view, section 12 functions as a de facto reporting restriction but lacks alignment with our recommended form of liability for contempt by breach of order. Unlike bespoke discretionary court-ordered reporting restrictions, which are subject to judicial scrutiny and proportionality assessments,[24] section 12 operates automatically and without safeguards. It may impose liability even where the publisher is unaware of the restriction, creating inconsistent and potentially unjust outcomes. This overlap risks confusion and undermines legal certainty. To ensure fairness and coherence within the contempt framework, and informed by consultees' views, we recommend abolishing the provisions in section 12 that affect child welfare and certain proceedings brought under the Mental Capacity Act 2005 or the Mental Health Act 1983. We also recommend that Government consider abolishing those provisions that affect proceedings where information relates to a secret process, discovery or invention. Any reporting restriction should instead be imposed through clear, court-issued orders that are consistent with human rights standards.

1.49 **Chapter 8** considers the constitutional function of the AG in respect of contempt, which includes bringing contempt proceedings to protect the administration of justice. We recommend that the AG should retain the contempt function. The AG is well suited to determining whether it is in the public interest to bring proceedings and plays an important role in limiting the number of contempt applications that may be pursued against the media and other publishers. In addition, we recommend that proceedings for contempt by publication when proceedings are active may only be brought by or with the consent of the AG or the court acting on its own motion. Finally, we acknowledge concerns that the political character of the role of the AG may give rise

[24] See generally, Judicial College, *Reporting Restrictions in the Criminal Courts* (July 2023).

to apparent or actual bias in decision-making. Accordingly, we recommend that all contempt decisions made by the AG should be subject to judicial review.

Acknowledgments

1.50 The Commissioners would like to record their thanks to the following members of staff who worked on this report: Dr Lawrence McNamara (lead lawyer); Dr Nicholas Hoggard (team lawyer); Yasmin Ilhan and Marianne Holbrook (legal assistants); research assistants Cara Robinson and Henry Screaton (who assisted with consultation), Awele Nkemnacho (who assisted with analysis), Claire Paton and Lauren Schaefer (who assisted in preparing the report for publication); and David Connolly (team manager).

Chapter 2: The contempt liability framework

INTRODUCTION

2.1 The primary objective of this chapter is to explain our recommended framework for liability for contempt of court. That is the focus of the first part of this chapter. We then turn to some of the recommendations that underpin that framework. Most notably, we conclude that the categories of civil contempt and criminal contempt that lie at the foundations of the existing framework for contempt liability should be discarded and should no longer form a part of the law of contempt. In doing so, we consider whether, even if the distinction were to be discarded, contempt should be a criminal offence, and we conclude that it should not be. Finally, we recommend that the term "kindred offences" should no longer be used; conduct currently captured by the term "kindred offences" should be described as contempt.

OUR RECOMMENDED FRAMEWORK FOR CONTEMPT LIABILITY

2.2 In our consultation paper, we provisionally proposed that there should be three forms of contempt liability: general contempt; contempt by breach of court order or undertaking; and contempt by publication when proceedings are active.[1] Under our provisional proposals, disruption of court proceedings would have fallen under the umbrella of general contempt.[2]

2.3 In this report, informed by the responses we received in consultation, we recommend those three forms of liability and, in addition, that disruptive conduct fall for consideration under a separate, fourth form of liability: contempt by disrupting proceedings.[3]

2.4 We explain briefly here these four forms of contempt that we recommend in the following chapters and the relationship between them.

The four forms of liability

2.5 Many different types of conduct may interfere with the administration of justice or create the risk of an interference. Whether a person's conduct will constitute contempt of court will depend on the degree of actual or risked interference that resulted from their conduct, and on the degree of fault, which is to be determined with reference to their state of mind at the time they engaged in the conduct.

2.6 Our starting point is that a person should not be liable for contempt unless they interfered with the administration of justice in a non-trivial way, or their conduct created a substantial risk of such an interference, and when they acted, they intended to interfere with the administration of justice. Proof of this intent is important as the sanctions for contempt include imprisonment, and imprisonment can be imposed by a

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1 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), para 2.47, chs 3-5.

2 Above, paras 3.122-3.127.

3 We explain this move in detail in chapter 5 below.

criminal or non-criminal court. These thresholds of non-trivial interference and proof of specific intent underpin the test for what we call "general contempt".

2.7 However, in our view, in three circumstances there will be good reasons to depart from those thresholds. These circumstances are:

(1) Where a court order or undertaking has been breached.

A lower fault threshold and a different conduct element are justified. This is because the defendant has been alerted to their obligation to do or not do the conduct by the order or undertaking and, for justice to be administered effectively, there is a need to ensure that orders and undertakings are complied with.

(2) Where there has been prejudicial publicity when proceedings are active.

A lower fault threshold is justified because prejudicial publicity puts the defendant's right to a fair trial at risk. However, a lower fault threshold is only justified provided that it is accompanied by a higher conduct element of actual or risked serious interference and provided that, except where a court acts on its own motion, proceedings are consented to or brought by the Attorney General (AG). The lower fault threshold protects fair trial rights (especially those of a defendant in a criminal case). It also serves to ensure the fairness of proceedings in any matter that is the subject of publicity. At the same time, the higher conduct threshold and role of the AG protect freedom of expression to ensure the discussion of matters of public interest is not disproportionately restricted.

(3) Where proceedings have been disrupted.

A lower fault threshold and narrower conduct element are justified because the courts must have the necessary tools to control proceedings to ensure the effective and efficient administration of justice.

2.8 In recommending our framework for liability, including the departures from our starting point in each of these three circumstances, we aim to reflect the demands and secure the benefits of the rule of law. As we explained in the consultation paper, the rule of law requires that law is intelligible, clear and predictable. It requires that dispute resolution is efficient and effective, with fairness to all parties.[4]

2.9 We present our framework in the next four chapters. In chapters 3, 4 and 5 we look at the forms of contempt that are concerned with a specific category of conduct. Respectively, these are:

- contempt by breach of court order or undertaking
- contempt by publication when proceedings are active; and

[4] CP 262, paras 1.57-1.58, referring to the analysis of the rule of law by former Lord Chief Justice and Law Lord, Lord Bingham in *The Rule of Law* (2010).

- contempt by disrupting proceedings.

In chapter 6, we turn to general contempt, which functions as a residual category that captures any conduct that constitutes or creates a risk of a non-trivial interference with the administration of justice.

The relationship between the forms of liability

2.10 We think it is helpful to be clear about the relationship between the forms of liability.

2.11 We received some comments from consultees that queried potential overlap between different forms of contempt. It has also been suggested that the creation of strict liability contempt under the Contempt of Court Act 1981 (CCA 1981) extinguished the possibility that proceedings might be commenced for common law contempt where the statutory criteria are met.[5] The better view, we think, is that the CCA 1981 has not extinguished that possibility,[6] but we acknowledge the uncertainty and want to be sure that no such question arises in the framework we set out.

2.12 In our recommended framework, proceedings for contempt may be commenced on the basis that a defendant has committed contempt of court on any one or more of the above four bases. It would be very unusual for contempt by disrupting proceedings to be argued as an alternative ground because proceedings for this form of liability would usually be initiated on the court's own motion.[7] With respect to other forms of liability, we expect an applicant would ordinarily allege that only one type of contempt has been committed, but there may be circumstances where an applicant would seek to argue alternative grounds. For example, an applicant may argue that contempt by breach of order has been committed and that the defendant is also or alternatively liable on the ground they have committed general contempt. Similarly, a defendant who has published prejudicial material when proceedings are active could potentially meet the threshold for either or both contempt by publication when proceedings are active and general contempt. The reasons for proceeding in this way may vary, but it could be that proof of intention to interfere with the administration of justice (required for general contempt) would result in more serious sanctions.[8] This does not mean there is a "hierarchy" of the forms of contempt. The question in every instance will simply be whether the elements of a form of contempt can be satisfied. Where the elements of a form of contempt have been proved then there will be a finding of contempt of court (rather than, for instance, a finding of, for instance contempt of court

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5 See the discussion of *Roger Bullivant v Ellis* Financial Times 15 April 1986 (Lexis) in P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) (*Arlidge, Eady & Smith*), paras 4-224–4-226. The authors also cite *Al Megrahi and Fhima* 1999 SCCR 824, though in our view that case does not support this argument.

6 See the discussion of *Attorney General v Hislop* [1991] 1 QB 514, cited in *Arlidge, Eady & Smith* (2019) para 4-226.

7 See para 5.4 below.

8 In part two of the report, we will discuss sanctions and address the circumstances where a court has concluded that there has been proof of intention to interfere with the administration of justice and where a defendant's liability for contempt of court has been or could be established on more than one basis.

by breach of order). The defendant could not be found liable for contempt more than once for the same conduct.[9]

2.13 We wish to be clear about this to avoid any doubt. Accordingly, we make a recommendation that a defendant may be liable for contempt of court on the basis of one or more of the four forms of contempt liability.

Recommendation 1.

2.14 We recommend that a defendant may be liable on the basis of any one or more of the four forms of contempt in the new liability framework, which are:

(1) contempt by breach of court order or undertaking;

(2) contempt by publication when proceedings are active;

(3) contempt by disrupting proceedings; and

(4) general contempt.

Departures from the existing liability framework

2.15 Before turning to the substance of our recommended framework in the following chapters, we look at the existing liability framework and explain the departures from that framework. In doing so we also consider an alternative put to us in consultation, which was that contempt of court should become a criminal offence. Finally, we examine the status of "kindred offences".

THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

The existing framework and our provisional proposal

2.16 Traditionally, every contempt of court falls into one of two categories: civil contempt or criminal contempt. A contempt is not categorised as civil or criminal depending on whether it arises in civil or criminal courts, or civil or criminal proceedings; a civil contempt may be committed in a criminal court and a criminal contempt may be committed in a civil court.[10] The distinction is instead directed to the nature of the conduct – but the categories are ill-defined. It is possible to identify archetypes, but it is difficult to provide a comprehensive, clearly demarcated statement of what falls within each.

2.17 On the one hand, the Supreme Court in *Attorney General v Crosland* explained that civil contempt involves "a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to

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9 This would breach the rule against "double jeopardy", which is that once a person has been (in the language of the criminal law) acquitted or convicted then they cannot be tried again for the same matter. For a detailed discussion see Criminal Appeals (2025) Law Commission Consultation Paper No 268, paras 13.1-13.10.

10 CP 262, para 2.5.

protect the private rights of that other party".[11] However, as we noted in the consultation paper, civil contempt may be committed by breaching a wide range of orders and statutory requirements, including breaching a production order made under the Police and Criminal Evidence Act 1984 (PACE) or breaching an order made under the Criminal Justice and Police Act 2001 to return property that has been seized in a criminal investigation.[12]

2.18 On the other hand, criminal contempt, it was said in *Attorney General v Crosland*, is concerned with "conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice".[13] For example, it will be a criminal contempt to interfere with a witness, disrupt court proceedings (which is one way of committing contempt in the face of the court), or publish content that amounts to strict liability contempt by publication under sections 1 and 2 of the CCA 1981. However, criminal contempt may also be committed by breaching a court order. Where a breach amounts to a serious interference with the administration of justice – for example where a person subverts the court's purpose in making an order, where there is a breach of a *contra mundum* order,[14] a reporting restriction order, a General Civil Restraint Order, or where there is a breach of an embargo on a draft judgment – then it could be treated as a criminal contempt.[15] Where there is a breach of an order made to protect the administration of justice then it may be a criminal contempt, but that will not always be so.[16]

2.19 As we explained in the consultation paper, the distinction between civil and criminal contempt lies at the foundations of a legal landscape in this area that is characterised by inconsistency and uncertainty. That may be explicable as a consequence of piecemeal development over centuries, with the law spread across common law and statute, with overlaps and variations – but is not satisfactory.

2.20 In the consultation paper we explained that the distinction:

> can make it difficult for laypeople and legal practitioners to identify and understand the relevant law, and for the courts to recognise and respond appropriately to interferences with the administration of justice. … The classification into civil and criminal contempt owes more to history than it does to principle and practicality. Any conceptual or practical benefits that may once have been derived from the distinction have increasingly become of limited assistance, so much so that the courts have described the classification of contempt as civil or criminal as "unhelpful" and "largely meaningless". … In our provisional view, the utility of the distinction between civil and criminal contempt has rightly been called into question, and

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11 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23].

12 CP 262, para 2.3.

13 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23], citing *Director of the Serious Fraud Office v O'Brien* [2014] AC 1246 at [39] (Lord Toulson), which is also published as *R v O'Brien* [2014] UKSC 23, [2014] AC 1246.

14 A *contra mundum* order is one that is not solely directed to the parties but is an order said to be "against the world" or "with worldwide effect"; see further para 3.3 below.

15 CP 262, paras 2.28-2.33.

16 Above, paras 2.31-2.33.

> fundamental change is needed. It is not clear that the categorisation of contempt as criminal or civil assists in identifying or addressing contempts of court.[17]

2.21 Accordingly, we provisionally proposed in CQ 1 that "a reformed framework for liability for contempt of court should discard the traditional distinction between civil and criminal contempt".[18]

Consultation

2.22 There was very strong support for the provisional proposal. Of the 139 responses we received to the consultation, 58 answered CQ 1. Of those 58, 44 agreed the distinction should be discarded, five disagreed, and nine gave an answer categorised as "other".

2.23 Support for the provisional proposal came from a wide spectrum of consultees, with considerable agreement that the distinction between civil and criminal contempt is difficult to understand and explain, causes confusion, is unnecessary, and should be discarded. Responses from the Attorney General's Office (AGO) and the judiciary on behalf of the courts of England and Wales (the judiciary) agreed with the proposal.[19] The judiciary said: "We agree that the distinction between criminal and civil contempt should be abolished. It is confusing and of no real value". Agreement also came from numerous professional bodies and lawyers, academics, media stakeholders and law enforcement.[20] Professor Helen Fenwick (consultant editor on contempt for Halsbury's Laws of England) indicated the breadth of the problem: "The distinction … is unhelpful and confusing. … It has not proved to be possible to provide a clear, coherent, transparent definition of the distinction in this up-dated work".

2.24 The case to discard the distinction was supported by consultees working in different areas of the law. The Crown Prosecution Service (CPS) said:

> We consider that it is of critical importance to better law in this field that the distinctions between different types of contempt are both clear and have a meaningful rationale. We think the usefulness of this distinction has rightly been called into question.

The Chancery Bar Association said: "We agree in principle that the traditional distinction should be abolished. It is hard to see a cogent justification for retaining it". The Personal Injuries Bar Association (PIBA) said that simplification would avoid confusion with criminal proceedings, which we understand to mean that proceedings

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17 CP 262, paras 2.7, 2.43 and 2.45.

18 Above, para 2.50, CQ 1.

19 The Family Division of the High Court and the Association of HM District Judges also agreed with the provisional proposal.

20 For example: Personal Injuries Bar Association (PIBA); the Criminal Law Solicitors' Association (CLSA); Kathryn Harvey; the Justices Legal Advisers and Court Officers' Service (JLACOS); the Law Society of England and Wales (the Law Society); the Civil Justice Council (CJC); Chancery Bar Association; Professor Helen Fenwick; Professor Stephen Bailey; academics from the University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM); Guardian News and Media Limited (GNM); PA Media; National Police Chiefs' Council (NPCC) and Association of Police Communicators (APComm).

for criminal contempt can be confused with proceedings for a criminal offence. The Criminal Law Solicitors' Association (CLSA) and Kathryn Harvey both said it would help avoid confusion over legal aid. The Justices' Legal Advisers and Court Officers' Service (JLACOS) said the distinction "imports unnecessary complexity".

2.25 In some instances, support for the proposal from those who agreed or answered "other" was accompanied by qualifications. Notable were comments from the CPS, Forum of Insurance Lawyers (FOIL) and the Commercial Bar Association (COMBAR).[21]

2.26 The CPS supported the provisional proposal to discard the distinction between civil and criminal contempt but also argued that some types of contempt should be criminal offences.

2.27 FOIL was "generally supportive" of the proposal but "keen to avoid a landscape where the deterrent effect of contempt proceedings is further diluted". They were concerned that disposing of the distinction between civil and criminal contempt would affect the way "the objectives of punishment, deterrence and coercion" operate in contempt proceedings.

2.28 COMBAR agreed that "the current formal distinctions between civil and criminal contempt should be discarded because they are confusing". However, they saw "important substantive differences between what is currently conceptualised as civil and criminal contempt". Arguing that the distinction was that civil contempt was a private wrong and criminal contempt a public wrong, "the particular issue we have in mind is the fact that seeking to uphold court orders in contempt proceedings largely engages private interests" and that the consultation paper "often elides this with questions relating purely to the administration of justice". They argued elsewhere in their response that the distinction between private and public wrongs was important in the context of permission to commence a contempt application; for the former, permission is not required, but for the latter it is. In all, while supportive of the proposal, they were worried that the proposals if enacted "may lead to considerable uncertainty" if the role of contempt in protecting private interests was not adequately recognised.

2.29 Among the consultees who did not agree with the proposal, the General Council of the Bar of England and Wales (the Bar Council) disagreed with the proposition that the distinction is confusing:

> In practice, however, the current division between "civil contempt" (breach of order or undertaking) and "criminal contempt" (everything else, ie any other interference with the administration of justice) is, once grasped, readily understood.

The Bar Council also argued that that the proposed liability framework in the consultation paper did "not propose that the three-way distinction between what may be termed Criminal, Civil and Strict Liability contempt should really be modified".

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[21] The COMBAR response was prepared by a sub-committee and represents the views of that group rather than the views of COMBAR as a whole. We refer to it as the COMBAR response for convenience.

2.30 The Housing Law Practitioners' Association (HLPA) was concerned that if the distinction is removed then there will be a loss of the civil contempt focus on compliance with court orders that seek to regulate behaviour, and that there is a risk of unfair labelling insofar as a person who breaches a court order should not be labelled a criminal. In our view, removing the distinction between civil and criminal contempt should not mean a breach of a court order will be viewed as criminal behaviour. Eliminating the distinction between the two categories of contempt should not result in an automatic assumption that contempt that was previously considered civil contempt would be criminal.

2.31 Greg Callus (barrister and editor of the contempt section of the White Book[22]) provided several reasons why he disagreed with the provisional proposal to discard the distinction between civil and criminal contempt. These sat within a wider view he took of the current law and the suite of reforms that we proposed in the consultation paper. Primarily, he argued that criminal contempt is a criminal offence, and so the distinction has real meaning (for example, it explains why some contempts are on the Police National Computer). We deal with this argument below in the next part of this chapter. He also argued that our proposed liability framework would not change the existing liability that much ("miniscule", he argued, in relation to contempt by breach and contempt by publication when proceedings are active), and the benefits of change would be outweighed by the cost of litigation to establish meaning and operation of new law. Thus, he took the view that the distinction between civil and criminal contempt should not be discarded.[23]

Discussion

2.32 Having a single framework for contempt of court would in any event make the law more consistent and streamlined. Additionally, there is very strong support for the provisional proposal to dispose of the distinction between civil and criminal contempt. There is strong agreement from a wide range of key stakeholders that the distinction is unhelpful and makes the law unnecessarily confusing. The Bar Council argued that the distinction "once grasped, is readily understood", but "once grasped" is significant; overwhelmingly the view is that it is not easily grasped. It is important that the law is accessible and as readily comprehensible as possible to non-lawyers and indeed to lawyers not regularly working with contempt laws.

2.33 We have considered carefully the reservations of those who agree and the objections and concerns of consultees who disagreed or responded with "other". However, the points made can be and will be addressed in other ways in both this part of our report and in part two.

2.34 First, regarding the COMBAR concerns, we agree that private interests are engaged when a party seeks to enforce an order using contempt proceedings, and that is important. However, it is wrong to discount the public interest in the administration of justice in being able to enforce court orders, whether in commercial matters or

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22 The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

23 We cite Greg Callus' position on a number of issues in this and other chapters. Where we indicate that he is supportive of provisional proposals, we do so with the awareness of his overriding disagreement with the reform proposals in the consultation paper.

otherwise. The rule of law demands efficient and effective dispute resolution.[24] Ensuring that court orders can be enforced is critical to that and the protection of the public interest in the administration of justice is fundamentally engaged when a court order is breached. We also agree completely that uncertainty is undesirable and we endeavour through our recommendations to ensure the law is clear and certain. Concerning permission, we will address procedure in part two of the report but the consideration of private rights and public interests in permission requirements does not require the retention of the distinction between civil and criminal contempt.

2.35 Secondly, FOIL was concerned that reforms should not diminish the deterrent role of contempt, but there is no reason why removing the distinction between civil and criminal contempt would have that result. As we explained in the consultation paper, the distinction between civil and criminal contempt has been relevant in sentencing for contempt. Notably, the Court of Appeal (Civil Division) in *Lovett v Wigan Borough Council* drew attention to the distinction between sentencing for criminal offences and sentencing for civil contempt (though not the distinction between sentencing for criminal contempt and civil contempt), emphasising the importance in civil contempt of securing future compliance.[25] The objectives of sentencing for civil contempt are, the court said, "in this order": ensuring future compliance; punishment; and rehabilitation.[26] We will consider sanctions in part two of our report but the distinction between civil and criminal contempt does not fully correlate with the seriousness of any given contempt and, again, there is no reason that the removal of the distinction should necessarily lead to a diminution (or enhancement) of the relevance of deterrence in sentencing for contempt.

2.36 Fourthly, where the Bar Council and Greg Callus argued that the provisionally proposed liability framework does not really change the law at all, in our view that understates the lack of coherence, consistency and clarity in the existing law, all of which we set about addressing through reform.

2.37 Finally, we address in the next part of this chapter questions about whether any form of contempt is or should be a criminal offence.

Recommendation 2.

2.38 We recommend that a reformed framework for liability for contempt of court should discard the traditional distinction between civil and criminal contempt.

CONTEMPT AS A CRIMINAL OFFENCE

2.39 In this report we discuss a number of criminal offences where there is some overlap with contempt of court, and in some instances make recommendations. These include

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24 On contempt and the rule of law, see CP 262, paras 1.56-1.58.

25 Above, para 10.190; *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [32]-[33].

26 CP 262, para 10.190; *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [32]-[39].

offences relating to: taking photographs in court;[27] privacy for children involved in certain proceedings;[28] and assaulting officers in the County Court.[29] However, in each of these instances the criminal offence is not an offence of contempt of court. It is a different offence, with its own elements, and these elements are not the same as contempt.

2.40 The following discussion examines the quite different question of whether contempt is, or should be, a criminal offence in its own right.

2.41 In the consultation paper we explained that contempt of court is a criminal offence for the purposes of the right to a fair trial guaranteed by article 6 of the European Convention on Human Rights (ECHR), one consequence of which is that there are procedural protections that must be complied with.[30] That, however, does not make contempt a substantive criminal offence in England and Wales and we explained that it is not currently a criminal offence:

> Neither civil contempt nor criminal contempt are criminal offences. Both may be punished by a fine or imprisonment. It is sometimes said that civil contempt is not a crime, but that does not mean that criminal contempt is "a crime" in the ordinary sense of the word. Rather, in making observations about whether a contempt is or is not a crime, the courts are concerned with the nature of the defendant's conduct, which is what makes the contempt "criminal".[31]

2.42 Under our provisional proposals for a new liability framework it would remain the case that contempt would not be a criminal offence.

2.43 During consultation our position was challenged in three main ways. First, it was put to us that criminal contempt is a criminal offence under the law as it stands. Secondly, it was put to us that if contempt is not to be a criminal offence then we needed to explain more clearly our reasons why that should be so. Thirdly, it was put to us that contempt should become a criminal offence where there is an intention to interfere with the administration of justice. We address those points here.

The current law: is criminal contempt a criminal offence?

2.44 One consultee, Greg Callus, argued that criminal contempt is a criminal offence (and thus the distinction between civil and criminal contempt has great significance). His position was that there is nothing in the case law to say criminal contempt is *not* a criminal offence and that, although it is no longer possible to proceed on indictment,

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27 See paras 6.223-6.247 below.

28 See para 7.9 below.

29 See paras 6.213-6.222 below.

30 CP 262, paras 8.102-8.105.

31 Above, para 2.4 (references omitted). Notwithstanding that, as we explained, there are intersections and overlaps between the criminal law and the law of contempt: CP 262, paras 2.9-2.11. For example, some conduct that constitutes contempt might be dealt with either as contempt or as a criminal offence, and some criminal offences may be dealt with as if they were contempt (offering a procedural alternative). Some of these intersections are dealt with in chapters 5 and 6 below: see para 2.39 and accompanying footnotes above. As the discussions in subsequent chapters indicate, where the intersections relate to procedure or sanctions then they will be addressed in part two of the report.

the criminal offence of contempt of court has never been abolished. He drew attention to the statement in *Borrie and Lowe on Contempt* that "criminal contempt is, for all its peculiarities, a crime, whereas a civil contempt despite its criminal characteristics is not".[32] He stated that the Law Commission's 2012 consultation paper on contempt "appears to read as though it is accepted that criminal contempt is a criminal offence, just one that is not tried by indictment or with a jury".[33] He also provided some authority, the most recent and directly relevant of which is an obiter statement from the then President of the Family Division, Sir James Munby in *Egeneonu v Egeneonu*. Reviewing the case law and commentary, and finding the matter "not so clear cut", Sir James stated, "I am inclined to think that a criminal contempt *does* constitute a criminal offence … [but] as the point does not in fact arise for decision, I prefer not to express any concluded view".[34]

2.45 We appreciate the line of authority that suggests the doctrinal question is arguably still an open one but that is some considerable way from being able to state with certainty that criminal contempt *is* a criminal offence. When Sir James Munby reviewed the cases, he noted that while Lord Toulson JSC in the Supreme Court in *Director of the Serious Fraud Office v O'Brien* said without qualification that civil contempt "does not constitute a criminal offence", he also observed that "it does not necessarily follow from this, either as a matter of logic or as a matter of law, that a criminal contempt does constitute a criminal offence".[35]

2.46 While there is no clear doctrinal position, it seems to us beyond doubt that in modern practice not only is criminal contempt not (as we put it in 2012) a "normal criminal offence",[36] it is not understood in the criminal justice system as any type of a criminal offence. This is not merely because it cannot be tried on indictment. The issues are much more deep-seated. It fundamentally lacks characteristics that are at the bedrock of criminal law. It does not appear police have the power to investigate it; it is not handled by the DPP as a matter for prosecution; it is not necessary that proceedings occur in a criminal court; it is not treated as a criminal cause or criminal matter for the purpose of appeals; and where a defendant is committed to prison or fined, this is not done within the sentencing framework for criminal offences.[37] In our view, these factors take it so far from the plain, contemporary understanding of what characterises a criminal offence that, even taking account of the extent to which the doctrinal

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32 Citing *Borrie and Lowe on Contempt* (3rd ed 1996) p 662.

33 Referring to Contempt of Court (2012) Law Commission Consultation Paper No 209, CQs 11-16.

34 *Egeneonu v Egeneonu* [2017] EWHC 43 (Fam), [2017] 4 WLR 100 at [89], [92] (emphasis in original). The response also cites *Director of the Serious Fraud Office v O'Brien* (also reported as *R v O'Brien*) [2014] UKSC 23, [2014] AC 1246 at [38]-[39] (Lord Toulson); *Scott v Scott* [1913] 1 AC 280; *Attorney General v James* [1962] 2 QB 637; and *Cobra Gold Club Inc v Rata (No 2)* [1998] Ch 109 at 129-159.

35 *Egeneonu v Egeneonu* [2017] EWHC 43 (Fam), [2017] 4 WLR 100 at [91], citing *Director of the Serious Fraud Office v O'Brien* (also reported as *R v O'Brien)* [2014] UKSC 23, [2014] AC 1246 at [38] (Lord Toulson).

36 Contempt of Court (2012) Law Commission Consultation Paper No 209, from para 2.65.

37 In part two of the report, we will look at the entry of some contempts on criminal records, which we discussed in the consultation paper: CP 262, paras 10.215-10.237. We note at this point Greg Callus' analysis and his conclusion the "codes against which contempt is recorded appear to be criminal contempts". Regarding policing powers, sentencing and appeals, which will also be addressed in part two, see CP 262, respectively paras 7.132-7.154, chapter 10, and para 11.120.

position might be contested, criminal contempt should not be described or identified as a criminal offence.

2.47 All this being said, any conclusion about the current status of criminal contempt is only of so much assistance. The more pressing law reform question is whether it should be formalised as a criminal offence if a new framework of contempt is created. It is to this that we now turn.

Should contempt be a criminal offence?

2.48 Professor Stephen Bailey, who agreed with the provisional proposal to discard the distinction between civil and criminal contempt, did not argue that contempt should become a criminal offence, but noted that:

> The fact that [it is not a criminal offence], as the position described in the detailed analysis through the [consultation paper] shows, is anomalous and has caused many problems, for a number of reasons. Contempt is (correctly) treated as "criminal" for the purposes of [article] 6, ECHR; the conduct is potentially more serious than many statutory criminal offences, as demonstrated by the maximum sanction of 2 years' imprisonment; the fact that they are not technically offences has caused all sorts of difficulties when it comes to investigation, adjudication, sentencing and record-keeping.

Given this, he argued, the consultation paper needed to provide a "detailed analysis of why contempt should not in future be treated as a criminal offence", and in his view this was missing. We address this concern as we now consider responses that argued contempt should be a criminal offence.

2.49 A number of individual consultees, across different CQs or in general comments, conveyed views that suggested contempt should be a criminal offence. Some of these were non-specific and were in effect more concerned that contempts should be investigated and punished, rather than being addressed specifically to the status of contempt as a criminal offence.

2.50 There were two responses that presented a position more clearly articulated as an argument that contempt, while not currently a criminal offence, should become one.

2.51 Academics from the University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM) stated their position in the following terms:

> to achieve clarity, consistency and coherence in this field of law, contempts should be regarded as criminal offences, and … relevant terminology should reflect this. Therefore, … contempts should be recorded as criminal offences are; and when contempt investigations or proceedings are initiated, those suspected or accused of a contempt 'offence' should have the types of official procedures, as regards protection of their rights, which arise from criminal investigations/charges. It seems from the consultation paper that the Commission broadly shares this view in respect of such protective procedures.

2.52 Our provisional proposals in the consultation paper addressed many of these concerns, especially with respect to procedure, which we will consider in part two of

the report.[38] While our overarching view in the consultation paper was, in essence, that safeguards associated with criminal procedure should apply in contempt of court proceedings, that is not an answer to the question of whether contempt should of itself be a criminal offence. With regard to clarity, consistency and coherence, we agree these are needed but it is not necessary that any or all contempts need to be criminal offences to achieve those goals, though that would of itself not explain why we are content to leave in place the anomalies that Professor Bailey has pointed to. We provide that explanation in addressing the CPS response.

Criminalising intentional interference with the administration of justice

2.53 The CPS argued that some contempts should be criminal offences. The following outline aims to summarise its position before presenting our discussion and conclusion.

2.54 Specifically, the position was that there should be a criminal offence of deliberate interference with the administration of justice.[39] In the CPS's view, this would capture general contempt and would also capture circumstances where a court order was breached, or where there was a publication of prejudicial material, provided that there was proof of intention to interfere with the administration of justice. It argued that the courts should have the option of treating a matter as a contempt or referring it for prosecution as a criminal offence.

2.55 Several rationales underpinned the CPS position. It said general contempt uses the language and concepts of the criminal law, and that it fits on the spectrum of public justice offences. It said there would be clarity in the law were it a criminal offence. This clarity, it said, would aid courts and the police. It argued that our provisional proposals were in any event aligning contempt with many aspects of criminal law and procedure. In this regard it argued that creating a criminal offence:

> would make it clearer when the police should be able to investigate deliberate interference as such, and the distinction between deliberate interference which the court can deal with and deliberate interference within the competence of the police.

2.56 We explored with the CPS where exactly it saw the gap or shortcoming in the law. We were told there were three key areas.

2.57 First, it was argued that a criminal offence would fill a gap where there is a deliberate interference with the administration of justice which requires police investigation and prosecution, but there is no criminal offence available and so this cannot be done. The examples cited were circumstances where social media posts identify a person whose identity is protected by an injunction, or where posts are prejudicial to a trial. An investigation may be needed to find out who is responsible. The creation of a criminal offence would enable that investigation. A further example cited was that an unauthorised recording of court proceedings may be dealt with as a contempt, but

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[38] See for example the discussion of procedural safeguards and compliance with ECHR fair trial protections in CP 262, paras 8.98-8.127.

[39] The CPS also argued there should be no distinction between publication or conduct other than publication in either general contempt or the offence. We address that issue in paras 6.98-6.107 below.

there is no apparent criminal offence and yet it is possible to see how deliberate conduct might need to be addressed by investigation and prosecution.

2.58 Secondly, the CPS argued that an offence of deliberate interference with the administration of justice would serve a purpose where a criminal offence is available but does not meet the gravity of the conduct. Two examples were given. It was said that where a defendant glues themselves to a court fixture to disrupt proceedings then the potentially available charges "do[] not properly reflect the mischief of the offending". The argument was that it would fall:

> neatly between less serious offences such as criminal damage and public order offences – the risk to the administration of justice merits a more serious offence – but short of the very serious offences of witness intimidation, perjury and perverting the course of justice.

Inadvertent identification of a victim of a sexual offence, we were told, may well continue to be met by a summary, financial penalty-only offence – but a deliberate identification intending to harass and to disrupt the case could properly be investigated and prosecuted as a criminal offence of contempt.

2.59 Thirdly, it was argued that a new offence would be valuable in circumstances where a criminal offence is available but it is appropriate also to mark the contempt as a further charge before the court. The CPS said here that:

> An incident may involve a charge which is sufficiently serious and is going to be prosecuted in its own right – such as an assault on an emergency worker or assault on a police officer – but it may be appropriate in the criminal trial to have a further charge of contempt before the court – to reflect the nature and extent of the offending and to give the court adequate powers of sentence (including the option of imposing consecutive sentences).

2.60 With respect to the operation of an offence, the CPS had in mind a hierarchy of courts, then police, then the AG, in which:

(1) The court would decide whether to (a) take no action, (b) take contempt action (potentially referring it to a higher court), or (c) refer a matter to police.

(2) If a matter is referred to police, then police would take it over and decide whether to take any action. The court would be "estopped" (so to speak) from dealing with it once it has been referred to police.

(3) If no action is taken, the AG may take it up.

Where a complaint is made from outside that hierarchy (for example, by a party to a matter or by a non-party) then police would decide whether investigation is warranted.[40]

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[40] We considered private prosecutions and in our view, the DPP's ability to take over and, if appropriate, discontinue private prosecutions would provide a suitable control. See generally, Consents to Prosecution (1998) Law Com No 255.

2.61 Procedurally, the CPS was open to different options. One would be that contempt is a criminal offence, to which a particular procedure attaches, and is dealt with using that procedure. It may be dealt with "in a range of courts", which appeared to include non-criminal courts. A second option would be that it is a criminal offence to which the usual criminal procedures apply. But, in both options, it proposed that "the courts would decide whether to instigate proceedings and the prosecutor's role (if they were present) would be to assist the court, as distinct from a case requiring [investigation] and prosecution".

Discussion and conclusion

2.62 In our view, the CPS raises important concerns. However, there are other ways to address many of them and the proposal would result in problems that would significantly outweigh any potential benefits. In all, we are not persuaded that an intentional interference with the administration of justice should be a criminal offence.

2.63 Among the general rationales advanced is that clarity and certainty about what constitutes contempt would follow if contempt were a criminal offence. This may be so, but clarity and certainty can be achieved by stating what constitutes contempt. We agree that courts and police would be aided by certainty, but that does not require a criminal offence either. That clarity and certainty may also be undermined by complexity that would be introduced by the CPS model, and we address this further below.

2.64 The first of the three suggested legal gaps is concerned with circumstances where no criminal offence is currently available. The example in relation to unauthorised recording of proceedings is a matter we have resolved separately in chapter 6, where we discuss recording and live-streaming of proceedings.[41] The examples regarding social media are in effect arguing that the way to address a problem with investigatory powers relating to communications data is to create a criminal offence. In the consultation paper we addressed the investigatory powers problem, and we will examine that in part two of our report. However, we observe that although creating a criminal offence may be a relatively straightforward way of empowering police to investigate, that may still not solve the problem that has been identified. As we stated in the consultation paper, the existing CPS guidance explains that social media companies may reject requests to provide communications data. As such, even where there is a criminal offence, police may still not be able to identify a person who holds a social media account. It is not clear that the creation of a new offence would successfully overcome that obstacle to identifying an account holder.

2.65 The second posited gap concerns circumstances where a criminal offence is available but is not serious enough to meet the gravity of the conduct. In our view this gap is not substantial. The identification of a victim in sexual offences cases will still be subject to the criminal law. Although the penalty for a defendant newspaper proprietor, editor or publisher may only be a fine,[42] other defendants are liable to up to 6 months' imprisonment and/or a fine.[43] As with offence, these matters may be investigated

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41 See paras 6.223-6.258 below.

42 Sexual Offences Amendment Act 1992, s 5(1).

43 Above, s 5(1A).

whether committed deliberately or inadvertently. We observed in the consultation paper that a file may be passed from the CPS to the AG for contempt proceedings where prosecutors think the available criminal penalties would be insufficient.[44]

2.66 Were a criminal offence of intentional interference with the administration of justice to be created then it is likely prosecutions would usually occur only where the defendant's conduct was at the more serious end of the spectrum. In the consultation paper we noted that the courts have interpreted the offence of perverting the course of justice as meaning that "there must be a possibility that what [the defendant] has done 'without more' might lead to injustice", and we noted that this is a high threshold.[45] Thus, as the most serious contempts may also potentially satisfy the elements of perverting the course of justice there may be an offence available.

2.67 There is, nevertheless, force in the point that identification done deliberately to interfere with the administration of justice may warrant a greater penalty. We agree that there may still be some conduct that would not meet the perverting threshold but would be of concern to the CPS, but in our view this is not a large gap and, in any event, the conduct could still be punished as contempt.

2.68 The third gap also concerns circumstances where existing offences are available. Here, we agree there are genuine concerns about whether the offence of common assault reflects or is able to reflect the particular harm, wrongfulness and culpability of an assault committed with the intention to interfere with the administration of justice, at least for most common assaults. The Sentencing Council provides a useful overview of the penalties, including the maximum imprisonment for common assault (six months, or two years where the victim is an emergency worker or the assault is racially or religiously aggravated), actual bodily harm (five years) and grievous bodily harm or wounding (seven years).[46] However, for a common assault, the option of passing the file to the AG for contempt proceedings may be an alternative. The court can also proceed for contempt on its own motion, so a higher penalty may be available using contempt proceedings. The absence of criminalisation does not equate to absence of legal power to address the conduct with penalties that include imprisonment.

2.69 The concern may be less significant where the assault involves bodily harm as the penalties are greater. Consecutive sentences for multiple offending would be available, subject to the Sentencing Council Guideline on Totality.[47]

2.70 In sum, we agree that there may be circumstances in which a criminal offence of intentional interference with the administration of justice could be a useful and appropriate measure for dealing with conduct that can otherwise only be the subject of contempt proceedings. However, as the discussion above indicates, we think those

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44 CP 262, paras 7.15-7.16.

45 Above, para 3.9. The CPS legal guidance on perverting the course of justice provides examples of what can fall within the scope of that offence: CPS, *Public Justice Offences* (1 July 2019; revised 18 September 2024).

46 Sentencing Council, *Assault* (2025).

47 Sentencing Council, *Totality* (1 July 2023).

circumstances are limited and the gap is not that great. Given this, should a criminal offence be created?

2.71 In reaching a conclusion, we have looked at the problems that would arise were there to be a separate criminal offence. We agree that were there to be an offence then it would need to operate alongside contempt and as an alternative to it. A point made by many consultees was that courts need the ability to deal swiftly and effectively with some conduct; it is simply untenable to suggest that a swathe of contempt powers currently available to the courts should be removed, which would be the effect unless any new offence sat alongside contempt. But the operation of that concurrent offence would, we think, give rise to two significant difficulties.

2.72 First, criminal matters may go to the police from any complainant. This may raise a problem if the courts have decided in the context in which a potential contempt occurred, not to treat a matter as contempt, only then to find that it is being investigated as a criminal matter. Were this to arise in, for example, family proceedings, where much leeway is given by judges with a view to the circumstances and the aims of dispute resolution, then this could have the effect of disrupting and undermining those proceedings. Were it to arise in a criminal case then there is the potential for disruption or delay that adversely affects a defendant, victim or witnesses. A party in, say, a family case, who is feeling particularly aggrieved, may adopt a tactic of seeking to involve the police in matters of conduct by an opposing party that are currently dealt with in the court in question.

2.73 Secondly, the proposition that the courts would be unable to deal with a matter as contempt after it has been referred to police would prompt legitimate judicial concerns. Where the courts have referred a matter to the police on the basis that it is a serious contempt and so should be addressed as a criminal matter, if the police subsequently elect not to address it (as they may decide to do, being rightly independent of the courts) then the fact the courts would see a serious contempt unaddressed would be very unsatisfactory. While this may already happen if a court refers a matter to the AG, where matters have been referred to police then we have heard in consultation judicial dissatisfaction with how long it takes police to deal with them and in some instances that nothing has happened at all.

2.74 In conclusion, our view is that the prospect of these problems arising – the first, in particular – outweighs what we consider to be any limited benefits that would result from the creation of a criminal offence.

CONTEMPT AND "KINDRED OFFENCES"

2.75 In the consultation paper we considered the current contempt framework and explained that in certain statutory provisions, conduct which may amount to contempt has also been described as a "kindred offence".[48] We pointed to some significant problems with this.

[48] CP 262, paras 2.51-2.56.

2.76 First, although statutes refer to kindred offences, it is not clear what falls within that category.[49] Drawing on our 2000 report on the Powers of Criminal Courts (Sentencing) Bill, we said the phrase seems to refer to conduct punishable under a statutory provision which, if carried out before a superior court, would amount to a contempt of court.[50] However, we also noted that some statutory provisions use the term "contempt" to describe offences which are similar in nature to contempt and so might be described merely as "kindred to" contempt.[51] We noted that in 2000 we said that in the context of the Bill there appeared to be no good reason for the distinction between contempt and kindred offences, and logically, committals for kindred offences should be treated in a similar way to committals for contempt.[52]

2.77 Secondly, we said that neither contempt nor kindred offences are criminal offences, yet the terminology "kindred offence" suggests otherwise. This causes confusion.

2.78 We concluded that:

> The current position is neither helpful nor necessary. Our provisional view is that where conduct constitutes contempt and is dealt with as contempt then it should be labelled as contempt. There would then be no need for the use of the term "kindred offences" and no uncertainty about whether the conduct in question was to be punished as contempt.[53]

2.79 We provisionally proposed in CQ 2 that the term kindred offences should no longer be used.[54]

Consultation

2.80 We received 37 responses to this CQ. Of those, 31 consultees agreed with the provisional proposal.[55] 6 gave an answer categorised as "other". Nobody disagreed with the proposal.

2.81 Comments from both those who agreed and those who responded "other" primarily focussed on the lack of clarity in the term "kindred offences". For example, the Central England Law Centre said that if the phrase "does not refer to clearly identifiable conduct, it is likely to be best that it is no longer used, and any relevant conduct identified clearly as contempt or otherwise". The Bar Council said that the proposed change "would bring clarity" to this area of the law. Kathryn Harvey said that clearer language would "avoid uncertainty". COMBAR said that "such language is of little assistance to those attempting to understand the law". The Law Society of England

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49 CP 262, para 2.52.

50 Above.

51 Above.

52 Above, para 2.53, citing Powers of Criminal Courts (Sentencing) Bill (2000) Law Com No 264; Scot Law Com No 175, p 7.

53 CP 262, para 2.56.

54 Above, para 2.57.

55 These included: the AGO; the CPS; Criminal Bar Association; FOIL; Central England Law Centre; the General Council of the Bar of England and Wales (the Bar Council); GNM; PIBA; COMBAR; the Law Society; JLACOS; the Court of Protection Bar Association (CPBA); and several academics.

and Wales (the Law Society) viewed it as "historic terminology that could be abandoned".

2.82 Several responses drew attention to the problems that unclear laws cause for people without legal expertise. Sunny Gill, who responded with "other", said that the term "does not make much sense to a member of the public who is not well-versed in law". Trudi Warner made a similar point. A consultee responding anonymously told us, "What 'kindred offences' says to someone in the legal profession might come across as meaning something totally different to a complete novice". District Judge Rachel Watkin said kindred offences is "not a [term] easily understandable by a lay person and, therefore, reduces access to justice for non-lawyers and those who cannot afford lawyers".

Discussion

2.83 The proposal attracted significant support and no disagreement. As the comments from consultees indicate, the problems are plain and significant.

Recommendation 3.

2.84 We recommend that the term "kindred offences" should no longer be used. Instead, conduct currently captured by the term "kindred offences" should be described as contempt.

Chapter 3: Contempt by breach of court order or undertaking

INTRODUCTION

3.1 Court orders are the quintessential manifestation of the administration of justice. They constitute an exercise of lawful judicial power governing behaviour and resolving disputes. Among the many purposes they serve, they protect rights, determine duties, ensure litigation is fair and effective, and allow decisions of the court to be enforced. Undertakings are the voluntary obverse of court orders: they are formal, legally binding commitments given to the court by a person agreeing to do something or to refrain from doing something.[1] Through court orders and undertakings, justice is both managed as a process and discharged as an outcome – or, in short, administered.

3.2 Breach of those orders and undertakings does not, therefore, merely affront the administration of justice – it directly and inescapably undermines it. The practical authority of the court, denuded in the breach, must be re-affirmed; the administration of justice requires it. One of the tools for vindicating the authority of the court – at least for sufficiently blameworthy breaches – is the contempt of court jurisdiction. The essential role that contempt of court plays where court orders are breached was recently affirmed by King LJ in *B (A Child) (Sentencing In Contempt Proceedings) (Rev1)*[2] in the Court of Appeal (Civil Division). As she put it, "punishment for breach of court orders serves as an essential aspect of upholding judicial authority as well as ensuring compliance".[3]

3.3 However, at present, the way that the law of contempt applies to court orders varies depending on the type of order. Civil contempt applies to breaches of orders that are made in the context of private litigation, with committal applications in respect of the breach usually made at the instance of the other party.[4] However, civil contempt does not apply to all court orders (many of which will apply to those not involved in litigation). A failure to comply with a reporting restriction order (RRO) under section 4(2) or section 11 of the Contempt of Court Act 1981 (CCA 1981), for example, is technically criminal contempt in that those orders are directed to the world rather than solely to the parties in litigation (what we refer to here as "*contra mundum*" orders, or "orders with worldwide effect"). The case law is not entirely clear on what difference this should make in practice – courts have inferred an intention to interfere with the administration of justice (the cornerstone of criminal contempt) from the defendant's knowledge of the order. In *Solicitor General v Cox*, the then Lord Chief

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1 An undertaking is a legal promise to the court, accompanied by a penal notice on its face; see for example HMCTS *Form N117 General Form of Undertaking* (1 October 2012, updated 27 January 2025).

2 *B (A Child) (Sentencing In Contempt Proceedings) (Rev1)* [2025] EWCA Civ 1048.

3 Above at [40] (King LJ).

4 See, for example, *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23]: "a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party".

Justice held that the intention to interfere "is proven in reality by the deliberate and knowing breach itself".[5]

3.4 Civil contempt itself is beset by similar imprecision. For example, courts have taken an inconsistent approach to the question of whether the defendant must be shown to have known the *terms* of the order (albeit that we have concluded, as noted in the consultation paper, that the better reading of the current law is that they do not[6]).

3.5 We recommend a single form of contempt that governs breaches of all court orders and undertakings. We recommend a clear set of elements that must be proven in order to establish liability, as well as three defences to liability. Though not wholly dissimilar to the existing law of civil contempt, the recommended form of contempt clarifies and simplifies the various common law approaches to breaches of court orders and undertakings.

An overview of contempt by breach of court order or undertaking

3.6 We will deal with each aspect of the below, but it is helpful to provide an overview here to give a sense of how each element and defence works together. We deal in turn with breach of sealed court orders, breach of unsealed court orders, the relevant defences, and breach of undertakings.

Liability for breach of a sealed court order

3.7 We consider that a person should be in contempt of court (subject to the following paragraphs) if it is proved beyond reasonable doubt that:

(1) the person has breached an order sealed by a court in England and Wales,

(2) a contempt warning was added to the front of the order or otherwise given to the person, and

(3) the order and the contempt warning were given to the person by being served on the person in accordance with any requirements as to service imposed by law.

3.8 We consider that the court hearing the contempt application should have discretion to dispense with the requirement to prove that a contempt warning was included on the front of the order, provided that doing so would not result in injustice.

3.9 Our concept of a "contempt warning" is:

> a statement by a court (however expressed and whether or not in writing) that a person who breaches an order or undertaking may be guilty of a contempt of court. We think that it should be immaterial whether a contempt warning is given by the same means or at the same time as the order or undertaking to which it relates.

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5 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] EMLR 22 at [78] (Lord Thomas LCJ).

6 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), para 4.34.

Liability for breach of an unsealed court order

3.10 We consider that a person should be in contempt of court (subject to the following paragraphs) if it is proved beyond reasonable doubt that:

(1) the person has breached an order given by a court in England and Wales,

(2) before the breach occurred, a contempt warning was given to the person by the court, and

(3) the order and the contempt warning were given to the person by being—

(a) communicated orally when the person was present or legally represented in court, or

(b) served on the person in accordance with any requirements as to service imposed by law.

3.11 We think that interpretive provision will be needed to define who is a legal representative, and may also be needed to clarify what counts as presence in court in the case of corporations. A definition of "court" will also be needed to ensure that our recommendations about the scope of the liability are given effect.

Defence: accident or mistake

3.12 We consider that a person who breaches an order or undertaking should not be guilty of a contempt of court if it is proved on the balance of probabilities that:

(1) the conduct constituting the breach was accidental, or

(2) because the person had made an innocent mistake of fact (one neither dishonest nor negligent), they did not realise that they were breaching the order.

3.13 We think the law will need to make it clear that a mistake as to the terms of the order or undertaking is not a mistake of fact.

Defence: lack of knowledge of order

3.14 We consider that a person who breaches an order should not be guilty of a contempt of court if it is proved on the balance of probabilities that:

(1) the order or the contempt warning—

(a) was communicated orally when the person was not present in court, or

(b) had effect against the whole world, and

(2) the person did not know of the existence of the order.

Liability for breach of an undertaking

3.15 We consider that a person should be in contempt of court in relation to a breach of an undertaking in circumstances corresponding to those set out above in relation to orders, except that:

(1) in the case of an undertaking, the means by which the undertaking itself is given will not need to be proved as set out above, and

(2) a defence of lack of knowledge should only be available in relation to the contempt warning and not the undertaking itself.

The structure of this chapter

3.16 It is not helpful to deal with each of these elements sequentially. Instead, this chapter will be structured as follows:

(1) breach of court order or undertaking accompanied by contempt warning;

(2) notice of the court order and lack-of-knowledge defence;

(3) defence – accidental conduct;

(4) defence – mistake of fact;

(5) standard of proof;

(6) knowledge of the terms of the order;

(7) triviality;

(8) reasonable excuse; and

(9) public bodies.

BREACH OF COURT ORDER OR UNDERTAKING ACCOMPANIED BY CONTEMPT WARNING

3.17 Contempt by breach of order or undertaking should apply to breaches of all court orders and undertakings. This form of contempt is broader in scope than civil contempt, which involves "a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party".[7] In our view, the gravamen of breach of an order is the same whether or not that order also protects private rights, at least with respect to the interference in the administration of justice and the denudation of the court's practical authority. It therefore makes more sense to treat all breaches of orders (and undertakings) as a single species of contempt liability.

3.18 Notably, this means that liability for breaches of reporting restrictions (amongst other types of order) would fall to be assessed under contempt by breach, rather than as a species of criminal contempt (as is currently the case for some types of order).

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7 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23], as cited in CP 262, para 2.2.

Contempt by breach of order offers a clear and structured approach towards liability. It also provides for defences. The current approach to breaches of reporting restrictions, though ostensibly predicated on a finding of intention, essentially requires proof only that the defendant knew of the order and deliberately breached it. It is a relatively unstructured approach that effectively elides civil and criminal contempt with the effect that any difference between the two is more apparent than real.

3.19 The provision of a contempt warning is important for two reasons. Firstly, and most fundamentally for questions of form, the contempt warning serves to define the boundaries of this form of contempt, particularly in the context of unsealed court orders. It is obviously important that contempt liability does not attach automatically to any and all directions from the court; the contempt warning serves to bring a court order within scope (to the extent it is not already within scope by virtue of being sealed). Further, it allows the court to consider – often with the benefit of submissions – whether the order (or undertaking) is one that ought appropriately to be enforced by contempt.[8]

3.20 Secondly, and importantly for fairness, the contempt warning makes it clear to those subject to the order that the consequences of breach may be a finding that they are in contempt of court.

3.21 The latter function is currently served by a penal notice. A penal notice is defined in rule 81.2 of the Civil Procedure Rules as:

> a prominent notice added to the front of an order by or at the request of a party warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.

A penal notice can, however, be waived where it would cause no injustice to the defendant (as some consultees noted).[9] The current approach to penal notices does not therefore operate to determine which orders can be enforced by contempt; it is not the determinant of civil contempt in the way that a contempt warning would be for contempt by breach of unsealed court orders.

Consultation

3.22 In CQ 18, we provisionally proposed that establishing the circumstance element for contempt by breach of order or undertaking should require proof that there is:

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8 There are other measures available to a court where their directions have not been complied with – including costs measures or preventing a party from relying on certain evidence or pursuing a particular claim or defence – so it does not follow that the decision not to provide a contempt warning would leave the court without any way of enforcing its orders.

9 See, for example, *Serious Organised Crime Agency v Hymans* [2011] EWHC 3599 (QB) at [12] (Kenneth Parker J): "I am entirely satisfied that [the respondent] knew the consequences of breach of the order as varied, and it would not serve the interests of justice to allow him to escape those consequences because no penal notice was expressly endorsed on the variation order".

(1) an order of the court, whether expressed as a summons or otherwise, that applies to the defendant, or

(2) an undertaking given by the defendant,

provided the order or undertaking is accompanied by a penal notice or its equivalent.[10]

3.23 This proposal was, in effect, doing two things. It was asking consultees, firstly, whether there should be a discrete form of contempt that governed breaches of all court orders and undertakings (so not just orders that would fall within scope of civil contempt) and, secondly, whether a penal notice or its equivalent should be necessary or sufficient to bring those orders and undertakings within scope of this form of contempt (our position being that it was both necessary and sufficient).

3.24 As will be seen below, although the response from consultees was generally positive, there were two issues raised that call for particular consideration. Firstly, not all consultees agreed that a penal notice should be necessary. Secondly, there was a view by some media consultees that breach of RROs in their various forms should be jurisdictionally and procedurally separate from contempt by breach of order, whether as a subset of breach or as a part of general contempt by publication.

3.25 This leaves two questions to be resolved:

(1) Is a penal notice or its equivalent a necessary requirement to establish contempt liability for breach of order or undertaking?

(2) Should breach of reporting restriction orders be categorically distinct from breaches of other forms of court order?

Consultation responses

3.26 The majority of consultees agreed with the proposal.[11] Those in general agreement included the Family Division of the High Court; the Property Chamber of the First-tier Tribunal (FtT); the Chartered Institute of Journalists (CIoJ); the Association of Lawyers for Children; the Court of Protection Bar Association (CPBA); the Information Commissioner's Office (ICO); the General Council of the Bar of England and Wales (the Bar Council); and the Attorney General's Office (AGO), among many others.

3.27 A repeated concern from consultees was that the court considering liability for contempt should be able to waive the requirement to append a penal notice or its equivalent (and that "defects in the penal notice should also be capable of being waived", per the Chancery Bar Association), particularly where there has been (to use Kingsley Napley's term)[12] "complete disregard" for the court's order. This concern was expressed with particular force by the Commercial Bar Association (COMBAR)[13] and

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10 CP 262, para 4.17.

11 Of the 48 consultees who responded to this question, 37 responded "yes", 2 responded "no", and 9 responded "other".

12 This response was submitted by the Dispute Resolution team at Kingsley Napley LLP.

13 The COMBAR response was prepared by a sub-committee and represents the views of that group rather than the views of COMBAR as a whole. We refer to it as the COMBAR response for convenience.

echoed by Greg Callus (barrister and editor of the contempt section of the White Book[14]). They pointed to the commentary on penal notices in the White Book and accompanying case law to the effect that the lack of a penal notice will not be a bar to committal where the court is satisfied that the lack did not cause any injustice to the defendant. They argued that this:

> avoids respondents running "technical" defences to shield themselves from the consequences of a serious contempt, which ultimately lead to greater cost and disproportionate use of court time.

3.28 The Criminal Bar Association (CBA) argued that penal notices might need to be given orally in circumstances where there is insufficient time to draw up the order in appropriate form.

3.29 The Constitutional and Administrative Law Bar Association noted that it is not the general practice of the Administrative Court to endorse coercive orders with a penal notice.

3.30 The Law Society of England and Wales (the Law Society) also noted that it should be made clear to which parts of the order the penal notice refers (assuming it is not the whole order).

3.31 Both the Media Lawyers Association (MLA) and Guardian News and Media Limited (GNM) expressed some concern with the fact that this form of contempt would bring RROs (and other restrictions on reporting aspects of court proceedings) within scope. Neither argued strongly that such restrictions should *not* be within scope. However, GNM argued that it was not clear whether publication in breach of an RRO should fall within general contempt by publication or breach of order. The MLA expressed concern that this categorisation would have effects beyond the question of what fault elements need to be proven in order for breach of an RRO to constitute contempt. Notably, it would bring coercive remedies within scope and, further, it would allow inferior courts to hear contempt applications in respect of breach of RROs by the media. They therefore argued that, in order to safeguard freedom of expression, breach of RROs should be a discrete sub-category within contempt by breach of order. (We will deal with inferior courts and remedies in part two of the report).

Discussion

Contempt warning

3.32 It is clear that current practice means that penal notices are not universally required (and, even when they are notionally required, a court can waive the requirement so long as this would cause no injustice). It is also clear that a penal notice *per se* will not always be appropriate or possible (we note the CBA's observations about the need to give oral warnings, which we deal with below).

3.33 We did not ever envisage (or indeed propose) a regime that required penal notices (as defined in the Civil Procedure Rules) to be given. However, we did propose a requirement that courts make it clear when they envisage that the consequences of

[14] The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

breach ought to amount to contempt. The archetypal form of notice will be a formal written penal notice on the face of the order. However, what is important for these purposes is not the strict form of the notice but the fact that a warning has been communicated to those subject to the order. This is the "equivalent" to a penal notice envisaged in our CQ.

3.34 In the context of sealed court orders – written orders bearing the court's seal – we are satisfied that such orders are clearly formal orders of the court and therefore fall within the scope of this form of contempt. The classificatory role we had envisaged for contempt warnings can be equally fulfilled by the presence of the court's seal. Accordingly, we do not consider a contempt warning necessary to bring the order within the ambit of breach-of-order contempt.

3.35 Nevertheless, we take the view that fairness will generally require a contempt warning to be given. At the same time, it will often be abundantly clear to people subject to sealed orders that they are obliged to comply. We therefore recommend that, for sealed orders, the court hearing the contempt application should have discretion to dispense with the requirement to prove that a contempt warning was given, provided that doing so would not result in injustice. This reflects the current approach to penal notices.

3.36 In the context of unsealed orders (such as oral orders), the contempt warning (in whatever form it takes) allows the court to determine which of its orders (or which parts of its orders, per the Law Society) will come within the scope of contempt by breach of order. This is the way in which we delineate the scope of this form of contempt.

3.37 If we were to recommend that the current practice of waiver continue in respect of all court orders (sealed and unsealed), then it is not clear on what basis we could delimit the boundaries of this form of contempt. It is therefore necessary to say that waiver of any notice at all is fatal to a contempt application (under this category of contempt). However, with respect to COMBAR's point about technical defences to serious breach, defect in the *form* of notice ought not be fatal to a contempt application so long as it was in fact made clear to the defendant (which might be by service) what the consequences of failure to comply might be.

3.38 Whilst a warning is a necessary precondition to a finding of contempt – and, indeed, it must be a warning that was given prior to breach (a court cannot give a warning after breach and then find someone in contempt in respect of that prior breach) – it does not follow that the warning needs to have been given at the same time as the order. This would seem to be an unduly restrictive requirement. Our view is that this provides important flexibility to the court without undermining the point of the warning.

The scope of contempt by breach of court order and undertaking

3.39 There is real benefit in consolidating the approach to breaches of court orders. The argument for such consolidation lies not only in simplification, but also in the fact that it provides a unifying rationale for all instances of breaches of court orders or undertakings: where a person is subject to a court order, or has provided a voluntary, formal undertaking, then the foundation of liability for contempt lies in disobedience to

that order or undertaking. In line with that approach, our view is that RROs should stay within the scope of contempt by breach of order.

3.40 As a matter of liability there is nothing about RROs that raises concerns that would not apply equally to orders *contra mundum* generally. We return to this issue later in the chapter. We do not suggest that orders *contra mundum* should be categorically distinct, though we do recommend a defence that applies specifically to orders *contra mundum* (which, to emphasise the point, is a category that includes RROs).

3.41 Taking the MLA's argument at its strongest, there are particular freedom of expression concerns that apply to RROs, and it is correct that those routinely notified of RROs would find it more difficult to prove they did not know about the order than those who may legitimately plead ignorance of the RRO (because, say, they only drifted in and out of court during the day and were not present at the relevant times).

3.42 However, neither of these matters speak to the appropriateness of the liability framework generally. There are real problems that currently attend to the transparency and availability of RROs (a fact that a number of consultees have noted), but this was the basis of our recommendation in 2014 that there should be an accessible online database of reporting restrictions. We reiterate the fundamental importance of there being an accessible database of RROs: we will deal with notice and knowledge below, but it would be very difficult to enforce RROs (and improper to do so) if it cannot be demonstrated that there was sufficiently clear notice of the RRO.

Recommendation 4.

3.43 We recommend that there should be a specific form of contempt governing breaches of court orders and undertakings, such that a person will be in contempt of court if they breach an order given by a court in England and Wales or an undertaking given to such a court.

Recommendation 5.

3.44 We recommend that an order or undertaking will be in scope of this form of contempt if—

(1) the order was sealed, or

(2) a contempt warning was given to the person by the court in relation to the order or undertaking (but a person cannot be subject to a contempt application under this form of contempt if the alleged breach was prior to the contempt warning being given).

3.45 A "contempt warning" is a statement by a court (however expressed and whether or not in writing) that a person who breaches an order or undertaking may be guilty of a contempt of court.

3.46 It is immaterial whether a contempt warning is given by the same means or at the same time as the order or undertaking to which it relates.

Recommendation 6.

3.47 We recommend that, in cases involving a breach of a sealed court order, it should generally be required to prove that a contempt warning was given to the alleged breaching party. However, the court hearing the contempt application should retain discretion to dispense with this requirement where doing so would not result in injustice.

NOTICE OF THE COURT ORDER AND LACK-OF-KNOWLEDGE DEFENCE

3.48 A person should not be liable under this form of contempt unless they had notice of the order. Notice is achieved either by serving the order on the person in accordance with any requirements as to service imposed by the court or under any Act, or by communicating the order orally when the person was present or legally represented in court. The reason is that a person should not be liable for contempt unless they had knowledge of the order. However, in practice, it may be very difficult for an applicant to prove that a person had knowledge of a court order beyond adducing evidence of their compliance with the terms of service. There is also a sense in which parties who have complied with all of the service directions required of them should be entitled to enforcement of the order.

3.49 Our view is that oral communication of the order would be sufficient notice, providing the person subject to the order is actually present in court or formally, legally represented in court. If the person knows about the order, it seems counterintuitive to suggest that the order should nevertheless not be enforceable. However, where a person is legally represented in court rather than present themselves, we recommend

later in this chapter a defence that would allow the person to show that they did not actually know of the existence of the order.

3.50 When we say "formally, legally represented", we mean represented by a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act). We say this because it means that there will be a professional obligation on the part of the representative to inform the person of the order, and more particularly that they will be able to communicate that order accurately.

Consultation

3.51 In CQ 20, we provisionally proposed that establishing contempt by breach of a court order or undertaking should require proof that the defendant knew that they were bound by the relevant court order.[15]

3.52 As will be seen, there is a difficulty here that we did not fully address in the consultation paper, namely that personal service is not always required currently (albeit that it is the norm). We conflated the questions of notice (that is, deemed service) and actual knowledge. Privileging notice as against actual knowledge is relatively uncontroversial where the defendant is a named party in litigation. In the case of *contra mundum* orders – those intended to bind the world at large – the issue becomes more complex. Applicants are entitled to rely on having complied with the court's directions regarding service and publicity. However, this may conflict with the public's legitimate interest in being made aware (rather than merely deemed to be aware) of orders that affect them.

Consultation responses

3.53 The majority of consultees agreed with the proposal.[16] These included, as a sample, the CPBA; the Bar Council; the ICO; Kingsley Napley LLP; the AGO; the Association of HM District Judges; Garden Court Chambers, Civil Liberties Team; the Social Housing Law Association; and numerous others.

3.54 The CBA, the News Media Association, GNM, PA Media, the Incorporated Council of Law Reporting, and the MLA all agreed with the proposal, but all noted the vital importance of an accessible database of reporting restrictions. The MLA also further called for a streamlined way of notifying in-house legal teams of RROs.

3.55 Resolve (a charity focussing on individuals suffering from substance misuse and homelessness) argued that it is not obvious how landlords would prove a defendant's knowledge beyond proof of service. They also noted that anti-social behaviour injunctions "are often obtained due to violent behaviour, therefore any additional requirements to engage with a defendant when serving a document may place those [serving] documents at unnecessary risk of harm".

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15 CP 262, para 4.43.

16 50 consultees answered CQ 20, of whom 39 said that they agreed with the proposal, 2 disagreed, and 9 responded "other".

3.56 Anthony Collins Solicitors LLP argued that the case law clearly supported the proposition that deemed service was sufficient (rather than there being a requirement to prove personal knowledge of the order), and suggested that the fault element could therefore be "known or ought reasonably to have known".

3.57 The Justices' Legal Advisers and Court Officers' Service (JLACOS) said that:

> there is a strong strand of pseudo-law, which is frequently cited as a defence, that if, in the view of the defendant, the original order was wrongly made, it is not binding. The defendant therefore does not "know" they are bound: they have persuaded themselves (or someone on the internet has persuaded them) that they aren't bound.
>
> The true issue is not the defendant's knowledge that they are bound, but that they know that they are subject to a court order which the court has said is binding.

3.58 The Official Solicitor said that, if a person is unable to understand the information relevant to a decision, or to retain or weigh that information, then they should not be liable for contempt.

Discussion

3.59 The language we adopted in this part of the consultation paper was unintentionally loose. At paragraph 4.30, we said "the defendant must have had notice of the order if they are to be expected to comply with it. Our provisional view is that this should remain the case".[17] We cited *Masri v Consolidated Contractors* in support of our proposition.[18] This is clearly not quite what we said in the consultation question itself, which used the language of knowledge (knowledge being a mental element – which notice, as a question of service, is not). Whilst personal service is considered very important, there are circumstances in which a court may grant permission for service to be effected by other means (such as, say, email, depending on the circumstance). In saying that the defendant must be proven to have known of the order, it was not our intention to undermine the case law and Civil Procedure Rules as to deemed service.[19]

3.60 Further, to hold that personal service is a necessary requirement in all cases would present practical difficulties, including not only the problem of violent behaviour noted above but also, for example, where defendants have deliberately placed themselves outside the jurisdiction in such a way that they cannot be personally served, even though in some circumstances they might have actual knowledge of the order.

3.61 Nevertheless, it should be clear that proper service should be the norm and that exceptions to personal service should be carefully justified bearing in mind the contempt liability that will attach to those orders.

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17 CP 262, para 4.30.

18 *Masri v Consolidated Contractors* [2011] EWHC 1024 (Comm) at [353] (Clarke J).

19 For example, Civil Procedure Rules (CPR), r 81.4(c) clearly contemplates that the court making the order (that is the subject of the contempt application) may have dispensed with personal service.

3.62 As for orders *contra mundum*, we noted the extensive service requirements that were required of HS2[20] to ensure that their route-wide injunction was publicised as widely as possible. There is an argument that, so long as the applicant (HS2, in this case) has complied with their service obligations, they should be able to enforce the order through contempt. Or, to put it more strongly, if they have complied with all the directions of the court, they should be *entitled* to enforce their order through contempt. One might ask what the point is in service requirements if the order may nevertheless be unenforceable.

3.63 The counter-argument is that people may find themselves in breach of an order that, despite the best efforts of the applicant, they did not even know existed (and, unlike defendants who are parties in litigation, the defendants in orders *contra mundum* may not even be aware that the litigation existed).

3.64 Nevertheless, it may be very difficult for an applicant to prove that a person had knowledge of a court order beyond adducing evidence of their own compliance with the terms of service. It is therefore suggested that the person will be shown to have knowledge of the order if the applicant served (and publicised) the order in accordance with the directions of the court. The onus must therefore be on the court making the underlying order to ensure that notice (which is to say service and publication of the order) is sufficiently robust such that knowledge is not routinely assumed or illusory.

3.65 In any event, in both the context of orders made *contra mundum* and oral orders where the defendant was not present in court, it should be open to the defendant to show that they did not in fact know of the order – in effect a rebuttable presumption in favour of knowledge where service has been complied with. So, for example, a journalist could show that their lawyers did not send them notice of an injunction, or an RRO was not served and publicised in the approved fashion (we reiterate here our views on the need for an accessible database of RROs, which would seem to be an essential component of proper service in this context). This balances the need to ensure that *contra mundum* orders against persons unknown can be enforceable without unrealistic evidential requirements, on the one hand, with the need to prevent contempt liability being imposed on those who were genuinely unaware that they were subject to a court order, on the other.

3.66 The alternative – which we reject – is to require the applicant to show that the defendant actually knew of the order. It is not clear how far evidence of service would go in demonstrating proof beyond reasonable doubt that the defendant knew of the order; this is a fact-sensitive question. It may rarely be possible to provide sufficient evidence of such knowledge. As noted by Anthony Collins Solicitors, it will often be the case that proof of service is the only evidence available to the applicant.

3.67 It is for that reason too that we recommend that the standard of proof that the defendant has to meet in raising the defence will be the balance of probabilities (though this is to be contrasted with the higher standard of proof – beyond reasonable

[20] High Speed Two (HS2) Limited.

doubt – that must be met by the applicant in establishing those elements for which they bear the burden of proof).

Recommendation 7.

3.68 We recommend that it should be a precondition of liability under this form of contempt that the order or undertaking and (where relevant) the contempt warning were given to the person by being—

(1) communicated orally when the person was present or legally represented in court, or

(2) served on the person in accordance with any requirements as to service imposed by or under an Act.

Recommendation 8.

3.69 We recommend that a person who breaches an order is not in contempt of court under the contempt by breach of court order and undertaking provisions if it is proved on the balance of probabilities that—

(1) the order—

(a) was communicated orally when the person was not present in court and was not served on the person, or

(b) had effect against the whole world, and

(2) the person did not know of the existence of the order.

DEFENCE – ACCIDENTAL CONDUCT

3.70 This question goes to the deliberateness of the conduct or omission that breached the order or undertaking; it is not a question of whether the *breach* was deliberate. We did not ask a consultation question about accidental conduct on the basis that the point had seemed entirely uncontroversial during our pre-consultation engagement with stakeholders. Nevertheless, we did discuss this in the consultation paper and considered that it could be a matter that goes to fault.[21]

3.71 However, we have considered this further and have concluded that it should not be an element to be proven by the applicant. It would be unusual (at least in criminal law terms) to require specific proof that the relevant conduct was deliberate, absent the matter being raised by the defence. More particularly in this context, the evidence available to the applicant may be very limited. The applicant will not be likely to have

[21] CP 262, paras 4.27-4.28.

investigatory powers (which is not the situation in the criminal law), and therefore it may simply be unrealistic to require the applicant to bear a burden of proof with respect to whether or not the defendant's conduct was deliberate.

3.72 Instead, we have concluded that there should be a defence of accidental conduct. If the defendant is able to show on the balance of probabilities that the conduct constituting the breach was accidental, then they will not be in contempt of court. This fairly reflects the fact that it is oxymoronic to describe genuinely accidental conduct as contemptuous in nature.

Recommendation 9.

3.73 We recommend that a person who breaches an order or undertaking is not guilty of a contempt of court under this form of contempt if it is proved on the balance of probabilities that the conduct constituting the breach was accidental.

DEFENCE – INNOCENT MISTAKE OF FACT

3.74 In this part, we recommend that it should be a defence for a person to show that, because they had made an innocent mistake of fact (other than a mistake as to the terms of the order or undertaking), they did not realise that they were breaching the order or undertaking. By "innocent", we mean that the mistake was neither the result of dishonesty nor of negligence.

3.75 We provisionally proposed (in line with the current law) that a defendant must know the facts that made their conduct unlawful.[22] We said that "if the person were mistaken as to an essential quality of their conduct ("essential" in the sense that it relates to the breach), then they are not sufficiently culpable".[23]

3.76 By way of explanation, we cited *Adam Phones Ltd v Goldschmidt*.[24] Of that case, we said this:

> The defendant had deliberately deleted a computer programme, and in so doing he was in breach of a court order – but he had done so in the genuine belief that a copy of the programme had been made. The breach… was therefore insufficiently blameworthy to bring it within the scope of contempt.[25]

3.77 The law ostensibly requires proof that the individual knew the facts which rendered their conduct a breach. However, though oft-repeated,[26] this requirement has never

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22 CP 262, para 4.55, CQ 22.

23 Above, para 4.45.

24 *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 (Ch).

25 CP 262, para 4.54.

26 See, as just a few examples: *Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc* [2009] EWHC 1445 (QB) at [14] (Teare J); *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm) at [150] (Christopher Clarke J); and *Sheikh Abdulrahman Khalid Bin Mahfouz v El-Rashid* [2017] EWHC 1460 (Comm) at [8] (Teare J).

been subjected to much judicial scrutiny. We have concluded that this does not reflect how the law operates in practice. Moreover, if interpreted literally, such a requirement would be unworkable. It would necessitate the applicant identifying every fact that made the conduct a breach – potentially a large number of facts, depending on the terms of the order. In reality, it is sufficient to show that the individual was mistaken about one of those facts. The mischief to which the current law is directed is treating factual mistakes as contempt. Crucially, the reason such a mistake exonerates the person is that it demonstrates they did not realise their conduct breached the order. Mistake of fact is a well-established exculpatory element with the criminal law fault doctrine.[27] As such, it represents a more conventional means of addressing the mischief it targets. We therefore recommend that this principle be clearly reflected in statute.

3.78 Further, were we to retain the current formulation, a person who knew full well they were breaching an order (because, for example, their legal adviser had told them their proposed conduct would be in breach) might make a technical argument that they can avoid liability because they were not aware of one of the facts making their conduct a breach. A defence of mistake is therefore a more accurate, just, and workable approach.

3.79 We are also concerned that the current law enables people to evade liability for contempt by relying on mistakes that were the product of their own dishonesty or negligence. The contempt jurisdiction is not designed to punish mere incompetence, which is partly why genuine mistakes are exempt (not that such mistakes invariably arise from incompetence). However, liability should not be excused where errors arise from dishonesty or from failing to take steps that a reasonable person would take to ensure compliance with the order or undertaking. We therefore further recommend that the defence should be limited to innocent mistakes, which is to say mistakes that are not the product of dishonesty or negligence.

3.80 We will explain later in the chapter why the defence of mistake does not encompass mistake as to the terms of the order. In short, our firm view is that there should be no requirement to show that a person had knowledge of the terms of the order. To allow arguments by people who were on notice of the order that they had failed to acquaint themselves with the terms of the order would be a charter for the wilfully ignorant. Further, and in any event, mistake of law (which is to say, a mistake as to what the law – such as a court order – requires a person to do or not do) neither justifies nor excuses a person who breaks the law. It is a cliché – but no less true for being so – that ignorance of the law is no excuse.

Consultation

3.81 In CQ 22, we therefore provisionally proposed that:

[27] See, for example, *Archbold Criminal Pleading Evidence and Practice* (Sweet & Maxwell 2026) 17B-12 and following.

> to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant had knowledge of the facts that made the conduct a breach.[28]

Consultation responses – CQ 22

3.82 The majority of consultees agreed with the proposal.[29]

3.83 GNM noted that it may in practice be difficult to separate knowledge of facts from knowledge of law, though they agreed the proposal was important nevertheless to prevent "innocent factual mistakes from being treated as contempt".

3.84 Only two consultees disagreed with the proposal. Anthony Collins Solicitors expressed concern that housing tenants often seek to evade service and so would not have knowledge of the facts that made the conduct a breach.

3.85 Greg Callus argued that:

> the defendant needs to know he is doing the act which is in breach, but he doesn't need to realise the legal consequences of the act (ie that it is a breach) whether based on extrinsic facts or not. The lack of knowledge or understanding where a deliberate act in breach of a known order goes to sentence not breach.

3.86 The Official Solicitor agreed with the proposal but argued that:

> I do not consider that 'knowledge' is sufficient but also an understanding of the facts, an ability to retain those facts and weigh the relevant information (the test for mental capacity set out in the MCA 2005 [the Mental Capacity Act 2005]).

Discussion

3.87 As we have explained above, we have concluded that we should retain the spirit of this part of the law, but that it should be reframed as a defence of mistake (which, in any event, seems to reflect the practice if not the letter of the law).

3.88 We further conclude that the defence should only operate in respect of innocent mistakes, rather than those attributable to dishonesty or neglect. The current legal framework – specifically the requirement to prove knowledge of the relevant facts – has obscured the reality that a lack of knowledge may stem from dishonesty or neglect. This becomes clearer when the element is reframed as a defence of mistake, revealing a gap that is difficult to justify: the more culpable the mistake, the less exculpatory it should be. As noted above, while mere incompetence is not contemptuous, dishonesty or a failure to take reasonable care to comply certainly is.

3.89 We are not persuaded that mistake is simply a matter that goes to sentence rather than liability. As we note above, a person who deletes the only copy of evidence in the

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[28] CP 262, para 4.55.

[29] Of the 46 consultees who responded to this question, 37 agreed with the proposal, 2 disagreed, and 7 responded with "other".

genuine and innocent belief that another copy existed, for example, should not be in scope of contempt (it is quite literally not contemptuous).

Recommendation 10.

3.90 We recommend that a person who breaches an order or undertaking is not guilty of a contempt of court under this form of contempt if it is proved on the balance of probabilities that, because the person had made an innocent mistake of fact (one that is not the result of dishonesty or negligence), they did not realise that they were breaching the order or undertaking.

STANDARD OF PROOF

3.91 We have already recommended that, for the defences, the burden of proof should be on the defendant to the civil standard, which is the balance of probabilities. However, for the elements of the contempt that fall to be proven by the applicant, these should, as with the current law, be made out by the applicant to the criminal standard, which is to say beyond reasonable doubt. Any reasonable doubt that the defendant has breached the terms of the order, or that there was notice, or that a contempt warning was given, should be resolved in favour of the defendant, particularly bearing in mind the potential sanctions that follow a finding of contempt. Further, the applicant will be well-placed to evidence both notice and breach.

3.92 Moreover, this also has the benefit that any reasonable doubt as to the meaning of terms will be resolved in favour of the defendant (at least so far as their conduct falls within one of the possible interpretations).

3.93 This is the current law, and we have not received any evidence to persuade us to change approach (save that we have reframed some elements as defences for reasons already explained).

KNOWLEDGE OF THE TERMS OF THE ORDER

3.94 We now turn to a matter that we have concluded should not form one of the elements of this form of contempt, namely knowledge of the terms of the order.

Consultation

3.95 In CQ 21, we provisionally proposed that an applicant should not be required to show that the defendant knew the precise terms of the order. We said that:

> to hold otherwise would be to reward the wilfully blind and incentivise people to fail to acquaint themselves with the terms of court orders, knowing they could thereby place themselves beyond the reach of the contempt jurisdiction.[30]

3.96 Further, we observed that:

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[30] CP 262, para 4.33.

were it the case that knowledge of the terms of the order had to be shown, this would be very difficult to square with the authority that it is no defence that a person had not read the order… – that is, they can be liable for contempt even if their position is that they did not know the terms of the order.[31]

3.97 It was enough to establish culpability, we said, that a person knew there was a court order by which they were bound.[32] This also fully addressed any concerns about orders *contra mundum*: if knowledge of the order can be established, no useful purpose is served by also requiring proof of knowledge of the terms of the order.[33]

3.98 With some limited exceptions in respect of protected persons and minors, our position reflected the current law so did not constitute an expansion of liability.

Consultation responses

3.99 A majority of consultees agreed with our proposal.[34] Those included academics from University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM); Kingsley Napley; the CPBA; the CBA; the Bar Council; the Forum of Insurance Lawyers; the AGO, and many others.

3.100 The response from the University of Sheffield CFOM stated:

> That this should be the approach is well-illustrated by *R v Stephen Yaxley-Lennon*[35] in respect of the breach by Yaxley-Lennon of the order made under section 4(2) of the Contempt of Court Act 1981. For example, Dame Victoria Sharp said in that judgment: 'It would be impracticable to impose responsibility on the court to ensure that everybody who is intended to be bound had actual knowledge of the terms of an order, and it would create a perverse incentive for reporters to avoid acquiring actual knowledge.'[36]

3.101 Consultees who disagreed with the proposal included Liberty; Garden Court Chambers, Civil Liberties Team; the CIoJ; and the Housing Law Practitioners' Association, among others.

3.102 Liberty argued that:

> injunctions can bind anyone who arrives to protest at a site, who could conceivably have no idea of the terms of the order. We would welcome clarification that the law requires knowledge of an order in order to create liability for breaching it and agree that to establish fault, proof must be required to show that a defendant had knowledge of the precise terms of the order.

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31 CP 262, para 4.36.

32 Above, para 4.40.

33 Above, para 4.41.

34 Of the 47 people who responded to this question, 26 agreed, 11 disagreed, and 10 responded "other".

35 *R v Stephen Yaxley-Lennon* [2019] EWHC 1791, [2020] Criminal Law Review 534.

36 Above at [55] (Dame Victoria Sharp PQBD).

3.103 Garden Court Chambers, Civil Liberties Team also disagreed, suggesting that:

> whilst knowledge of the specific wording of an order may be too high a threshold, in accordance with the principles of quasi-criminal liability outlined above, an applicant should be required to prove that a defendant was aware that his/her action was in breach of a court order before liability for contempt may be established. Persons should not be made subject to sanction for contempt of court for breach of a court order unless they are aware that they are breaching a court order.

3.104 Greg Callus argued that:

> a person should not be held strictly liable for civil contempt unless he knew the precise terms of the order said to have been breached. I can see a carve out for wilful blindness, where the defendant could easily have discovered the precise terms (ie enclosed in a letter he decided not to read), but that should be a wilful blindness exception from a general rule that the precise terms are knowable and known.

3.105 COMBAR had a mixed response from their members. Whilst a number of their members agreed with the proposal (any alternative would "encourage incuriosity or evasion"), some said that:

> the respondent might have some good (or at least reasonable) reason not to know the precise terms of the order. Examples might include a lack of understanding due to some vulnerability, learning difficulty or personal circumstance, or incorrect or inadequate legal advice on which the respondent relied in good faith ....
>
> Some Contributors therefore favoured a new requirement that the respondent was at least reckless as to the terms of the order, or whether the conduct in question breached the terms of the order. This would incorporate an additional fault element into the law in this area which some felt strongly ought to exist. These Contributors argued that treating this aspect of fault as a matter that can only be considered at the sanction stage failed to accord the point sufficient weight.
>
> These Contributors took the view that a respondent who was able to read and understand an order, or in a position to have it explained to them, but ignored or chose to remain ignorant of its contents, could reasonably be regarded to be reckless. By contrast, someone who for some good reason was not in a position to know or understand its contents would not fail that test.

3.106 The Open Justice Court of Protection Project argued that compliance with orders was often rendered practically very difficult because the terms were not in fact knowable, albeit that the existence of the order was known, or that there was sometimes a difference between the terms of the order as described orally and the terms of the eventual order in writing.

Discussion

3.107 We have concluded that the applicant should not be required to prove that the defendant knew the precise terms of the order. We echo the words of the President of the King's Bench Division (quoted in the University of Sheffield CFOM response above) that it would not only be impractical to require the applicant to prove that the

defendant knew the terms of the order, but would also have the effect of incentivising people to avoid acquainting themselves with the terms of the order.

3.108 As to the suggestion that there be a carve out for wilful blindness, it is not obvious how one would prove wilful blindness. The entire point of strict service requirements (whether personal or otherwise) is that such requirements allow those subject to the order to know that they are subject to the order and to acquaint themselves with the terms of the order. If the defendant were to claim that they nevertheless did not know the terms of the order, what evidence beyond service would be available to the applicant to demonstrate wilful blindness? This would be a particularly acute problem if the defendant were not served personally and would, in all cases, allow the defendant to run a defence that they had misunderstood the terms of the order (even if they did see the order). This would unavoidably encourage "incuriosity and evasion".

3.109 It is also not obvious how recklessness would operate in this context. It is not obvious to us that there are circumstances when it would be reasonable to take the risk of breaching a court order, particularly if the alternative to taking the risk were making sure that the terms of the order were known. In any event, it is not clear that this would address the problem it is proposed to solve, namely the liability of those who may not (for good reason) be expected to understand the terms of the order (rather than of those who are aware of the risk they are breaching the order).

3.110 If a person lacks capacity under the terms of the Mental Capacity Act 2005 (MCA 2005), then it is far from clear that permission ought to be given to proceed against them in contempt (though we will deal with the question of permission in part two of our report). In any event, a court that found that a person lacked capacity under the MCA 2005 in relation to the order would not be likely to find that knowledge of the order could reliably be proven (even assuming a defence was not available to the person). If a person had fluctuating capacity such that they knew of the order at the time of breach but now lack capacity in relation to it, there would be no justification in sanctioning them on the basis that none of the objectives of sanctioning would apply: there would seem to be little public interest in punishing the person and even less so in trying to coerce them to comply.

3.111 So far as *contra mundum* orders are concerned, the fact remains that it may be almost impossible to prove knowledge of the terms of the order. It is also worth reiterating the point that this question would only really arise where a person were shown to have known they were subject to a court order, at which point it becomes less obvious that they are only sufficiently culpable if they are shown to have acquainted themselves with the terms of the order (because, as we note, failure to do so is itself indicative of culpability).

TRIVIALITY

3.112 We have further concluded that the conduct element should not include a threshold with respect to triviality of consequence. As we said in the consultation paper:

> Our provisional view is that any breach of a court order or undertaking – particularly one that has been reinforced with a penal notice – constitutes a non-trivial interference with the administration of justice ….

> While the nature and consequences of a breach will be considerations in determining whether permission to bring a contempt application should be granted, they may not be the overriding considerations bearing in mind the interests of justice and the public interest in court orders being seen to be obeyed.[37]

3.113 Our view was that any contempt application would be subject to the general requirement of proportionality in litigation, so that applications in respect of breaches that were obviously minor and of no consequence would be unlikely to be granted permission.[38] Nevertheless, as we intimate in the quotation above, it would be wrong for this to ossify into a general rule that contempt would never be appropriate.

Consultation

3.114 We considered this question at CQ 19.[39] The consultation responses were generally supportive of our approach (albeit that a number echoed the need for proportionality in litigation).[40] The Chancery Bar Association's response is particularly noteworthy:

> We strongly agree with this proposal. Although the consequences that follow from a failure to comply may be (highly) material to the question of sanction, in our view it would be contrary to principle and policy to introduce a 'significant consequences' requirement for this species of contempt. The difficulties with such a requirement would be especially acute in relation to the freezing and proprietary injunctions (and the associated disclosure obligations, including in particular the obligation to give what is known as 'tracing relief' disclosure). In such contexts, it may be practically impossible to assess the consequences of a failure to comply until after the trial of the substantive claims (if not later).

3.115 However, a few consultees disagreed. Garden Court Chambers, Civil Liberties Team and GNM each argued that there should be no liability for breaches that have only trivial effects. GNM noted that many orders are drafted "too widely" and only corrected after challenge by GNM, and objected that the "current proposals contemplate trivial breaches being factored in by the court when deciding whether it would be proportionate to institute contempt proceedings". They provided the following example:

> This happens with particular frequency with orders sought to protect the identity of children in the family courts. A common mistake that appears in such orders is that they are drafted without specifying that breach will only occur if the child is identified as the subject of the court proceedings. If such orders are granted unchallenged, then any publication of a photograph of the child that is entirely unrelated to the proceedings (for instance, in a school newsletter publishing their success at school) could breach the court order. The GNM has frequently written to the courts pointing

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37 CP 262, paras 4.21-4.22.

38 Above, para 4.22.

39 Above, para 4.23.

40 Of the 45 consultees who answered this question, 33 agreed with the proposal, 6 disagreed and 6 responded "other".

out issues with these orders but cannot hope to be comprehensive in spotting these errors or being able to correct all orders that are served upon it.

Discussion

3.116 In our consultation paper, we noted that there was very little authority for the proposition that trivial breaches are out of scope of contempt, and that what little authority there is (*Adam Phones Ltd v Goldschmidt*[41] and *Bhimji v Chatwani*[42]) could be fully explained by reference to the lack of sufficient fault, without the need to appeal to triviality.[43] It is therefore not clear that our form of contempt (that is, one absent a triviality threshold) would actually change the law in this respect. We follow GNM's concern about the terms of orders being drafted inappropriately widely, but there is no suggestion that findings of contempt are actually being made in respect of breaches that did not undermine the intended gist of the orders. Our recommendation would not make that situation any more likely to arise.

3.117 In any event, the Chancery Bar Association's observation that the consequences may be unknowable at the point of breach is fatal to the argument that there should be a triviality threshold. This is particularly so when taken in conjunction with the arguments that (i) contempt sanctions may be required to secure ongoing compliance, even if the initial breach is inconsequential, and (ii) the interests of justice require that court orders are obeyed and that breach should not be the method of appealing orders with which a person disagrees.

3.118 We will, in part two of the report, be considering the question of permission. A permission filter would address many of the concerns about contempt applications being made in respect of breaches that are demonstrably trivial (but would also allow argument that even apparently trivial breaches may warrant contempt proceedings).

REASONABLE EXCUSE

3.119 The CBA and Garden Court Chambers, Civil Liberties Team each argued that there should be a reasonable excuse defence for failure to comply with a court order.

3.120 The difficulty is that this would risk people asking for forgiveness after breach of an order rather than permission. There are routes for applying to vary or appeal court orders: litigating the substance of court orders through a defence subverts those more appropriate routes. In cases where it was genuinely not possible to apply to vary the court order (extreme emergency, for example), then that is a matter that would either furnish the defendant with a defence of accidental conduct or would go to the proportionality of the contempt application and the related costs. Failing that, it would clearly be a seriously mitigating factor at the penalty stage. In short, the risk that the defence would introduce is not worth the relatively minimal benefit.

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41 *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 (Ch).

42 *Bhimji v Chatwani* [1991] 1 All ER 705 (Ch).

43 CP 262, paras 4.19-4.20.

PUBLIC BODIES

3.121 The Administrative Law Bar Association (ALBA) raised a number of related concerns about how contempt by breach of order would apply in the context of public bodies.

3.122 ALBA noted that the current practice of the Administrative Court was to direct coercive orders at the defendant public body alone, rather than to named officers within the public body who are likely to have knowledge of the order and "who would in practice be the individuals who would need to act on such an order". ALBA argued that, because of this practice, our proposals:

> might result in a lacuna in the context of claims for judicial review: in short, the body which is the subject of a coercive order would not have knowledge of the order (or the fact of breach), whereas the individual who does have such knowledge would not be the subject of the order.

3.123 ALBA went on to note that one potential solution (an "officers and agents"-type clause in coercive orders) would "require a change in the practice of the Administrative Court" and that, further:

> it would also raise the prospect of individual public officials (such as local authority officers) potentially facing personal liability for contempt in the context of claims for judicial review, which would constitute a significant change in approach as a matter of substance and may raise difficult issues of principle.

3.124 ALBA's argument in relation to a knowledge requirement is persuasive, although the problem they identify rather falls away given that we are recommending a service requirement rather than a knowledge requirement. Moreover, to the extent that it does not fall away, our position remains that it is not unreasonable for individuals who are responsible for giving effect to coercive orders, to bear personal liability if they fail to do so. This view is supported by feedback received during our pre-consultation meetings, where we heard multiple accounts of public bodies either not complying with orders or doing so with undue delay.[44] If the introduction of personal liability serves to reduce such occurrences, that would be a welcome development. In any case, even if the deterrent effect is uncertain, we do not consider the proposed approach to be so impractical or lacking in principle as to warrant exempting the Administrative Court from this form of liability – or to justify the creation of a bespoke regime. We recognise that this may necessitate changes to the Court's current practices, but such adjustments are often an inherent part of meaningful legal reform.

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[44] A recent example is *Nadine Buzzard-Quashie v Chief Constable of Northamptonshire* [2025] EWCA Civ 1397, which concerned (among other matters) the failure of Northamptonshire Police to comply with a court order requiring them to produce footage of the appellant's arrest.

Chapter 4: Contempt by publication when proceedings are active

INTRODUCTION

4.1 In this chapter we set out our recommendations for the second of our four forms of liability, contempt by publication when proceedings are active. This form of liability does not replicate the existing "strict liability" contempt provisions under the Contempt of Court Act 1981 (CCA 1981), though – subject to some reforms – it largely parallels the current law.

4.2 This chapter addresses issues raised not only in the consultation paper,[1] but also in the supplementary consultation paper.[2] As we explain in chapter 1, there was a renewed public interest in contempt liability after the murders of three children by Axel Rudakubana in Southport in July 2024 and the subsequent public disorder. It was suggested that the disorder was an indirect result of contempt of court laws – specifically, that in constraining what information public authorities could disclose in relation to the defendant, the law of contempt helped to create an information vacuum into which misinformation, disinformation and counter-narratives could spread unchecked. There was particular debate about what information could be published when criminal proceedings were active. Though we had addressed these issues in the consultation paper, we revisited them in the supplementary consultation paper. We did not ask any new questions, but rather repeated two consultation questions and invited consultees to respond in light of the events in Southport in 2024 and the disorder that followed.[3] It is in this chapter that we address those issues.

4.3 We begin this chapter by providing an overview of this form of liability. Next, we look at the conduct element, which has two core components. The first is the conduct threshold, which is currently "serious impediment or prejudice" to particular active proceedings. We recommend that this should be the threshold in the new form of liability. The second is the act of publication. We look at several issues regarding publication, including how it is best described, how online communications fit within it, and what constitutes a communication to a section of the public. We move then to the circumstances in which this form of liability will apply. It will only apply when proceedings are active and we look at when proceedings should be considered to be active, with a particular focus on criminal proceedings. Next, we turn to the fault element. We recommend that the current threshold for fault should be the threshold in the new form of liability, but with the burden of proof falling on the applicant. Finally, we look at those who can be liable for this form of contempt.

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1 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262).

2 Contempt of Court (2025) Law Commission Consultation Paper No 269 (CP 269).

3 See paras 4.27-4.28 above.

AN OVERVIEW OF THIS FORM OF LIABILITY

4.4 In this chapter we recommend a form of liability for contempt called contempt by publication when proceedings are active. This form of contempt replaces the existing "strict liability" contempt that was established by the CCA 1981, though in many (but not all) respects it maintains the substance of the existing law. There are three key aspects to our recommendations.

4.5 First, the applicant would be required to prove the defendant had engaged in the requisite conduct. The conduct threshold would be met where, at the time of publication, the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. For these purposes, a publication includes any material that has been made available to the public at large or any section of the public.

4.6 Our recommendations here largely mirror the current law, though add certainty to the position where material has been uploaded or posted to the internet from a location outside England and Wales.

4.7 Secondly, this form of contempt liability would apply only to material published in relation to proceedings that are active. The period during which proceedings are considered active depends on the particular type of proceedings, and under the current law these periods are prescribed in schedule 1 to the CCA 1981. We recommend that the existing law should be retained other than in two respects: criminal proceedings should be considered active from the point at which a suspect is charged until the point of verdict or guilty plea; and extradition proceedings should be considered active from the point at which the suspect first appears in a court in England and Wales in respect of a request/arrest for extradition either to or from the UK.

4.8 Third, the applicant would be required to prove that the defendant was at fault. Fault would be established where the defendant knew that proceedings were active or was aware of a risk that proceedings were active.

4.9 In requiring proof of fault, our recommendations differ from the existing "strict liability" approach. However, as we explained in the consultation paper,[4] the existing law is not in effect one of strict liability because defences (including innocent publication) are available.[5] As a result, the most significant difference is that, under our recommendations, the defendant would no longer bear a reverse burden of proof. Our recommendations also move away from the distinction between publisher and distributor that is used in the existing law.

4.10 We turn now to the detail of all these matters.

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4 CP 262, para 5.9.

5 See Contempt of Court Act 1981 (CCA 1981), s 3.

CONDUCT: THRESHOLD

4.11 This section makes recommendations on the restrictions that should apply to publications during active legal proceedings.

4.12 Two features of this form of contempt are relevant to determining what cannot be published when proceedings are active. The first is the conduct threshold, which is currently stated in section 2(2) of the CCA 1981 and establishes the type of publication that is prohibited. Under the provision, the threshold is whether the publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

4.13 The second is a specific protection for the discussion of public affairs, for which provision is currently made by section 5 of the CCA 1981. Under section 5, where a publication is "made as or as part of a discussion in good faith of public affairs or other matters of general public interest" then it will not be treated as a contempt "if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion". Section 5 is commonly referred to as a defence. For reasons that will become apparent, we refer to this as a "narrow" public interest defence.

4.14 We consider the threshold in this part of the chapter and the public interest defence in the following part. Our overall recommendation is that the threshold and defence are appropriate in scope and form (though we do recommend that one part of the defence be clarified).

4.15 In making these recommendations, we understand that there has been a pressing need for clarity on what information can be published when proceedings are active, a need that has been felt particularly acutely by public authorities. Some public statements in high profile cases in recent years suggest that there may be a lack of understanding in some quarters of the law in this area.

4.16 We consider that defining the scope of contempt in law by either proscribing or permitting specific categories of information is not appropriate. While such categorical frameworks may be useful for internal guidance, they are too reductive to accommodate the vast and varied factual contexts that arise across legal proceedings, and risk becoming outdated as technology and society change. We believe that any test must be grounded in the risk specific to the legal proceedings in question.

4.17 Nevertheless, our view – which accords with that of some consultees, notably Jonathan Hall KC[6] – is that a consensus or practice has emerged that treats the threshold as lower than it actually is. Too little attention has been paid to the significance of the word "serious": it is not enough that there is a substantial risk of *any* impediment or prejudice; the risk must be of *serious* impediment of prejudice. Whilst a cautious approach is understandable – all the more so given the desire not to impede or prejudice trials – excessive caution carries its own risks (the risk to public order being an oft-cited example).

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6 Jonathan Hall KC is the Independent Reviewer of State Threats Legislation and the Independent Reviewer of Terrorism Legislation.

4.18 It is also important to note that, later in this chapter, we recommend narrowing the time for which proceedings are active by moving the start from arrest to charge. There will therefore be significantly more scope for publication prior to charge than is currently permitted.

4.19 We discuss below the consultation responses in respect of both the conduct threshold and the public interest defence, before then making recommendations.

Current law

4.20 We note above (at paragraph 4.12) the statutory provision for the threshold in section 2(2) of the CCA 1981. That threshold comprises two limbs. The first relates to the degree of risk: it requires that the risk of the relevant consequence must be *substantial*. What constitutes a "substantial risk" is not defined in the CCA 1981, but, as we said in the consultation paper,[7] the courts have interpreted it as a risk which is "practical",[8] "not remote",[9] "not insubstantial",[10] and "not minimal".[11] It excludes from scope those risks that are trivial or remote.

4.21 The second limb relates to the consequence in respect of which there must be a substantial risk, namely *seriously impeding or prejudicing the course of justice in the proceedings*. Again, this phrase is not defined in the CCA 1981, but has been considered by the courts. It has been said that the "course of justice is not just concerned with the outcome of proceedings", but rather "the whole process of the law"[12] – which includes (but is not limited to) the defendant's right to a fair trial under article 6 of the European Convention on Human Rights (ECHR). The course of justice may be impeded (and the defendant's right to a fair trial undermined) in many ways, including, for example, by "external pressure which impedes or restricts" the "freedom of a person accused of crime to elect the mode of trial he prefers, or to conduct his defence in the way which seems best to him and his advisers".[13]

Consultation

4.22 We considered the existing conduct threshold under the CCA 1981 in both the consultation paper and the supplementary consultation paper.

4.23 In the consultation paper, we first explained that we had not heard concerns from stakeholders that the existing threshold was inappropriate.[14] Our provisional conclusion was that it is appropriate that the conduct threshold for contempt by

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7 CP 262, para 5.27.

8 *Attorney General v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874 at 881.

9 *Attorney General v British Broadcasting Corporation* (*BBC*) [1997] EMLR 76 at 80.

10 *Attorney General v News Group Newspapers* [1987] QB 1 at 15.

11 Above at 15; and *Attorney General v British Broadcasting Corporation* (*BBC*) [1997] EMLR 76 at 80.

12 *Attorney General v Times Newspapers Ltd*, *The Times*, 12 February 1983.

13 Above. See also *Arlidge, Eady & Smith*, which says that to "impede" the administration of justice is understood as "slowing down the stream of justice, or… diverting its flow even temporarily": P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) (*Arlidge, Eady & Smith*) para 4-116.

14 CP 262, para 5.29.

publication when proceedings are active is higher than for general contempt, given that the former imposes a lower fault threshold than the latter.

4.24 Secondly, we noted our 2012 contempt project, in which we considered whether the conduct threshold for statutory contempt by publication should be aligned with the test for staying proceedings as an abuse of process.[15] That test requires the court to consider whether "the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it", thus making it impossible for the defendant to have a fair trial.[16] In 2012, we provisionally proposed that the tests should not be aligned (and consultees agreed).[17] In our 2024 consultation paper, our provisional conclusion was that the 2012 analysis still stands.[18]

4.25 Thirdly, we considered whether there should be different conduct thresholds for professional journalists and lay people. We recognised that professional journalists are likely to have had relevant training and thus may be better able to understand and navigate the law of contempt to avoid liability. However, we also recognised that the potential consequences of prejudicial publicity are not necessarily connected to the status of the publisher, and that a variable threshold would pose practical challenges (for example, having to determine into what category a publisher falls). For these reasons, we provisionally concluded that there should be a single threshold that applies to all publishers equally.[19]

4.26 In light of the above, our provisional view was that the conduct threshold for liability under the CCA 1981 should be retained for our proposed form of contempt by publication when proceedings are active. Therefore, in CQ 31 we said:

> We provisionally propose that for contempt by publication where proceedings are active, the conduct threshold should be the same as that which currently applies under the Contempt of Court Act 1981. That is, the applicant should be required to prove that the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
>
> Do consultees agree?[20]

4.27 As indicated at paragraph 4.2 above, in the supplementary consultation paper we revisited the issue of whether the conduct threshold is appropriate. We said that the public disorder following the murders and attempted murders by Axel Rudakubana in Southport raised the issue of "whether there should be contempt of court liability for those who risk prejudicing a criminal trial by releasing information in the interests of

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15 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.48.

16 See, for example, *Montgomery v HM Advocate* [2003] 1 AC 641, [2001] 2 WLR 779 at 667; *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659.

17 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.49.

18 CP 262, para 5.30.

19 Above, para 5.31.

20 Above, para 5.33.

public safety or national security".[21] We reiterated our provisional position on the conduct threshold taken in the consultation paper but stated that, following the Southport attack and the subsequent disorder, a question arose over "the extent to which misinformation and disinformation can be countered by a public authority without risking liability for contempt of court".[22] We said:

> In the context of widespread misinformation or disinformation – which may carry its own prejudicial effect – it is important to note that a publication by a public authority countering that false information may be less likely to reach the contempt threshold than in circumstances where there is no misinformation or disinformation. The context is relevant. However, a trial may potentially be prejudiced by information whether it is true or false. It does not follow that "correcting the record" also inexorably undoes any prejudicial effect; you may simply swap one prejudicial effect with another.[23]

4.28 We recognised that public authorities understandably "wish to know with some certainty what information they can release", and that it is "sensible for laws to be understood by all, and for those laws to be clear".[24] We considered a suggestion made by Jonathan Hall KC in his response to our consultation paper. He argued that a statutory provision could be introduced "to make it clear that certain matters would generally not be considered to give rise to a substantial risk of serious prejudice" – for example, "the name, nationality, and age of the individual; and potentially other matters where there could be no dispute about the facts".[25] However, we noted that it is "not easy to generalise categories of information that would fall below the threshold" and that "the more commonplace the publication of certain categories of information, the more conspicuous would be its absence in a particular case".[26]

4.29 In light of these issues, we sought further views on our CQ 31 (which was restated as SCQ 1).[27]

4.30 In response to both CQ 31 and SCQ 1, the majority of consultees agreed with our provisional proposal to retain the existing conduct threshold under the CCA 1981.[28] The main themes that emerged from consultees' comments were:

(1) support for retaining the current threshold because it is effective and well understood by publishers;

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21 CP 269, para 4.

22 Above, paras 11-12.

23 Above, para 13.

24 Above, para 14.

25 Above.

26 Above, para 15.

27 Above, para 30.

28 Of the 42 responses to CQ 31, 27 consultees agreed, 1 consultee disagreed, and 14 consultees gave an answer categorised as "other". Of the 16 responses to SCQ 1, 13 consultees agreed, no consultees disagreed, and 3 consultees gave an answer categorised as "other". 10 consultees responded to both questions.

(2) concern that the meaning of a "substantial" risk is unclear;

(3) some concern that the consequence limb of the threshold is too broad;

(4) general consensus that the problems with the threshold lie in its practical application; and

(5) recognition of various factors, other than the law of contempt, that result in restrictions on publication of information about active proceedings.

These are considered in turn below.

Support for retaining the current threshold

4.31 There was significant support for retaining the current threshold in section 2(2) of the CCA 1981 on the basis that it is effective and well understood by publishers.[29] For example, Gavin Sutter (a media law academic) described it as "a sensible and long-standing approach", and academics at the University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM) said that it "seems to be working satisfactorily in the sense of being understood in day-to-day journalism, in that such contempt proceedings against the media are rare". Professor Jacob Rowbottom argued:

> The current test is known by professional publishers, and the case law has built up guidelines that allow publishers to make an informed assessment of the risk of being in contempt. Even a relatively minor amendment to the law could unsettle the existing understandings about contempt, generate unforeseen questions and require further case law to clarify certain matters. Unless there is something obviously wrong with [section 2 of the CCA 1981], then the standard should remain in place.
>
> While the strict liability rule comes into effect once proceedings are active, content that is published long before a trial takes place is less likely to pose a risk of prejudice (this is referred to as the fade factor). The point means that publishers have greater freedom to publish at the earlier stages of an investigation. The case law also places some faith in the robustness of the juror and for trial proceedings to focus their attention on those matters in the courtroom. The judge's direction to disregard media coverage is also taken to have a neutralising effect. Reliance on these factors raises the threshold for a contempt and gives greater room for publications to discuss matters relating to the proceedings.

4.32 Several consultees agreed with our provisional conclusion in the consultation paper that a single threshold should apply to both professional publishers and lay people.[30] Guardian News and Media Limited (GNM) endorsed the reasons given in the consultation paper. Impress (the UK's independent press regulator) argued that imposing different standards "would be impractical and create disproportionate levels of liability depending on a publisher's structure". It said that such a framework could

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29 These included: Greg Callus (barrister and editor of the contempt section of the White Book); Gavin Sutter; University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM); Professor Jacob Rowbottom.

30 These included: Paul Foster; Guardian News and Media Limited (GNM); Impress.

have "perverse consequences" by "incentivising news organisations to shift liability for contempt onto non-employed contractors such as contributors or freelancers, so that the organisation can avoid liability".

Whether the requisite degree of risk is sufficiently clear

4.33 There were mixed views among consultees regarding the degree of risk that should be required to establish liability. On the one hand, the Justices' Legal Advisers and Court Officers' Service (JLACOS) supported retaining the existing requirement under section 2(2) of the CCA 1981 that the publication must create a "substantial risk" of the relevant consequence. It endorsed the courts' interpretations of "substantial risk" described in paragraph 5.27 of the consultation paper (that is, "practical", "not remote", "not insubstantial", and "not minimal"). On the other hand, Professor Helen Fenwick and Dr Richard Danbury criticised these interpretations.

4.34 Professor Fenwick argued that "the courts have not been fully consistent in their approach to the meaning and application of the term 'substantial'" in section 2(2). Her analysis of the development of the law suggested that, since the 1980s, the courts have shifted between "strict" and "much more liberal" interpretations of the term, which she considered an indication that "there has been uncertainty about [its] meaning". Professor Fenwick concluded that the courts now take an approach that is arguably too broad by defining a substantial risk as one that is not remote, which "does not comport with the dictionary definition of the term, or the general understanding of it". Although Professor Fenwick could see merit in retaining the current wording "on the basis that the courts are familiar with it and are reasonably able to navigate it", she ultimately favoured reform "for the sake of clarity and transparency". Her preferred reform option was replacing "the term 'substantial' with the term 'more than minimal' or 'significant'".

4.35 Dr Danbury described the purpose of the law of contempt in this context as preserving the court process, particularly in respect of a criminal trial. He suggested that the more effective the law of contempt is in helping this process then "the more justified it is", whereas the more "it helps deal with other social or legal concerns", such as protecting the reputation of defendants, then "the less it is justified". Dr Danbury concluded that the current wording of the test in the CCA 1981 is appropriate in that the law of contempt should indeed be concerned with "substantial" risks. However, he argued that the term "substantial" should not be interpreted to mean "merely having substance", as the courts have done, but rather to mean "weighty". That is the proportionate way to balance the individual interest (the right to a fair trial) with the broader societal interest (freedom of expression).

The consequence element

4.36 The Media Lawyers Association (MLA) suggested that the threshold for establishing that a publication creates the requisite risk of serious *prejudice* is sufficiently "high", and therefore "all but the most severely prejudicial information does not meet" that bar.[31] It indicated that, in criminal trials involving a jury, the courts generally rely on "a short direction by the trial judge" to deal with potentially prejudicial publications:

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[31] The Media Lawyers Association (MLA) responses to the consultation paper and supplementary consultation paper were 54 and 10 pages in length respectively. While we deal with the individual points the MLA makes

Indeed, the material ordinarily provided to jurors (the standard jury video, the jury notice, and the directions from the trial judge at the start of any trial, reinforced by the new juror misconduct offences) may be more than sufficient on its own to counteract such a publication.

4.37 However, the Media Lawyers Association (MLA) also said that the serious impediment threshold is "lower [than the serious prejudice threshold] and a far more difficult risk to assess in the early stages of an investigation and where there is limited prospect of it being neutralised by the trial judge". It argued that the "serious impediment" component of the conduct threshold "engages very broad considerations to do with the administration of justice and the public interest". The MLA referred to *Attorney General v Yaxley-Lennon*[32] and also quoted the Divisional Court's description of the breadth of this component in *Attorney General v MGN*,[33] in which the court cited Oliver LJ in *Attorney General v Times Newspapers Limited*,[34] with emphasis added by the MLA:

> "The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law, including the freedom of a person accused of a crime to elect, so far as the law permits him to do so, the mode of trial which he prefers *and to conduct his defence in the way which seems best to him and to his advisers. Any extraneous factor or external pressure which impedes or restricts that election or that conduct, or which impels a person accused to adopt a course in the conduct of his own defence which he does not wish to adopt, deprives him to an extent of the freedom of choice which the law confers upon him and is, in my judgment, not only a prejudice but a serious prejudice".*
>
> Although Oliver LJ, at the end of this passage, referred to prejudice, these are examples, but not a comprehensive list, of occasions when the course of justice would be impeded. …
>
> In our judgment, as a matter of principle, the vilification of a suspect under arrest readily falls within the protective ambit of section 2(2) of the 1981 Act as a potential impediment to the course of justice. At the simplest level *publication of such material may deter or discourage witnesses from coming forward and providing information helpful to the suspect, which may (depending on the circumstances) help immediately to clear him of suspicion or enable his defence to be fully developed at trial. This may arise, for example, because witnesses may be reluctant to be*

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throughout this and other chapters, we understand its overarching position (across both consultation responses) on the existing strict liability contempt framework to be that the law is too restrictive. In sum, as we read it, the MLA view is that while the conduct threshold is suitable; the MLA does "not recognise a need to amend the general test". However, its position is that the test can nevertheless, at least partly due to uncertainty in its practical application, have the effect of restricting publication that would not interfere in a defendant's article 6 rights, and that this should be remedied by a broader public interest defence or by moving the point at which criminal proceedings become active from arrest to charge. The MLA argued that such changes would address much uncertainty that arises in practice, especially as assessing the risk of serious impediment is particularly difficult at the early stages of an investigation.

32 See *Attorney General v Yaxley-Lennon* [2019] EWHC 1791, [2020] Criminal Law Review 534 at [72] (Dame Victoria Sharp PQBD).

33 *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408.

34 *Attorney General v Times Newspapers Ltd, The Times* 12 February 1983.

> *associated with or perceived to be a supporter of the suspect, or, again, because they may begin to doubt whether information apparently favourable to the suspect could possibly be correct.* Adverse publicity may impede the course of justice in a variety of different ways, but in the context we are now considering, *it is not an answer that on the evidence actually available, the combination of the directions of the judge and the integrity of the jury would ensure a fair trial. The problem is that the evidence at trial may be incomplete just because its existence may never be known, or indeed may only come to light after conviction*.[35]

4.38 In light of this judgment, the MLA argued that the "serious impediment" component of the test "catches within its net information which falls far short of subverting the right to a fair trial". It is not, however, clear to us that this conclusion is readily supported by the material cited.

Problems with practical application

4.39 Overwhelmingly, consultees argued that the existing conduct threshold is not overly restrictive and suggested that the problems lie in how it is being applied in practice.[36] Professor Rowbottom said that there is "a considerable amount of information that the police can release without falling foul" of the threshold in section 2(2) – for example, "certain details that will be made known to the jury, which can be reported without creating a risk of prejudice". Similarly, the General Council of the Bar of England and Wales (the Bar Council) described the test as "sufficiently robust to allow for the publication of further information about the circumstances of a particular alleged crime post arrest".

4.40 Kate Astall and Dr John McGarry concluded that, following the Southport attack, "the police were not prevented by the law of contempt from releasing more information". They highlighted that, at the time, the police did in fact disclose the arrest of a "17-year-old male from Banks in Lancashire, who is originally from Cardiff".[37] Kate Astall and Dr McGarry agreed with Jonathan Hall KC's comment to BBC Panorama that the police could have revealed that:

> there had been an attack by a 17-year-old male who was black, British, born in Wales and has lived in the UK all his life … comes from a Rwandan background, and as far as the police were aware, from a Christian background.[38]

Kate Astall and Dr McGarry argued that publication of such information "would not have amounted to contempt because it would not have created a substantial risk of serious impediment or prejudice to any proceedings" under section 2(2) of the CCA 1981.

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35 *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [29]-[31] (Lord Judge LCJ), citing *Attorney General v Times Newspapers Ltd*, *The Times* 12 February 1983 (Oliver LJ).

36 These included: Professor Rowbottom; the General Council of the Bar of England and Wales (the Bar Council); GNM; the MLA; Kate Astall and Dr John McGarry; Jonathan Hall KC.

37 Jonathan Coffey and Judith Moritz, *Inadequate Information Released after Southport Attack by Authorities, says Terror Law Reviewer* (BBC News, 24 February 2025).

38 Above.

4.41 Similarly, the Crown Prosecution Service (CPS) argued in its consultation response that the Director of Public Prosecutions' (DPP's) letter to the House of Commons Home Affairs Committee[39] about the disorder that followed the Southport attack "makes clear the CPS position on the 'basic details' relating to the Southport case including Rudakubana's place of birth, residence, age and his religion". Specifically, the CPS highlighted its position that, in this case, the publication of such information "could not prejudice the trial" and thus "it was solely a matter for the police". In that letter, the DPP said:

> Putting into the public domain significant material which forms part of the prosecution's case opens the prosecution up to an argument from the defence that it has unfairly prejudiced a potential jury ahead of the trial so that the jury cannot come to all the evidence, including that from the defence, with an open mind. This is the underlying rationale for the strict liability rule in the Contempt of Court Act 1981.[40]

4.42 In response to the supplementary consultation paper, Jonathan Hall KC argued that "a qualifier of 'seriously' is appropriate given that liability is strict" under the current law but that "that a practice has been allowed to take hold that does not give due weight to the word 'seriously'". He said that "in the absence of clarity in the caselaw as to its meaning, public authorities, particularly under pressure, will be tempted to take an overcautious approach".

4.43 Jonathan Hall KC considered two comments made by the DPP regarding the release of information after the Southport attack. First, in January 2025 the DPP said that no defence had been served in Rudakubana's case, "so there was the potential that all evidence would be challenged". The DPP continued:

> Public reporting of significant information before the conclusion of the trial, including about the actions of Axel Rudakubana on the day and some elements of his past history would have posed a serious risk to the integrity of the trial and risked undermining justice for the victims and their families.[41]

4.44 Jonathan Hall KC argued that "the fact that no defence statement had yet been served did not in itself mean that putting any information into the public domain would result in a substantial risk of serious impeding or prejudice". He considered that if, for example, Rudakubana had disputed his presence at the scene, then "on the facts of this case there is no conceivable way in which prior publication by the police of this detail could have risked serious prejudice to the eventual trial". He said that "assuming jurors remembered earlier press reporting, they would simply hear the same point repeated in prosecution's opening speech and in evidence".

4.45 Jonathan Hall KC further questioned the implicit suggestion that a publication which creates "the mere possibility of defence argument on jury prejudice" is sufficient to

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39 *Letter from the Crown Prosecution Service on the Process and guidance around publication of prosecution information*, submitted to the Home Affairs Select Committee Inquiry on the Summer 2024 disorder (21 February 2025).

40 Above.

41 *DPP's response to questions around the release of information relating to the trial of Axel Rudakubana* (22 January 2025).

satisfy the conduct threshold for contempt. He argued that in reality that "is not enough". He explained that "whether a substantial risk of serious prejudice arises has to be determined on the facts of the case" and it "is not a test of bare arguability". Jonathan Hall KC referred to the DPP's guidance on contempt,[42] which, he said, "provides far more cogent examples of publication that may meet the threshold". These include, among others, "reporting which vilifies a person in the proceedings or presumes their guilt or innocence, or reporting which relates to extraneous prejudicial evidence".[43]

4.46 Ultimately, Jonathan Hall KC described these comments as "indicative of test-dilution" and argued that they "suggest that the statutory test of seriousness is not being given sufficient weight". He concluded that "the problem seems to be with practice rather than the words of the statutory threshold", and therefore "no basis for amendment is made out". Taking "a functional approach", he said, "the desired outcome is that the police should feel less inhibited about setting out basic and sober details in the wake of a terrorist or other horrifying attack".

4.47 The Bar Council reached a similar view:

> The issue here is not that the test does not allow for the release, and consequent reporting, of more information about the crime or the suspect but rather that the authorities, principally the police, are too cautious in their approach to the application of it.

4.48 In a related vein, the MLA considered the "division of opinion expressed by the police, local CPS and national CPS" about the type of information that could be released following the Southport attack. It said that "it appears … that the police were at odds with local CPS who were themselves at odds with national CPS" about whether releasing Rudakubana's religion could satisfy the conduct threshold by potentially prejudicing a future trial.[44] The MLA concluded that this demonstrates the "uncertain scope" of the conduct threshold and the "difficulties of conducting the necessary risk analysis", even in the case of "experienced lawyers and police officers":

> The communication by the police was inadequate, if not misleading, but it was borne of uncertainty as to what could lawfully be said and fine judgments having to be made under immense pressure. The police, CPS, journalists and editors are naturally cautious about going near the strict liability threshold where criminal liability

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42 CPS guidance, *Contempt of Court* (revised 15 October 2024).

43 Above.

44 See the evidence of the Chief Constable of Merseyside Police to the Home Affairs Committee that, at the time, she had accepted the "clear view from the [local] CPS" that the suspect's religion should not be released "because of the impact on the criminal justice system": Q52-53, 58, Oral evidence of Chief Constable Serena Kennedy, Merseyside Police to the Home Affairs Committee, *25 February 2025 - Summer 2024 disorder - Oral evidence*. However, the MLA said that the national CPS "reach[ed] a different view and advise[d] that it could be published". The MLA said that, in his letter to the Chair of the Home Affairs Committee, the DPP subsequently "expressed the view that publication of Rudakubana's religion 'could not prejudice the trial' and it appears could not seriously impede the course of justice although this is not clear": *Letter from the Crown Prosecution Service on the Process and guidance around publication of prosecution information*, submitted to the Home Affairs Select Committee Inquiry on the Summer 2024 disorder (21 February 2025).

is the penalty for getting it wrong. Uncertainty about the lawfulness of their actions is a potent chilling effect.

4.49 While some of the MLA's comments suggest that the issue lies in the substance of the conduct threshold,[45] it ultimately argued that "the conduct threshold should be the same as that which currently applies" and noted its concern that the current wording is "somewhat elastic leading to uncertainty in its application".

4.50 Several responses considered that these practical problems could be remedied to an extent through improved guidance. For example, Professor Rowbottom said that there is "considerable scope for the police to review and revise current practices (for example to counter misinformation) and stay within the current law of contempt". Similarly, Kate Astall and Dr McGarry said that there is a need for "better legal advice to – and training of – the police about what information may lawfully be released about a live case". They suggested that the Attorney General (AG) should publish guidance on the release of such information.

Restrictions on publication imposed other than by contempt law

4.51 Some consultees highlighted various reasons that publication of information may be restricted, other than to avoid any risk of crossing the contempt threshold.[46] First, the police may limit the information that they release to avoid any risk of jeopardising a fair trial. Secondly, automatic reporting restrictions may apply in some cases in order to protect the identity of certain people involved in proceedings.[47] These prevent the name of the relevant person being disclosed, though the restrictions can also extend to any matter that is likely to lead members of the public to identify the relevant person. Indeed, in the case of Rudakubana, his name was withheld publicly upon arrest "not because [the police] believed they were constrained by the law of contempt",[48] but because he was under 18 and thus the automatic reporting restriction under section 45 of the Youth Justice and Criminal Evidence Act 1999 applied until his 18th birthday.

4.52 Thirdly, suspects generally have a reasonable expectation of privacy prior to being charged with an offence.[49] Consequently, the police are unlikely to name a suspect on arrest (as reflected in College of Policing (CofP) guidance)[50] and the media is unlikely to publish such information. Fourthly, where the police do not release the name of a suspect, a publisher would need to take care not to identify the wrong person as a suspect in order to avoid liability for defamation. Consequently, as recognised by Professor Rowbottom, "even if the law of contempt is reformed, these pressures would remain in place".

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45 See paras 4.37-4.38 above.

46 These included: Professor Rowbottom; GNM; Kate Astall and Dr McGarry.

47 See, for example, Children and Young Persons Act 1933, s 49; Youth and Criminal Evidence Act 1999, s 45.

48 Jonathan Coffey and Judith Moritz, *Inadequate Information Released after Southport Attack by Authorities, says Terror Law Reviewer* (BBC News, 24 February 2025).

49 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158. This is discussed further at para 4.279 below.

50 See para 4.255 below for further discussion of the relevant guidance.

Discussion

Substantial

4.53 The general support for "substantial" (and the case for consistency with the test for general contempt, which we consider in chapter 6) both lead us to the clear conclusion that "substantial" is the appropriate degree of risk of interference in the conduct element. However, we appreciate the points made about uncertainty, especially with regard to the part of our provisional proposal in CQ 6 that "substantial" should mean "a risk that is not remote".

4.54 The Supreme Court in *R v Golds* examined the different meanings that have been given to uncertainty in different areas of the law.[51] Adopting submissions by counsel, the Court observed:

> as a matter simply of dictionary definition, "substantial" is capable of meaning either (1) "present rather than illusory or fanciful, thus having some substance" or (2) "important or weighty", as in "a substantial meal" or "a substantial salary". The first meaning could fairly be paraphrased as "having any effect more than the merely trivial", whereas the second meaning cannot. It is also clear that either sense may be used in law making. In the context of disability discrimination … section 212 [of the Equality Act 2010] provides that "'Substantial' means more than minor or trivial". It thus uses the word in the first sense. Conversely, the expression "significant and substantial" when used to identify which breaches by the police of the Codes of Practice under the Police and Criminal Evidence Act 1984 will lead to the exclusion of evidence … is undoubtedly used in the second sense. It is to be accepted that the word may take its meaning from its context.[52]

4.55 The Court then addressed the issue before it. It held that in the context of diminished responsibility as a partial defence to murder, which requires proof of a "substantial impairment", the term "substantial" is used to mean "weighty":

> in the context of diminished responsibility an impairment of consequence or weight is what is required to reduce murder to manslaughter, and not any impairment which is greater than merely trivial.[53]

4.56 We find this analysis helpful. It is right that the meaning of "substantial" will be dependent on its context. In relation to contempt, there has been some variation in the interpretation of "substantial" by the courts. In light of the discussion in *Golds*,[54] our view is that "substantial" should not be used to mean "greater than merely trivial".[55] Were it to be used that way then the bar would be set too low. Just as the pairing of "substantial" with "impairment" necessarily requires something more than fanciful, so too does the pairing of "substantial" and "risk" in contempt. We agree with Professor

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51 *R v Golds* [2016] UKSC 61, [2016] 1 WLR 5231.

52 Above at [27].

53 Above at [28]-[29].

54 Above.

55 Even where "substantial" is used to mean "greater than merely trivial", that does not set a bar that can be jumped in every instance; we agree with counsel's observation in *Golds* at [27] that usage in that sense "does not entirely strip the word 'substantially' of meaning".

Fenwick that the term denotes "a greater risk than is denoted by excluding only risks that are remote". In contempt, "substantial" should be used to mean "important or weighty".

4.57 We have concluded that it is better not to define "substantial" as meaning "not remote" because that may inadvertently lower the bar with the result that "substantial" is interpreted to mean "more than trivial". It may unnecessarily tie the hands of the courts and, by limiting it to one phrase only, risk confusion and re-litigation. "Substantial" is sufficiently clear as a term on its own, used to mean "important or weighty" as described above, and the wide range of circumstances in which a contempt may be alleged means that it is better if it is open to the courts to use synonyms or terminology that are best suited to the circumstances that present themselves.

Risk versus actual impediment or prejudice

4.58 We recognise that there may be circumstances in which a publication creates a substantial risk of serious prejudice, or actually causes serious prejudice, but where it is nevertheless possible for the courts to mitigate the risk or the actual prejudice. However, that does not – and, in our view, should not – mean that the conduct threshold for contempt has not been met. The law of contempt seeks to prevent serious impediment or prejudice from occurring in the first place, and therefore it is concerned with the creation of a (substantial) *risk* of such an outcome.

4.59 Further, we note above the suggestion that the threshold for contempt should be aligned with the legal test for staying proceedings on the grounds of abuse of process.[56] By way of reminder, under that test the court must assess whether "the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it", thereby rendering a fair trial impossible.[57] We provisionally concluded that the two tests should remain distinct.[58] Consultees generally agreed, noting that contempt and abuse of process address fundamentally different concerns, operate in different legal contexts, and serve different purposes. Our view is that the reasoning set out in the 2012 analysis continues to hold and so we reject an alignment of the tests.

Serious impediment or prejudice

4.60 The consultation responses strongly supported our provisional view that the existing conduct threshold in section 2(2) of the CCA 1981 should be retained. There was broad consensus among consultees that the requirement for a publication to pose a risk of serious impediment or prejudice to the course of justice remains appropriate, effective, and well understood in practice.

4.61 While some consultees expressed concern about the overall breadth of the test, particularly in relation to the risk element (which we discussed above), there was no compelling argument for altering the consequence limb of the threshold. The requirement that the risk must relate to a serious impediment or prejudice serves as a

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56 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.48.

57 See *Montgomery v HM Advocate* [2003] 1 AC 641, [2001] 2 WLR 779 at 667; *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659.

58 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.49.

critical safeguard. It ensures that only publications with the potential to cause significant harm to the administration of justice fall within scope. This has the effect of upholding freedom of expression in a way that is compatible with the defendant's right to a fair trial in the context of criminal proceedings. In contexts such as family and Court of Protection (CoP) proceedings, the balance may be between upholding freedom of expression and, for example, the right to respect for the private and family life[59] of those involved (particularly those who are vulnerable).[60]

4.62 This consequence limb acts as a narrowing mechanism, filtering out cases where the potential impact on proceedings is minor or speculative. It provides the courts with a clear and robust standard for intervention, ensuring that the law targets only those publications that threaten the integrity of judicial proceedings and fairness of trials in a meaningful way.

4.63 In our view, the seriousness requirement is sufficiently stringent to accommodate a wide range of public interest publications without unduly restricting legitimate reporting or commentary. It reflects a proportionate approach that is both principled and practical, and we consider it essential to the continued effectiveness and credibility of the statutory framework.

Statutory provisions versus guidance

4.64 It is not the role of the Law Commission to issue guidance. While operational guidance may helpfully focus on categories of information that are unlikely to create a substantial risk to the course of justice, statute must adopt a different approach. The legal test for contempt must set a clear threshold rather than rely on categorical exclusions or presumptions. Its application will necessarily be context-specific and fact-sensitive.

4.65 Guidance that identifies categories of information as generally safe to publish serves an important operational function. It provides clarity and consistency for police forces and media organisations, enabling them to make informed decisions quickly. However, such guidance must be understood as indicative rather than determinative, given the legal requirement to assess risk in context.

4.66 We agree with consultees that the publication of certain suspect details – such as name, age, nationality, and ethnicity – is generally unlikely to create a substantial risk that the course of justice will be seriously impeded or prejudiced. This approach is reflected in recent interim guidance from the CofP and the National Police Chiefs' Council (NPCC), which recommends releasing such information in "high profile or sensitive investigations or operations" where there is, for example, "a policing purpose" or a "related risk or impact on public safety".[61]

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59 The right to respect for private and family life is protected under article 8 of the ECHR.

60 We understand that in family and CoP proceedings the primary concern relates to material published in breach of a reporting restrictions order. In those circumstances it may be more appropriate to pursue a defendant for contempt by breach of order, rather than contempt by publication when proceedings are active. We discuss liability for contempt by breach of order in chapter 3.

61 NPCC and CofP, *Interim guidance relating to ethnicity and/or nationality of suspects* (11 August 2025) p 1. That interim guidance has been incorporated into draft guidance published by the CofP on 5 November

4.67 While such guidance is operationally useful, the legal test for contempt must be context-dependent and cannot be reduced to fixed categories. Attempting to define certain types of information as always safe to publish would risk creating false certainty that a substantial risk of serious impediment or prejudice would not arise.

4.68 For example, although a suspect's immigration status may not usually meet the conduct threshold, it could potentially do so where the arrest concerns immigration offences and the immigration status is central to the case. In such instances, publication could prejudice the course of justice in the proceedings. Similarly, a suspect's religion may, or may not, meet the threshold depending upon the factual context.

4.69 For similar reasons, we take the view that, although general or case-specific guidance from the AG can be helpful, it is neither a substitute for nor an enhancement of the statutory test. It would be both unfair and unrealistic to expect it to serve as such.

Recommendation 11.

4.70 We recommend that the conduct threshold for contempt by publication when proceedings are active should be creating "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

PUBLIC INTEREST DEFENCE

4.71 We turn now to consider the exclusion of liability in respect of the discussion of matters of public affairs or of matters otherwise in the public interest.

4.72 In this part of the chapter, we reject arguments to expand the public interest defence beyond what is currently provided in section 5 of the CCA 1981. That defence allows for the publication of material in the public interest, even if it risks seriously impeding or prejudicing a trial, provided that the material is not directly concerned with the trial itself (what we call the "narrow" public interest defence). The restrictions imposed by contempt law are proportionate, as they do not prohibit the discussion of material unrelated to a trial, even where there is a substantial risk of serious impediment or prejudice.

4.73 However, if the law were relaxed to permit the publication of public interest material closely connected to ongoing proceedings (what we refer to as a "broad" public interest defence) – despite the risk of seriously impeding or prejudicing a trial – we would need to accept the potential consequences. These may include the collapse of trials or the adoption of alternative mechanisms to safeguard the fairness of trials, mechanisms that may be less desirable and less effective than contempt protections. Indeed, the evidence we have received suggests there is no appetite for either of these consequences.

2025, on which the CofP is currently consulting: CofP, *Media and communications: Authorised professional practice (APP) – consultation* (November 2025); CofP, *Media and communications – have your say* (5 November 2025).

4.74 We have further concluded that such a broad defence would offer limited practical benefit to those deciding whether to publish material during active proceedings, even if we thought the publication of all such material could be justified (which we do not).

4.75 It is also worth noting that, for the avoidance of doubt, our recommendation is for a defence. As will be seen below, some consultees argued that section 5 is not strictly a defence. Whatever the truth of that observation, we recommend that it should be for the defendant to adduce sufficient evidence to raise this issue at trial (an evidential burden), but that, once raised, it will be for the applicant to show beyond reasonable doubt that the defence does not apply (the legal burden). This is, in any event, the current law.

Current law

4.76 Section 5 of the CCA 1981 makes provision for publications that discuss public affairs or other matters of public interest. It provides:

> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

4.77 The effect is that, even where the section 2(2) threshold is met, publications within the scope of section 5 will not give rise to liability for contempt of court.

4.78 The courts have held that, for these purposes, "discussion" should be interpreted broadly, allowing robust public discussion of "controversial matters of general public interest".[62] Regarding whether a risk of impediment or prejudice is "merely incidental to the discussion", the court should "look at the subject matter of the discussion and see how closely it relates to the particular legal proceedings".[63] The more closely it relates the less likely that the risk is merely incidental.

4.79 In circumstances where a defendant seeks to argue that section 5 is engaged, they bear an evidential burden to raise the issue. The applicant must then prove beyond reasonable doubt that the publication in question is not within the scope of the provision.[64]

Consultation

4.80 As with the conduct threshold, we considered discussions of public affairs in both the consultation paper and the supplementary consultation paper.

4.81 In the consultation paper we noted that, in our 2012 review of contempt, we identified two conflicting concerns raised by section 5 of the CCA 1981:[65] first, that it "may not

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62 *Attorney General v English* [1983] 1 AC 116 at 143-144.

63 *Attorney General v TVS Television Ltd*, *The Times*, 7 July 1989 (Lloyd LJ). See also *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [91] (Tugendhat J); and *Attorney General v Guardian Newspapers* [1992] 1 WLR 874 at 882 (Mann LJ).

64 *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [93].

65 CP 262, para 5.126.

be compatible with the ECHR because a public interest defence cannot operate where a publication conflicts with the absolute right to a fair trial under article 6"; and secondly, that its ambit "is too narrow and may have a chilling effect on publishing about important social issues".[66] Our provisional conclusion in 2012 was that section 5 appropriately protects the right to a fair trial while enabling the media to report on matters of public concern, and that the courts "must necessarily consider the impact of articles 6 and 10 when deciding whether the risk of impeding or prejudicing proceedings is incidental to the public interest value of the discussion".[67] Further, in 2012 we acknowledged that section 5 is rarely relied on in practice, which may be attributable to the fact that the AG determines that it would not be appropriate to bring contempt proceedings in cases where section 5 would apply.[68] Consultees favoured retaining section 5 because it strikes the right balance. We made no recommendations in respect of section 5 in our final reports.

4.82 In our 2024 consultation paper, we explained that we had again heard from stakeholders that section 5 is rarely used and that this indicates that the provision works well. We nevertheless also heard some concern that the term "incidental" is unclear. Our provisional view was that, citing Lord Diplock in *Attorney General v English*,[69] section 5 operates to ensure that:

> bona fide public discussion in the press of controversial matters of general public interest [is not restrained] merely because there are in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue.

4.83 We explained that we are not aware of any evidence suggesting that section 5 puts fair trial rights at risk (by which we meant *has* put fair trial rights at risk, rather than the more sweeping suggestion that it could not) or that it unduly constrains public discussion on matters of public interest.[70] Our provisional view was that the law should not disproportionately or unnecessarily restrict public discussion on matters of public interest, even when proceedings are active. We acknowledged that this may be achieved in various ways and invited views on the form such a protection should take.[71] However, we reiterated our provisional proposal that contempt by publication when proceedings are active should only be established where the publication carries "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". In light of this, we emphasised:

> any defence that would have the effect of accepting that there is that degree of interference, and then permitting that interference, would need to be carefully

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66 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.54.

67 Above, para 2.54.

68 Above, para 2.55.

69 *Attorney General v English* [1983] 1 AC 116 at 143.

70 CP 262, para 5.130.

71 Above, para 5.131.

justified by consultees, especially where such an interference could affect the fair trial rights of a defendant in a criminal case.[72]

4.84 We then set out in CQ 40 the position we reached:

> We provisionally propose that there should be a defence that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active.
>
> Do consultees agree?
>
> We invite consultees' views on the form that defence should take.[73]

4.85 In the supplementary consultation paper, we considered a second issue raised following the murders in Southport and the subsequent disorder: "whether there are circumstances that would justify the publication of information that would otherwise come within scope of contempt of court liability".[74] We explained that this "requires us to consider a much broader form of public interest defence than currently exists, and it cannot be considered in isolation from the right to a fair trial".[75] We restated our provisional view in the consultation paper that we did not think there was a need for a broader defence which would permit to a much greater degree the publication of material that creates a substantial risk of serious impediment or prejudice.[76]

4.86 We said in the supplementary consultation paper that, in this context, the question we are faced with is "whether the law should permit the publication of material that risks undermining a person's right to a fair trial if the material were to be published for the purposes of public safety or national security".[77] One problem with such a defence is the difficulty in establishing which publications should benefit from it:

> How would it be established, for example, that the publication was for the purposes of enhancing public safety or protecting national security (whether on objective or subjective grounds)? Evidencing the claim that the publication was for the purposes of protecting national security may be particularly difficult if the relevant evidence cannot be submitted in open court. Even a risk to public safety may be hard to establish (noting again the lack of consensus that the disorder that followed the Southport attacks was caused by a lack of information).[78]

4.87 We considered a suggestion made by the MLA in response to the consultation paper that "liability could be exempted insofar as it seriously impeded the course of justice

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72 CP 262, para 5.132.

73 Above, para 5.133.

74 Above, para 12(2).

75 Above, para 19.

76 Above, para 20.

77 Above, para 21.

78 Above, para 22.

but did not otherwise interfere with a defendant's right to a fair trial". We recognised that there is some appeal in this approach but noted:

> it may be very difficult (or impossible) to know at the point of publication whether material would affect the fairness of proceedings, all the more so given the trial is likely to be some months away and the nature of the defence to the criminal charges is entirely unknown (as will very often be the case). Such a precarious form of defence to contempt liability would be cold comfort, both to the publisher and, indeed, to those with an interest in the legal proceedings.[79]

4.88 Finally, in the supplementary consultation paper, we noted alternative ways of protecting the right to a fair trial if the law were to permit publications that may interfere with that right. We recognised that "there are practical measures that can be taken to neutralise the effect of prejudicial material and so protect the defendant's right to a fair trial", such as postponing or relocating the trial, and directing the jury to disregard prejudicial material.[80] We further contemplated whether, if the protections afforded by the law of contempt were weakened in light of the risk to public safety, "one option might be to augment the range of other measures available to protect the right to a fair trial".[81] This could include enabling a judge to order that the trial "be conducted without a jury when that is necessary to ensure the defendant receives a fair trial" in circumstances where extremely prejudicial material has been published.[82]

4.89 Given that reform of this kind is beyond the terms of reference for our contempt review, we did not make any provisional proposals on this. We were noting the alternative measures simply to highlight the fact that weakening the protections afforded by contempt may necessitate other measures. This is a fact that must be borne in mind by those who would advocate for a broader defence.

4.90 Nevertheless, we sought further views on the protection in section 5 of the CCA 1981 by restating CQ 40 (see paragraph 4.84 above) in the supplementary consultation paper as SCQ 2.[83]

4.91 In response to both CQ 40 and SCQ 2, the majority of consultees agreed with our provisional proposal and none disagreed.[84] Consultees' comments indicated strong support for an approach that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active. Further, there was agreement generally that either an actual or a substantial risk of interference with fair trial rights would have to be very carefully justified. Views diverged mainly in respect of whether section 5 should be retained in its current form;

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79 CP 269, para 23.

80 Above, para 25.

81 Above, para 26.

82 Above, para 26.

83 Above, para 31.

84 Of the 40 responses to CQ 40, 27 consultees agreed, no consultees disagreed, and 13 consultees gave an answer categorised as "other". Of the 15 responses to SCQ 2, 10 consultees agreed, no consultees disagreed, and 5 consultees gave an answer categorised as "other". 12 consultees responded to both questions.

whether the wording in section 5 could be improved; whether there is a need for a broader protection than provided in section 5; and, if there is a need for broader protection, whether such a provision should exist in addition to, or instead of, the protection in section 5.

Arguments that section 5 should be retained in its current form

4.92 Many consultees argued that there is no need to reform section 5.[85] The wording of section 5 was described as "effective",[86] "clear and appropriate",[87] and "serv[ing] a useful purpose in newsrooms".[88] Several said that section 5 strikes the right balance between freedom of expression and fair trial rights.[89] Professor Rowbottom recognised that it is "relied on relatively rarely", which he considered "may reflect the fact that there are already filters elsewhere in the law that help to protect free speech (such as the interpretation of [section] 2 and the discretion of the Attorney General)". The University of Sheffield CFOM made a similar point.

Arguments that the term "incidental" is unclear

4.93 Some consultees criticised the wording of section 5 for lacking clarity.[90] The term "incidental" was described as "unclear" by Professor Fenwick and the University of Sheffield CFOM. The CPS said that "the wording 'merely incidental' may merit revisiting with a view to clarification", and Impress suggested that defining the term in statute "could provide an additional layer of [clarity] for publishers".

4.94 While the Bar Council considered that "there is an argument that 'incidental' is an ordinary English word which does not require any further definition", it concluded that a statutory definition is necessary "since there appear to be two inconsistent strands of judicial interpretation". The Bar Council argued:

> The mischief of the law on contempt here is the publication of material which carries a risk of prejudice to particular criminal proceedings. To that end Tugendhat J's adoption [in *Attorney General v Random House Group Ltd*] of a test which addresses the closeness of the topic of discussion to those proceedings is to be preferred.[91]

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85 These included: the Criminal Bar Association (CBA); JLASOC; the MLA; Greg Callus; Professor Peter Hungerford-Welch; University of Sheffield CFOM; Professor Rowbottom; Gavin Sutter; Kate Astall and Dr McGarry.

86 This response was made on behalf of Paul Foster (Senior Lecturer in Media Law and Regulation, University of Portsmouth; David Toomer (Senior Lecturer in Journalism, Liverpool John Moores University); Carole Watson (Associate Head of School, Journalism and Communications, University of Sunderland); Andrew Knight (lecturer in law and public affairs, Press Association Media Academy); Amanda Ball (Principal Lecturer in Media Law and Public Affairs, Nottingham Trent University); Dan Townend (Assistant editor Daily Express and chair of NCTJ Media Law board)..

87 Gavin Sutter.

88 The MLA.

89 These included: Gavin Sutter; Impress; Professor Rowbottom.

90 These included: GNM; Professor Helen Fenwick; Impress; the Bar Council; University of Sheffield CFOM.

91 *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [91], citing *Attorney General v TVS Television Ltd*, *The Times*, 7 July 1989 (Lloyd LJ): "A better test is surely to look at

4.95 Professor Fenwick argued that "the term 'incidental' should be removed and a few further words added for clarity". She proposed that the wording of the defence should provide that it applies "if the material creating the risk of impediment or prejudice to particular legal proceedings does not relate closely to those proceedings", rather than "if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion". This proposed wording draws on Tugendhat J's approach and, in Professor Fenwick's view, "makes it clearer that it is the material that creates the risk in question that must not relate closely to the proceedings if the defence is to succeed".

4.96 Hacked Off (a group "that campaigns for a free and accountable press")[92] argued that "the term 'incidental' is in need of further refinement" because it has been wrongly interpreted and applied:

> On its face, it is not entirely clear what additional benefit [section 5] provides. It says that speech which creates only an incidental risk of impediment or prejudice escapes liability – yet this seems like a redundancy when one considers that the strict requirements of [section 2(2)] already allows that which creates a risk of serious impediment/prejudice or a substantial risk of (some) impediment/prejudice to escape liability regardless of whether it is on a public interest matter or not.

Hacked Off said that section 5 has not been understood in this way because the "operative word 'incidental' creates a level of confusion that invites, or would seem to invite, judges to make purely value judgments about the connection between the significance of the speech (in public interest terms) and the impact upon the trial". It did not propose alternative wording.

Whether section 5 is a defence or component of the conduct threshold

4.97 Several consultees addressed the status of section 5 as a defence. The Bar Council said that "the current Act does not describe Section 5 as a defence and does not provide for a burden and standard of proof". It highlighted that, in *Attorney General v English*, Lord Diplock explained that section 5 is on an "equal footing" with section 2(2) and that if a publication is within the scope of section 5 then the burden is on the AG to show that the prejudice was not merely incidental to the discussion.[93]

4.98 Similarly, Hacked Off said:

> Strictly, [section 5] is not a defence. If the [section 2(2)] test is satisfied then the AG should, really, demonstrate that [section 5] does not apply if, that is, there is a colourable public interest angle to the story (which, as mentioned, may be straight-forward to do in high profile cases especially).

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the subject matter of the discussion and see how closely it relates to the particular legal proceedings. The more closely it relates the easier it will be for the [AG] to show that the risk of prejudice is not merely incidental to the discussion".

92 See Hacked Off, *About Us* (2025).

93 *Attorney General v English* [1983] 1 AC 116 at [142].

4.99 The Bar Council "hoped that any draft legislation will take the opportunity to expressly provide for the status of the 'defence', and precisely articulate where the burden and standard of [proof] lies in respect of each element of it".

4.100 The CPS also suggested that we "consider revising section 5 to make it clear it is not a defence … and part of the definition as to what contempt is, and is not".

Balancing articles 6 and 10 of the ECHR

4.101 As set out in greater detail above, at paragraph 4.83, in the consultation paper we said that "any defence that would have the effect of accepting that there is that degree of interference, and then permitting that interference", must be carefully justified, "especially where such an interference could affect the fair trial rights of a defendant in a criminal case".[94] In light of this, several consultees considered the need for the protection in section 5 (or similar) to balance the right to a fair trial and freedom of expression.

4.102 Jonathan Hall KC noted "the difficulty of crafting just the right defence that strikes an appropriate balance between the public interest and a fair trial".

4.103 Hacked Off "welcomed" reform of section 5 "if it brings additional clarity to the law, and balances [these] rights appropriately", but insisted that a "cautious approach is necessitated" to achieve this. Hacked Off suggested that the purpose of section 5 is to recognise that there may be circumstances where it is in the public interest to publish material that meets the conduct threshold and that contempt liability should not arise in that case:

> Properly understood, this is what the term 'incidental' is trying to do. It is not that the risk of prejudice is 'minor' or 'insignificant' as such but that the speech is more important on a proper analysis. … This is a high threshold to meet ....

4.104 Professor Fenwick said that the protection in section 5, if amended according to her proposed re-wording above, can be justified because the underlying idea is that "it is not the public interest material that creates the risk but another part of the publication". Consider a circumstance where "most of the material of public interest in the publication does NOT pose a substantial risk of serious prejudice or impediment", but some of it *does* pose such a risk and thus ordinarily would satisfy the conduct threshold in section 2(2). Where that material "is not closely related to the proceedings", the publication would therefore not satisfy the conduct threshold by virtue of Professor Fenwick's proposed version of section 5. In other words, Professor Fenwick argued that, under her proposed wording, section 5 would protect a publication where "the material which creates the risk while also relating to the public interest, does not itself relate closely to the proceedings".

4.105 Professor Fenwick noted that, where material does not relate closely to the proceedings, then it is unlikely that the conduct threshold would be satisfied in any case. However, where it is nevertheless satisfied, Professor Fenwick argued that factors such as the timing of the publication "could lead a court to find" that the risk is

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[94] CP 262, para 5.132.

sufficiently low that "there would be little impact on the fair trial rights of the defendant". Therefore, she said:

> If the defence is properly applied, which means re-wording [section 5], then material of public interest could be preserved while still protecting the fair trial rights of the defendant – ie, [section 5's] future partially equivalent provision should be able to allow the court to navigate more effectively the interaction between Art 10 and Art 6.

4.106 Several consultees criticised section 5 for being too limited in scope and suggested that it should allow for greater weight to be given to public interest considerations to ensure compliance with article 10.[95] The MLA said:

> The problem with section 5 is that it is unduly limited in scope through the requirement that the risk of prejudice or impediment be "merely incidental" to the discussion. This means that the section appears not to apply if it is the proceedings themselves which constitute the matter which is of general public interest. Therefore, to ensure that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active, the [existing section 5 protection] has to be read as permitting the court to dispense with the restriction in the strict liability rule where the right of freedom of expression under article 10 requires it.

4.107 The MLA argued that "it was implicitly acknowledged" by the Divisional Court in *Attorney General v Yaxley-Lennon*[96] that section 5 should be read in this way. The MLA referred to the judgment of Dame Victoria Sharp, in which she held that, where the interference with the administration of justice in issue *falls short* of subverting the right to a fair trial, any interference with article 10 must be necessary for and proportionate to the legitimate aim of "maintaining the authority and impartiality of the judiciary".[97] Consequently, while the MLA recognised that the protection of freedom of expression cannot justify an interference with the absolute right to a fair trial, it argued that "where the law is concerned with interferences with the administration of justice that fall short of subverting the right to a fair trial, there is scope for a principled balancing of the competing interests of justice and free speech".

4.108 Similarly, Professor Rowbottom considered that "a general balancing test is not appropriate" but only "where it is determined that the publication poses a risk to the administration of justice". He explained that "not every contempt results in actual prejudice or impediment", and that in some cases "a newspaper can be in contempt (as it posed a risk), but a fair trial can still go ahead (as the risk did not materialise)". On this basis, Professor Rowbottom said:

> Where a publication is clearly in the public interest and does not cause prejudice or impediment (or where such an effect could be avoided through alternative means), then the proportionality of the restriction could be questioned.

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95 These included: GNM; the MLA; the Chartered Institute of Journalists (CIoJ).

96 *Attorney General v Yaxley-Lennon* [2019] EWHC 1791, [2020] Criminal Law Review 534.

97 Above at [90]-[91].

Whether there needs to be some form of broader public interest defence

4.109 Many consultees considered whether the protection in section 5 goes far enough or whether there is a need for a broader public interest defence. By "broader", we mean a public interest defence that applies to publications that are not merely incidental to proceedings. This was discussed in light of the issue raised in the supplementary consultation paper about "whether the law should permit the publication of material that risks undermining a person's right to a fair trial if the material were to be published for the purposes of public safety or national security".[98]

4.110 We heard from several consultees that there is no need for a wider public interest defence. For example, the Bar Council argued that section 5 "is sufficiently wide to encompass the publication of information in order to prevent inaccurate speculation about the circumstances of the event or the individual(s) involved". Kate Astall and Dr McGarry said that they "are not convinced that there is a case for the creation of a new defence enabling the discussion of matters in the public interest or that such a defence is necessary". They reached this conclusion on the basis of:

> the lack of conclusive evidence that the release of more information would have prevented or mitigated the violent unrest that followed the Southport attacks, combined with the argument that the current law of contempt did not prevent the police releasing more information, and the primacy of the right to a fair trial.

4.111 Kate Astall and Dr McGarry emphasised that "it is paramount that the right to a fair trial is protected". They considered this "essential" for both defendants and victims "whose right to receive justice would be denied if a trial is abandoned because of, for instance, a publication which has such a prejudicial effect that fairness cannot be maintained". They highlighted that simply exempting liability for material that would otherwise constitute contempt does not mean that the publication of such material will not create a substantial risk of seriously impeding or prejudicing proceedings:

> To make a rather obvious point, while contempt by publication and the fairness of a trial are connected, they are separate things. The deployment of a new public interest defence might mean that a publication does not amount to contempt but it does not necessarily follow that it has not adversely affected the fairness of a trial. Any new defence would – when relied on – raise the threshold for when a publication amounts to a contempt and this would, in turn, mean that information may be released which, while not amounting to contempt, may be more likely to impede or prejudice a trial thereby having a negative effect on its fairness.

4.112 Professor Rowbottom said that "so far [he does] not see a need for a new public interest defence", but he considered two possible forms a defence could take if we are nevertheless minded to reform the law. The first was suggested "very tentatively as a possible approach" that a "public interest defence could be devised to apply in such circumstances, so that the threshold for a contempt is raised in a relevant case". He noted that a higher threshold has been considered by the courts in several cases, such as in *Attorney General v Conde Nast* where the court stated that "the question is whether the publication would have given rise to a seriously arguable ground of

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98 CP 269, para 21.

appeal if the trial had been allowed to continue and proceeded to conviction".[99] Professor Rowbottom said that, though the courts generally have not followed this approach, "it shows how the level of prejudice required for a contempt can be adjusted and raised for some cases". The second option is a public interest defence that would "permit the disclosure of prejudicial information in the context of a public emergency or threat to national security". This suggestion is similar to the type of defence favoured by media consultees.

4.113 For example, the MLA considered the introduction of "a new, broader form of public interest defence to allow for questions of proportionality and balance" in assessing "what can be published about major incidents". Such a defence "would balance the right of free speech on a matter of public concern against the substantial risk of serious prejudice or impediment to the course of justice". The MLA provided the following examples of circumstances in which such a defence would be useful:

> In an age where reporting crime is almost instantaneous, examples do arise where it is important to allay public concerns about safety. In the case of a violent assault, such as the Clapham acid attack where acid was thrown at a woman and children on the streets of London and the suspect was at large, many people were extremely frightened of further attack. Revealing the identity of the suspect, and that it was a targeted attack in respect of victims who were related to the suspect, would serve to allay those fears and might outweigh the weight to be given to due process. Similarly, where the media are investigating serious corruption, regulatory failings or other issues of public concern and/or political controversy and police investigations are following similar lines, or where ongoing police inactivity is the subject of investigation, the law should permit scope for the public interest to restrict liability for strict liability contempt. This, for example, would permit an urgent statement by the Home Secretary in the face of a challenge to public order, a public safety warning issued by the police or finding of serious regulatory failure to fall safely on the right side of what is permissible, notwithstanding that the information creates a substantial risk that the course of justice will be seriously impeded or prejudiced.

4.114 Though the MLA ultimately supported the creation of a broader public interest defence, it recognised that it "would introduce more uncertainty" because "it would be extremely difficult for editors to decide in advance whether such a defence could be successfully raised in any particular case". Other consultees raised similar concerns about these impracticalities, including the Bar Council, Professor Rowbottom, Impress, Kate Astall and Dr McGarry. The MLA said that "[o]nly in the clearest and most obvious of cases is [the defence] likely to be of utility", but nonetheless considered that "there is a need for more balance and proportionality to restrict the liability for strict liability contempt" in the form of such a defence.

4.115 The MLA also argued that it would improve the consistency, coherence and effectiveness of the law "if the public interest and public benefit considerations were set out in a defence". It considered this necessary in light of "a clear shift in more

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[99] *Attorney General v Conde Nast* [2015] EWHC 3322 (Admin) at [7]. See also *Attorney General v Birmingham Post and Mail Ltd* [1999] 1 WLR 361; and *Attorney General v Guardian Newspapers* [1999] EMLR 904.

recent case law to the separate use of the 'serious impediment' limb that engages very broad considerations".[100]

4.116 Consequently, the MLA proposed that "a defence of public interest/benefit should be articulated which allows for questions of proportionality and balance where the risk to the administration of justice falls short of subverting the right to a fair trial". It explained:

> Such a defence would require the court to have particular regard to the extent to which (i) the material has, or is about to, become available to the public; and (ii) it is, or would be, in the public interest for the material to be published.[101] This, for example, would permit an urgent statement by the Home Secretary in the face of a challenge to public order, a public safety warning issued by the police or finding of serious regulatory failure to fall safely on the right side of permissible reporting, notwithstanding that the reporting creates a substantial risk that the course of justice will be seriously impeded.[102]

4.117 Importantly, the MLA went on to argue that the "need for such a defence would be less acute if the 'active' period did not endure for so long and the starting point moved back to closer to trial". Notably, we are below recommending that the starting point for the active period be moved from arrest to charge.[103]

4.118 Policing consultees considered that, in certain circumstances, the publication of particular information should not constitute contempt even where the conduct threshold is met.[104] The joint response from the NPCC, the CofP and Counter-Terrorism Policing (CTP) said:

> We do believe there is room to offer stronger reassurance in cases where a tipping point has been reached and where releasing information that could help counter misinformation and disinformation to address public safety risks, would be helpful. Flexibility is required to mitigate the clear risks to public safety.

4.119 This response identified "tipping points" that would lead CTP to comment publicly on inquiries where ordinarily no comment would be made: where there was a "significant risk" to public safety or national security, and "[w]here there is a criminal investigation related to the running of the proceedings". The suggestion here is that in such circumstances the publication of material that created a substantial risk of seriously impeding or prejudicing the course of justice in active proceedings should be excluded from the scope of liability under the CCA 1981. Jonathan Hall KC similarly proposed

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100 The MLA cited, for example, *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 (DC); *Attorney General v Yaxley-Lennon* [2019] EWHC 1791, [2020] Criminal Law Review 534.

101 The MLA noted that, under defamation law, reporting privilege for certain statutory categories is disapplied if the matter is "not of public interest" and its "publication is not for the public benefit". As described in *Iqbal v Geo TV Ltd* [2024] EWCA Civ 1566, [2025] 2 WLR 663: "these are different issues, as the language and legislative history shows. The first condition is about the qualities of the 'matter' under consideration. The second is concerned with the impact and value of its publication".

102 This proposed defence was endorsed by GNM.

103 See para 4.285 below.

104 NPCC, CofP and CTP; and NPCC and APComm.

the creation of "a more user-friendly public interest defence" to enable the publication of information where necessary for the purpose of countering (the spread of) disinformation. He recognised, however, the difficulty in crafting "an effective public interest defence" with the effect of "both tolerating a substantial risk of serious prejudice to criminal proceedings in deserving cases, whilst preserving the prohibition in unmeritorious cases".

4.120 Consultees had mixed views about the circumstances in which a broader defence should apply. While some considered it appropriate for it to apply where necessary for public safety or national security,[105] others argued that the scope should be wider.[106] For example, GNM said that "it should also allow public authorities to release information for public benefit/reassurance".[107] Rebecca Camber, chair of the Crime Reporters Association, suggested that "as a starting point, the defence should rest on whether there was a 'policing purpose' in putting out that information for public discourse".

4.121 There was some support from consultees for a defence that would permit the publication of material which would otherwise contravene the strict liability rule, where it is limited to factual details.[108] Professor Fenwick proposed adding the following wording to her revised version of section 5 set out above:

> A report relating to a suspect once proceedings are active is not to be treated as a contempt of court under the strict liability rule if the material creating the risk of impediment or prejudice to particular legal proceedings … is confined to factual details concerning the name, nationality, religion of the suspect.

4.122 However, other consultees rejected this idea. The MLA and policing consultees[109] considered "an exhaustive list of information that can be released" to be unworkable. Similarly, the CPS said:

> We agree with the Law Commission that it is not always straightforward to generalise categories of information that would fall beneath the threshold for strict liability contempt of court. What it is proposed be published, and what its prejudicial effect might be, is context-specific.

Alternative measures to deal with prejudicial publications

4.123 Few consultees addressed our suggestion in the supplementary consultation paper that if a wider public interest defence were to be introduced then the impact of extremely prejudicial publications on a subsequent trial may be dealt with by, for

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105 These included: the CPS; the CIoJ.

106 These included: GNM; the MLA.

107 GNM argued that such a defence should apply to all forms of contempt: "Given the Law Commission's proposals to widen the ambit of general contempt, any defence should be applicable to all forms of contempt. This is particularly the case given that in recent months the police/CPS has released a number of statements about high-profile investigations where they are considering bringing charges but no suspect has yet been arrested". Given that general contempt requires an intention to interfere in the administration of justice, it is not obvious to us that such a defence would be necessary or appropriate.

108 These included: Professor Fenwick and Dr Clive Dolphin.

109 NPCC, CofP and CTP.

example, juryless trials.[110] All consultees who did address this point, however, disagreed.

4.124 Kate Astall and Dr McGarry described this suggestion as "problematic" for the following reasons:

(1) The "type of proceedings in which a defendant may be tried might come to be dictated by the degree of public unrest or threat to national security which the crime they are accused of has given rise". They considered this "to be wrong in principle".

(2) Given what they described as "the racist undercurrent" of the disorder following the Southport attacks, "it may be more likely that the release of prejudicial material and the consequent adoption of a special trial procedure would affect some ethnic groups more than others". They considered this "questionable" and warned that it may constitute a breach of article 6 of the ECHR "in combination with article 14 which prohibits discrimination as to how enjoyment of the Convention rights is secured".

4.125 Similarly, the Bar Council "oppose[d]" this idea for two reasons: "Not only would it amount to a serious erosion to the constitutional right to jury trial but it would significantly limit the deterrent effect of the contempt provisions". Jonathan Hall KC "discourage[d]" it because:

(1) The "strength of the jury system in England and Wales" is that it can "deal with all serious cases equally and according to common procedure".

(2) This issue is "particularly relevant to terrorism and state threat prosecutions where public interest may be very high".

(3) "Allowing such cases to be treated differently would give the appearance of these being special or different or even political", which would be at odds with "the longstanding approach in England and Wales … to treat acts of terrorism, and now state threats under the National Security Act 2023, as simply other, albeit very serious, types of crime".

Discussion

4.126 Given that consultees generally agreed that public discussion of matters of public interest should not be unnecessarily or disproportionately restricted when proceedings are active, the key issues that arise are:

(1) whether this is achieved adequately by the protection in section 5 of the CCA 1981; and

(2) whether there is a need for a broader defence that would permit publication of material which would otherwise meet the conduct threshold for contempt, where the publication is made in the interests of public safety or national security.

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[110] CP 269, para 26.

Section 5

4.127 We agree with the general view of consultees that section 5 strikes an appropriate balance between enabling public discussion and protecting fair trial rights. Its infrequent invocation in contempt proceedings suggests that it functions effectively and proportionately. Accordingly, we recommend that section 5 be retained.

4.128 However, we acknowledge concerns raised about the lack of clarity in the term "incidental" within section 5. We agree that the protection could be expressed more clearly and propose adopting the language used by Tugendhat J in *Attorney General v Random House Group Ltd*. Under this approach, whether the risk of prejudice is merely incidental depends on how closely the subject matter of the publication relates to the specific legal proceedings. This reframing would clarify that a publication discussing public affairs which creates a substantial risk of prejudice will not constitute contempt if the subject matter is not sufficiently closely related to the proceedings. We believe this better conveys the intended scope and effect of section 5. To adopt Dr Danbury's framing of the issue, this places a proportionate limit on the extent to which the rights of an individual can restrict an entire jurisdiction's freedom of expression.

4.129 We recommend that the defendant should bear an evidential burden to raise the defence. The applicant then would bear the legal burden of disproving the defence beyond reasonable doubt. This reflects the practical reality that section 5 will only be relevant in a minority of cases. We recommend that the burden and standard of proof be set out in statute.

A broader public interest defence

4.130 We have also considered arguments for a broader public interest defence, which would exempt liability for contempt even where the discussion concerned the proceedings directly. In the supplementary consultation paper, we had described a form of defence where liability would be exempted where publication was made in the interests of public safety or national security. Some consultees argued for an even broader form of defence that was framed more squarely in terms of the public interest. While consultees advocating this approach emphasised that such a defence should not compromise fair trial rights, we remain unpersuaded that a broader defence in either form is necessary or workable. Our concerns are fivefold:

(1) a broader public interest defence would inevitably present real risk to the course of justice in proceedings, and particularly to the defendant's fair trial rights, and we have not seen compelling evidence that would justify that risk (particularly in light of what we say about the scope of the contempt threshold and the overly-cautious approach to it in current practice);

(2) there is no evident desire for any other mechanism for enhancing the protection of fair trial rights in the absence of contempt protection, even if they were effective or desirable (on which we reach no firm view, but is far from a given);

(3) uncertainty for publishers, who would struggle to determine in advance whether the defence would apply;

(4) difficulty in defining the scope, as specifying particular public interest purposes (for example, public safety or national security) may, if tightly defined, either unduly restrict the defence or, if more loosely defined, fail to provide clarity about what types of material are covered;

(5) limited practical benefit.

4.131 We accept that section 5 does not protect publications where the subject matter is inherently and closely connected to the proceedings – for example, where the proceedings themselves are the matter of public interest, as in the publicity surrounding Rudakubana following the Southport attack. Nonetheless, we maintain that a broader defence would risk undermining fair trial rights. We also reiterate our view in the preceding section. Not only is there much more that can safely be said without meeting the contempt threshold than current practice would suggest, but we also conclude that "substantial" should be interpreted as meaning "weighty", and that the starting point of active proceedings be moved to charge. This will necessarily alleviate some of the need for a public interest defence.

4.132 While freedom of expression is foundational to a democratic society, and the public have a clear interest in national security and public safety, these values must be balanced against the equally fundamental right to a fair trial. The proposal to broaden the public interest defence – so that it could apply even when the publication is directly concerned with ongoing proceedings – risks undermining this balance in ways that are not justified, not necessary and not practically workable.

Risk to fair trial rights and the course of justice

4.133 The most compelling objection is the real and substantial risk that a broader defence would pose to the fairness of legal proceedings. The current contempt framework is designed to prevent publications that could, for example, prejudice jurors, intimidate witnesses (potential or actual), or otherwise seriously prejudice or impede the judicial process. A broader defence would invite arguments that certain prejudicial publications are justified in the public interest, even when they directly concern the proceedings. This would erode the protective boundary that contempt imposes concerning fair trial rights, potentially leading to ineffective or abandoned trials, appeals or the collapse of prosecutions.

4.134 Moreover, the current threshold for contempt is already high, and the law is interpreted unduly conservatively in practice. Our position that "substantial" should be understood as "weighty", and our recommendation to move the starting point of active criminal proceedings to charge rather than arrest, further alleviates pressure on publishers without compromising trial fairness. These reforms make a broader defence not only unnecessary but potentially dangerous.

Lack of alternative safeguards or appetite for reform

4.135 If contempt protections were to be weakened, alternative mechanisms would be needed to safeguard fair trials – such as, for example, jury sequestration or juryless trials. However, there is no clear appetite among stakeholders for such alternatives, nor any consensus that they would be as effective or desirable. It is not for this project to make recommendations on those alternatives, but an absence of viable substitutes reinforces the importance of maintaining the current contempt framework.

Legal uncertainty and publisher risk

4.136 A broader defence would introduce significant uncertainty for publishers. Determining whether a publication is "in the public interest" is inherently subjective, especially when the material directly concerns ongoing proceedings. This ambiguity could chill legitimate reporting or, conversely, embolden reckless publication under the mistaken belief that the defence applies. The law must provide clear, predictable boundaries, particularly where the stakes involve the administration of justice and the fairness of legal proceedings.

Conceptual and practical difficulties in defining scope

4.137 Efforts to define the scope of a broader defence – whether by specifying categories like national security or public safety, or by relying on a general "public interest" test – face intractable problems. Narrow definitions risk excluding legitimate cases; broad ones risk imprecision or disproportionately encompassing prejudicial material. Either approach would fail to provide the clarity needed for consistent application, and could lead to litigation over the defence itself, further complicating proceedings.

Limited practical benefit

4.138 Even if such a defence were available, its practical utility would be limited. Publishers would still face uncertainty, and courts would still need to assess whether the defence applies – often under urgent conditions. The supposed benefit of enabling more public interest reporting during proceedings is largely illusory, especially given that much can already be said without breaching contempt thresholds.

Conclusion

4.139 In sum, a broader public interest defence would compromise fair trial rights, introduce legal uncertainty, and offer only limited practical benefit, whilst undermining the clarity and effectiveness of contempt protections. The current framework, especially with the proposed reforms, strikes a proportionate balance between freedom of expression and the administration of justice. There is no compelling evidence to justify a departure from this balance.

Recommendation 12.

4.140 We recommend that a public interest defence in the form of section 5 of the Contempt of Court Act 1981 be retained.

4.141 However, we recommend that the statute clarify that the question of whether a publication is merely incidental depends on how closely the subject matter of the publication relates to the specific legal proceedings.

Recommendation 13.

4.142 We recommend that the burden and standard of proof of the public interest defence should be specified in statute (namely that the defendant should bear the burden of adducing sufficient evidence to raise the defence, but that the applicant should bear the burden of disproving the defence beyond reasonable doubt).

Recommendation 14.

4.143 We reject a broader form of public interest defence, whether on the grounds of public interest explicitly or on the narrower grounds of public safety or national security.

CONDUCT: PUBLICATION

4.144 This form of contempt liability is limited in its scope. One of those limits is that it applies only where there has been a publication. In this part of the chapter we look first at what is meant by "publication" and then at two aspects of publication that further confine the circumstances in which this form of contempt applies: the reach of a publication and the time of a publication.

The meaning of publication

4.145 In our view "publication" in contempt by publication when proceedings are active should not be defined in the same way it is defined in the CCA 1981. In particular, the development of online communications has led us to conclude that a different definition would be more suitable for a modern law of contempt.

Current law

4.146 Publication for strict liability contempt is defined in section 2(2) of the CCA 1981:

> "publication" includes any speech, writing, programme included in a programme service, or other communication in whatever form, which is addressed to the public at large or any section of the public.[111]

4.147 The definition does not refer to material that is online (for instance, website content or posts made to social media), though the words "communication in whatever form" means such material is plainly captured. This is not surprising given the definition is in a statute passed over 40 years ago when the concept of online communications did not exist.

4.148 The CCA 1981 does not define what constitutes "the public at large" or "any section of the public". Whether a publication is addressed to the public at large or a section of

[111] CCA 1981, s 2(1). A "programme service" has the same meaning as in the Broadcasting Act 1990: CCA 1981, s 2(5); see Broadcasting Act 1990, s 201.

the public appears to be highly case-specific and will "always be a matter of fact and degree".[112]

Consultation

4.149 In the consultation paper we asked questions about three issues that are relevant to the definition of publication.[113] The first two concern online communications.

4.150 In CQ 14 we provisionally proposed that:

> "publication" continue to be defined as it is in section 2(1) of the Contempt of Court Act 1981, but with illustrative examples to include online or electronic communications.[114]

4.151 While we thought the existing definition encompassed online communications, our view was that "if the law is to be clear and comprehensible to a lay person then the definition of publication should continue to be non-exhaustive, but the examples should include online and electronic communications".[115]

4.152 In CQ 33 and CQ 34 we looked at whether and how online material uploaded outside England and Wales should be subject to contempt laws. We framed these as questions about the place of publication. In CQ 33 we provisionally proposed that the legal position should be clarified.[116] In CQ 34 we asked an open question: "Where online publication occurs outside the jurisdiction, how should place of publication be relevant?"[117] We gave some examples of possible options:

(1) the place of publication should be irrelevant: liability should attach to a publication regardless of where it was produced or uploaded; or

(2) the place of publication should be relevant: liability should attach to a publication that:

  (a) has been produced or uploaded in England and Wales; or

  (b) has been produced or uploaded outside England and Wales by a person habitually resident in England and Wales or by an organisation with a place of business within England and Wales; or

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112 *Arlidge, Eady & Smith* (2019) para 4-63, citing *Dingle v Turner* [1972] AC 601 at 623 (Lord Cross).

113 The consultation questions were asked across chapters 3 and 5 of the consultation paper. This was because we had included in chapter 3 a provisional proposal for general contempt by publication and so the definition of publication arose in both chapters, and our provisional proposals were that the same definition would apply to both. We explain below at paras 6.98-6.107 that we do not recommend general contempt by publication as a strand of general contempt and so in this part of our report we deal with all relevant questions here.

114 CP 262, para 3.117.

115 Above, para 3.113.

116 Above, para 5.69.

117 Above, para 5.70.

(3) the place of publication should be defined in some other way (please specify).[118]

4.153 The third question, CQ 35, considered the words in the CCA 1981 definition, "addressed to the public at large or any section of the public".

4.154 In the consultation paper we referred to our 2012 work on contempt of court, in which we explained:

> There appears to be no definitive rule or standard that can determine whether a publication is addressed to the public or a section of it. Rather, the matter falls to be decided on a case-by-case basis. Likely relevant factors when making such assessment include the size of the group, the nature and function of the group, the means of control over access to the group or the specific publication and the context in which the publication was made. The essential contrast is with private communications. …
>
> We consider that the law in this area should be left to develop on a case-by-case basis since there are no hard and fast rules about what can amount to "a section of the public" and, in practice, this issue appears thus far to have generated limited litigation.[119]

4.155 We took the view that this remained the position:

> There is inherent and inevitable uncertainty about when a communication can be said to have been made to a section of the public, and that it is not clear that further guidance in statute will be of assistance in clarifying what will constitute such a communication in any given circumstance.[120]

4.156 We provisionally proposed in CQ 35 that:

> the definition of publication as "publication to the public at large or to a section of the public" remain unchanged and that there should be no further elaboration on the meaning of the definition.[121]

4.157 We address the online communications issues first and then turn to the third question.

Online communications

4.158 A majority of consultees agreed with our provisional proposal in CQ 14 to retain the current definition but add illustrative examples online or electronic communications.[122] Comments showed mixed views about whether and how the definition should deal with online communications. GNM said that "it would be helpful for the legislation to

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118 CP 262, para 5.70. The options and background are discussed in detail in paras 5.49-5.70.

119 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 3.24, 3.28-3.29 (references omitted); CP 262, para 5.72. See also *Arlidge, Eady & Smith* (2019) para 4-63.

120 Above, para 5.81.

121 Above, para 5.82.

122 Of the 38 responses to CQ 14, 26 consultees agreed, 5 consultees disagreed, and 7 consultees gave an answer categorised as "other".

specify that the definition applies to all online publications, including those on social media". Numerous consultees strongly supported incorporating such examples into the definition.[123] On the other hand, some considered this unnecessary on the basis that online and electronic communications are clearly captured by the current definition.[124] For example, Greg Callus (barrister and editor of the contempt section of the White Book)[125] argued that the phrase "other communication in whatever form" in section 2(1) "easily encompasses online and electronic communications, and this has never been in doubt".

4.159 In response to CQ 33, there was very strong support for the provisional proposal that it should be made clear what the legal position is regarding publication made outside the jurisdiction.[126] A number of media and legal consultees provided further comments indicating that clarification would be welcome.[127] The Court of Protection Practitioners Association (CoPPA) noted that it would be valuable because CoP proceedings "are frequently attended by friends and family members of the person at the centre of the case who live outside of the jurisdiction". No consultees disagreed with our provisional proposal.

4.160 On the substantive position about what the law should be, views were mixed. The three example options we provided in CQ 34 attracted fairly even support. Of the 28 responses, 8 favoured the first option, 10 the second, and 10 the third.

4.161 There were two common themes to the comments, regardless of which option was favoured.

4.162 First, there was a clear concern that material uploaded outside the jurisdiction may nevertheless be available in England and Wales, and thus may create a substantial risk of seriously impeding or prejudicing the course of justice in active proceedings.[128] There were different views about whether liability should attach to any such publication or should be limited.[129]

4.163 A broad approach was favoured by, for example, JLACOS, which said that the "outcome of publication is potentially too serious to allow evasion by stepping a foot

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123 These included: the Attorney General's Office (AGO); the Bar Council; Professor Fenwick; APComm and NPCC.

124 These included: the CBA; Greg Callus; DJ Rachel Watkin.

125 The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

126 Of the 34 responses to CQ 33, 24 consultees agreed with the proposal, no consultees disagreed with the proposal, and 10 consultees gave an answer categorised as "other".

127 These included: Charles Thompson; Gavin Sutter; the Court of Protection Practitioners Association (CoPPA); the CBA; the Bar Council; the AGO; JLACOS; GNM.

128 Accessibility in England and Wales was highlighted by, for example: JLACOS, CoPPA, Gavin Sutter, GNM and an anonymous consultee (supporting option 1); the Chartered Institute of Legal Executives (CILEX), University of Sheffield CFOM and techUK (supporting option 2); and Professor Rowbottom and the CBA (supporting option 3).

129 Only one consultee, the CIoJ, argued that online publications made outside the jurisdiction but available inside should not fall within the scope of liability. A publication of that kind, the response said, "is not the business of the courts of England and Wales".

over the Scottish border, taking a day trip to Boulogne, or asking a cousin in Canada to publish".[130] A consultee responding anonymously pointed to the possibility that a publisher may use a virtual private network (VPN) to hide their true location so it would appear that the material was posted outside England and Wales.[131]

4.164 Some consultees commented on the current legal position. Greg Callus explained that at common law, "'publication' occurs where information is received and understood", and that it is "completely and utterly irrelevant" where the material was produced or uploaded. He said that for liability under the CCA 1981, "the key feature is whether the information was published within England and Wales (including online) where jurors will read it". The Criminal Bar Association (CBA) drew our attention to *Solicitor General v Angela Power-Disney*.[132] In those proceedings, which concerned breach of a reporting restriction order (RRO), the defendant was not resident in England and Wales and Nicklin J said it was not clear whether the court had jurisdiction in those circumstances.[133]

4.165 Where a more limited approach was favoured then it often took as the discriminating factor whether there was an intention that the publication would reach an audience in England and Wales. For example, the University of Sheffield CFOM argued that liability should attach also "to any publication accessible in England and Wales, wherever it was produced or uploaded, and whoever produced it, if it was primarily targeted at a section of the public in those two nations". The Attorney General's Office (AGO) said "the administration of justice in England and Wales should seek to protect itself against substantial interference, regardless of the place of publication" but also suggested liability should be limited to circumstances "where the publisher intended that the publication would be accessed by members of the public in England and Wales". Gavin Sutter favoured the approach of section 19(11) of the Online Safety Act 2023, which attaches liability to "UK-linked" publications. This refers to publications which have the UK as a target market or their sole target market, or where "the content is or is likely to be of interest to a significant number of UK users".

4.166 Secondly, consultees raised the practical problems of enforcement.[134] The AGO noted that "there may be enforcement issues in practice and that expanding contempt jurisdiction to cover publication abroad for a foreign audience would breach principles of international comity". A techUK member supported option 2 on the basis that "any proposal whereby contempt liability is given extra-territorial effect would create both practical problems with enforcement … and also issues arising out of conflict of laws".

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130 The AG for Northern Ireland (supporting option 3) queried whether it would be "helpful or possible to extend the 'place of business' condition to a place of business in the United Kingdom".

131 An anonymous consultee.

132 *Solicitor General v Power-Disney* [2025] 4 WLUK 266 (15 April 2025). A subsequent order was published indicating that committal proceedings were listed for 23-24 July 2025. We have not seen a report of those proceedings. It may be that the matter was discontinued or subsequently listed for a later date, or no committal followed and so no further judgment was published.

133 The report of the judgment on Westlaw ([2025] 4 WLUK 266) is a summary of the *ex tempore* judgment (the oral judgment given immediately). The CBA said the case suggests "there is no requirement for a defendant in contempt proceedings to be habitually resident in England and Wales".

134 See also CP 262, paras 5.51-5.53.

However, JLACOS thought that enforcement would not always be difficult, that the practical problems were in any case "another matter", and supported option 1.

4.167 A different aspect of practicality, with legal implications, was flagged by Professor Rowbottom. He wondered whether "limiting liability to publications 'produced and uploaded' within [the] jurisdiction would hinder attempts to counter such publicity". Professor Rowbottom considered the implications:

> Under [option 2] a vlogger in the US would not be in contempt for publishing prejudicial content that is available in England and Wales. However, a person in England and Wales may share or promote that vlogger's content among a wide audience, without producing or uploading that content. The question is whether [option 2] would shield the person within jurisdiction republishing the content.
>
> Similarly, [option 2] may limit the potential to get the companies hosting the content to take action (if they have a place of business within the jurisdiction). Under the current law, a host with notice of unlawful content can be a publisher (which may incentivise the temporary removal of content). Under [option 2], the host company would not be uploading or producing the content (even if a publisher at common law). As a result, the hosting platform may have little reason to reduce the visibility of the prejudicial content. If [option 2] is to be pursued, then it is important to consider how such issues would be addressed (and whether there would be different measures to tackle prejudice from publications based outside of jurisdiction).

Discussion

4.168 Material posted to websites or social media clearly falls within the CCA 1981 definition of publication. We are not persuaded that we should proceed with our provisional proposal and recommend the inclusion of illustrative examples. There is, as consultees point out, certainty in the law as it stands and that is valuable. However, that does not answer the question of whether the CCA definition should be used in the new form of liability.

4.169 The consultation responses on material that is uploaded outside the jurisdiction have led us to conclude that the law should be made clear, and that the existing definition is not suitable for the new form of liability. Where in the consultation paper we framed CQ 33 and CQ 34 as questions about the place of publication, we are of the view that the issue is better conceived of and framed as being about the accessibility of material in England and Wales. It is accessibility that gives rise to the risk of interference with the administration of justice. Professor Rowbottom's point that material may be promoted in England and Wales without content being produced or uploaded in this jurisdiction is important in this regard.

4.170 We conclude that addressing these issues in terms of the place of publication is not the best way to resolve them. Rather, they should be approached through the definition of "publication", which, for the purposes of contempt of court, should be viewed as having occurred when material is made available in England and Wales.

This approach to defining publication is consistent with some more recent approaches in legislation.[135]

4.171 We have considered how this definition would apply to platforms that host material online. Our view is that they are not precluded from being held liable for contempt by publication when proceedings are active. This would, of course, require proof that a defendant has done an act that makes material available (alongside proof of the other elements). While platform systems provide a technological function that is essential for enabling users to make material available, it could be argued that there is no conduct by the platform that makes the material in question "available". However, whether a platform can be said to have made material available for these purposes is a decision for the court and will depend on all the circumstances. For example, where a platform pushes material to users then it could be argued that it is this conduct that makes material available. However, there may be circumstances in which a platform fails to prevent a user from publishing material or fails to remove material once published by a user. In these circumstances it may be more appropriate to pursue for contempt the user who has made the material available on the platform. All will depend upon the factual circumstances in any given case. A court may in addition or alternatively order the platform to remove the material, and liability for contempt by breach of order may arise if the platform fails to comply.

4.172 Given our conclusion that "publication" should be understood as making material available, should all material that is available in England and Wales be subject to contempt laws, or should there be limits? And what of the practical problems of enforcement?

4.173 In our view, contempt laws should apply to all material that is accessible in England and Wales. Given that the risk to the interference with the administration of justice may arise when material is accessible, it is necessary and proportionate for the protection of fair trial rights that the law does not preclude liability on the grounds that material was uploaded outside the jurisdiction. This broad approach lends itself to clarity, certainty and consistency in the law. Using a VPN or moving briefly into another jurisdiction should not be left open as methods for people ordinarily resident in England and Wales to attempt to avoid liability. A requirement to prove an intention to reach people in England and Wales would add complexity to the law. It may become increasingly challenging as technology evolves and new ways of masking one's location or reaching audiences become available. The words "addressed to" in the existing definition do not necessarily import a requirement to prove intention, but a definition that does not rely on those words would avoid the risk of an inadvertent limitation.

4.174 We recognise that there will sometimes be practical problems in enforcement. However, we do not consider this a sufficient reason to limit liability only to cases where publication occurs within the jurisdiction. In our view, it would be unsatisfactory to have a situation in which the law could be enforced against an individual or corporate body (who was aware of a risk that the proceedings were active and who

[135] Examples include section 20E of the Juries Act 1974 (exceptions to the offence of disclosing jury's deliberations) and section 11 of the Investigatory Powers Act 2016 (the offence of unlawfully obtaining communications data).

satisfied the conduct threshold) as a matter of practicality but liability could not arise simply because publication occurred outside England and Wales. Such a position would unnecessarily abdicate responsibility for protecting fair trial rights. An approach that imposes liability regardless of where and how material has been made available ensures that enforcement is possible in the widest range of circumstances where potentially prejudicial material is available to an audience in England and Wales. Even where enforcement is impractical or not possible, this approach signals that the right to a fair trial is nevertheless important and should be protected.

The public or a section of the public

4.175 The majority of consultees who responded to CQ 35 agreed with our provisional proposal that "publication" should continue to be defined as "publication to the public at large or to a section of the public" and that there should be no further elaboration. Both the data and comments showed wide support for retaining the definition.[136] For example, the CBA said that "a section of the public" is a phrase "used in other legislation, and is understood and applied without too much difficulty".[137] The MLA said that it "does not create problems in practice".

4.176 There was, however, one contentious issue, which was whether a single person or a small, closed group does and/or should constitute "a section of the public", or whether a larger closed group may constitute a publication to a section of the public or the public at large. Greg Callus drew our attention to the decision of the Divisional Court in *R (Yam) v Central Criminal Court*, where the phrase was considered in some depth, though the court did not ultimately reach a position on the issues.[138] We look at this decision below. Greg Callus argued that given the lack of clarity:

> A better delineation of 'section of the public' should perhaps be introduced. Any communication which is available to the public at large should be caught, but private and confidential communications to a specifically-addressed audience should not be caught, irrespective of scale, unless intended to be circulated more widely.

Discussion

4.177 In addressing the contentious issue, it will be helpful to start by explaining the decision of the Divisional Court in *Yam*.[139]

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136 Of the 29 responses to CQ 35, 21 consultees agreed with the proposal, 3 consultees disagreed, and 5 consultees gave an answer categorised as "other". The AGO, Gavin Sutter, CoPPA, the Bar Council, the CBA, the MLA, and Professor Stephen Bailey all made comments in support of the proposal.

137 The CBA provided the examples of ss 1 and 20 of the Terrorism Act 2006, and s 19 of the Public Order Act 1986, which refer to publication to the public or a section of the public. See in particular Terrorism Act 2006, s 20(3); and Public Order Act 1986, s 19(3).

138 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050. The decision of the Divisional Court was appealed to the UK Supreme Court but on narrower grounds and the issues discussed here were not considered: *R (Yam) v Central Criminal Court* [2015] UKSC 76, [2016] AC 771 at especially [20]-[21], [38].

139 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050.

4.178 The case involved an application for judicial review of the decision of Ouseley J to refuse to vary an order restricting publication of material heard in private during a criminal trial. The order said:

> IT IS ORDERED UNDER SECTION 11 of the CONTEMPT OF COURT ACT 1981 and all other powers enabling that the court having ordered that the press and public are to be excluded from part of these proceedings for the due administration of justice, no report is to be published revealing the grounds or reasons for the making of the order or any evidence, submissions, judicial decisions or other matter heard or dealt with in [private], other than that which has been said in public in these proceedings.[140]

4.179 For current purposes, the relevant issue in *Yam* was whether an application to the European Court of Human Rights (ECtHR) that deployed material heard in private during the criminal trial would breach an order made under section 11 of the CCA 1981 (which permits the court to make non-publication orders in respect of material that it has said can be withheld from the public).[141]

4.180 Section 11 of the CCA 1981 refers to directions prohibiting "publication". The definition of "publication" that applies to section 11 is the definition in s 2(1).[142] That is, a publication is limited to a communication addressed to the public at large or a section of the public. The claimant argued that including the material in an application to the ECtHR was "not properly to be described as a publication to the public or a section of the public" and so "would not amount to a publication within the meaning of [section 11]" or, necessarily, within the meaning of section 2(1).[143] The trial judge, Ouseley J, did not accept that submission and took the view that it was a communication to a section of the public: "once the addressee falls outside the scope of those entitled to receive the information, they are for these purposes a section of the public".[144]

4.181 In the Divisional Court, Elias LJ summarised the view of the trial judge:

> In essence the reasoning of Ouseley J is that the concept of "the public or a section of the public" must take its meaning from the purpose for which the order has been made. Where it is to protect an important matter of state security, the purpose would be wholly defeated if the communication were made even to just a single person.

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140 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050 at [4] (Elias LJ).

141 CCA 1981, s 11: "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld". See also *Re Guardian News & Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, cited at [42] of *Yam*: s 11 "gives the court the ancillary power to give directions prohibiting a newspaper which actually knows the name of the individual from publishing it. The section resolves any doubt about the power of the court in these circumstances to prevent persons, other than the parties, from naming the individual or mentioning the matter outside court".

142 CCA 1981, s 19.

143 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050 at [10], [46] (Elias LJ). This was one of three grounds in the appeal. The other two are not relevant to the issues discussed here.

144 Above at [47] (Elias LJ), citing Ouseley J at [75].

> The section must therefore be interpreted so as to treat a communication to even a single individual as a relevant publication within the meaning of the section.[145]

4.182 Lord Justice Elias had concerns about this approach:

> I have difficulty with the notion that a private disclosure to one person can be said to constitute a publication even though I accept that in a case where security interests are at risk it might well frustrate the purpose of section 11 not to interpret it in that way. I suspect that the problem arises because when considering the concept of "publication" the draftsman had principally in mind contempts which involve an interference with the course of justice by improperly influencing the judge or, more significantly, the jury. Hence section 2(1)(a) is in terms defining the concept for that purpose. In that context, if a publication is not at least to a section of the public it is highly unlikely to come to the notice of a judge or jury and thereby interfere with justice. But where the purpose of the order is to protect some other interest, such as … national security, more limited communications including entirely private ones may need to be prohibited. The concept of "publication" is inapt; it is not the language of private conversation. But it is the concept used in section 11 and by section 19 it is given precisely the same meaning as for contempts involving an interference with the course of justice.[146]

4.183 Having then accepted "that there must be a communication to at least a section of the public", Elias LJ said he was "inclined to think that the court staff and judges in Strasbourg as a body could properly be so described within the meaning of section 11".[147] Ultimately, however, Elias LJ did not consider it "strictly necessary to determine this difficult issue" because "there was in any event a power to make the order both using the inherent jurisdiction of the court and pursuant to section 12 of the Administration of Justice Act 1960" in addition or alternatively to section 11.[148] The issue in relation to section 11 was thus left somewhat unresolved.

4.184 With respect to the inherent powers, Elias LJ held that "common law would be seriously deficient" if there were not the power to prevent publication here:

> the court must have an inherent power to issue an ancillary order or direction whose express object is to secure the purpose of the order made in court. … I would uphold the order on this basis even if it would otherwise fall outside section 11.[149]

4.185 Concerning section 12 of the Administration of Justice Act 1960 (AJA 1960), Elias LJ agreed with the trial judge and said:

> in the context of [the AJA 1960], the concept of publication (which is not expressly defined) must extend to any circumstance where the prohibited information is made available to persons who would have been excluded from the court during the

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145 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050 at [48] (Elias LJ).

146 Above [49] (Elias LJ).

147 Above at [50] (Elias LJ).

148 Above at [51] (Elias LJ).

149 Above at [55] (Elias LJ).

[in private] proceedings. If that would constitute a contempt, the judge must surely be able to issue an order making the position clear.[150]

4.186 Hickinbottom J agreed with Elias LJ: the use of "publication" in section 12 of the AJA 1960 includes publication to a single person as the provision is designed to support the inherent powers of the court, and the construction of section 2(1) to capture publication to a single person has not been decided in this case but he was uncomfortable with the proposition that it may do. He said:

> As Elias LJ indicates, as a matter of construction, there is difficulty with the notion of a private disclosure to one individual in this statutory context being a "publication" – I should add that I find his suggestion as to why the difficulty arises compelling – and, as the point I make with regard to the ambit of section 2(1) was not fully argued before us, I would hesitate to say more without some such debate.[151]

4.187 We agree with Greg Callus that the position under the existing law is unclear. That is apparent from the decision in *Yam*. What should the law be?

4.188 Greg Callus argued that "private and confidential communications to a specifically-addressed audience should not be caught, irrespective of scale, unless intended to be circulated more widely". Were this approach taken, then the proposed disclosure to the ECtHR in *Yam* would not have constituted a publication for the purposes of section 2(1).[152] There is a logic and attractiveness to the position in this instance because it is troubling that the law of contempt may be used to disadvantage or even effectively prevent a defendant's appeal in a criminal case. However, in our view, such an interpretation would be at odds with the ordinary sense of what might be a section of the public; the mode of communication (that is, private) does not mean that a large group of people should not be considered "a section of the public".

4.189 Our view is that the current definition should be retained and that there should be no elaboration of what is meant by "a section of the public". Given the context-specific nature of these cases, the question of whether a communication has been made "to the public at large or to a section of the public" should be left to the courts to make a determination on a case-by-case basis.

4.190 We recognise that this position leaves some uncertainty about whether a publication to an individual or small private group will be subject to this form of contempt liability. However, we consider it unlikely that this uncertainty will be a concern in practice. First, where a communication is made to a single person or to a small and private group, it is more likely that the question of liability will turn on whether the conduct threshold was met rather than whether publication was to "a section of the public". It would seem that generally the smaller the group that receives the communication, the less likely that it will have created the requisite risk to satisfy the conduct threshold.

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150 *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 WLR 1050 at [57] (Elias LJ).

151 Above at [67] (Hickinbottom J).

152 Were an order made to (for example) prevent the disclosure of confidential or private information for the purpose of administering justice in proceedings, that would be different; the publication of such information contrary to that order could nevertheless amount to contempt by breach of order. It would still be troubling if that order had the effect of preventing or disadvantaging a defendant in a criminal appeal.

Secondly, in chapter 8 we recommend that proceedings for this form of contempt can be brought only by or with the consent of the AG. This serves as an additional safeguard against liability because the AG will consider the public interest in bringing contempt proceedings. The size and nature of the group to whom the publication was made will likely be a consideration for the AG in deciding whether there is a public interest in a particular case.

4.191 It is important that private communications should not be stifled where there are no statutory or court-ordered restrictions. A primary aim of liability for contempt by publication when proceedings are active is to prevent prejudicial publicity and, given the low fault threshold, it is appropriate that this form of contempt captures only publications to the public at large or to a section of the public.

4.192 Where communications are made to individuals or smaller groups then it will ordinarily be appropriate that there will be no liability under contempt by publication when proceedings are active and that if there is to be liability then it should only lie in one of the other forms of contempt. For example, where a publication occurs in breach of a court order, then liability for contempt by breach of order would arise if the elements of that form of contempt are met.[153] The definition of publication we are discussing here applies solely to contempt by publication when proceedings are active; where a court order prohibits publication then the definition would not apply and liability could arise where material is made available to a single person or a group or the public. Where a court wishes to ensure that information is not disclosed then it will be necessary and appropriate to make an RRO that is clear in its terms.

4.193 This does not eliminate the possibility that a publication to a single person could constitute a publication to "a section of the public" with the result that (if all other elements were to be established) a defendant will be liable for contempt by publication when proceedings are active. However, given the judgments of the Divisional Court in *Yam*, we consider it unlikely that the courts would readily take the view that such a publication was a publication to "a section of the public".

4.194 In light of the above, we have concluded that the definition of "publication" for contempt by publication when proceedings are active should refer to material made available to the public at large or a section of the public.

4.195 Circumstances may arise where material has already been made available to the public or a section of the public and then another person or body acts to make the material available beyond the availability of the original publication. For example, a person may see an article on a website and then post on social media a link to that article or a publisher may move the material to a new position or make the material prominent on its site. Whether a particular act amounts to making previously published material available to the public or a section of the public in a way that goes beyond the availability of the original publication will be a question of degree depending on the circumstances. In the consultation paper, our provisional proposals retained the concepts of publication and distribution that are used in section 3 of the CCA 1981.[154]

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153 Where a person is not subject to the order either directly or as a result of an order being *contra mundum* then liability for general contempt may be a consideration.

154 CCA 1981, s 3(2).

However, our view following consultation is that this distinction does not reflect the way that online communications function and the concept of "distribution" does not feature in our recommendations. Instead, we refer only to publication, defined as making material available. With respect to liability, the question will be whether there has been publication, and the conduct we describe here can be characterised in general terms as "republication". We consider how this conduct fits into our liability framework for contempt by publication when proceedings are active in the discussions below on the time of publication and the fault element.[155]

4.196 Our recommendation on publication reflects the conclusions we have explained in the discussion above regarding both online communications and "a section of the public".

Recommendation 15.

4.197 We recommend that for the purposes of contempt by publication when proceedings are active, to "publish" means to make available to the public or a section of the public.

The time of publication: material first published before proceedings were active

4.198 Material may be published that includes, for example, information about a crime a person has committed. The publisher may not be exposed to liability for contempt under the CCA 1981 because there were no active proceedings at the time; under section 2(3) liability will arise "only if the proceedings in question are active … at the time of the publication". However, if that same person is subsequently charged with an offence, then the availability of that previously published (or "archived") material may create a substantial risk of serious impediment or prejudice to the new active proceedings. Should contempt liability attach to this material that was first published before proceedings were active?

The provisional proposals in the consultation paper

4.199 In the consultation paper we considered whether contempt liability should arise in such circumstances. We explained that the issue was considered in our 2012 work on contempt, in which we concluded that publication should be treated as a continuous act in line with the decisions in *HM Advocate v Beggs (No 2)*[156] and *R v Harwood*.[157] We cited the following passage from the judgment of Fulford J (as he then was) in *Harwood*:

> It appears to me unrealistic to make a distinction between the moment when the material is first published on the website and the succeeding period of time when it is available for access on demand by members of the public. It appears to me that the better view is that the situation affecting the website may be compared with a situation in which a book or other printed material is continuously on sale and

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155 Paras 4.240 and 4.395-4.396 below.

156 *HM Advocate v Beggs (No 2)* [2002] SLT 139 at [22].

157 *R v Harwood* [2012] EW Misc 27 at [11].

available to the public. During that whole period, I consider that it would be proper to conclude that the material was being published.[158]

4.200 We explained that in 2012 we favoured this interpretation because it had the practical advantage of enabling liability under the CCA 1981 to capture the risk posed to the administration of justice. However, we also recognised problems with this approach – for example, that the publisher's conduct was lawful at the time of the original publication and they have not done anything to make it unlawful, and that publishers would need to monitor their content and any events that may mean it has become relevant to active proceedings.[159]

4.201 In our current contempt work, we considered arguments that it is not proportionate or necessary to require an online archive to be "sanitised" whenever a high-profile trial commences because of a perceived risk that jurors might access prejudicial (or seriously prejudicial) material. We considered whether juror misconduct offences enacted since our 2012 work and directions to juries not to conduct internet research were sufficient and the proportionate response to any risk. However, our provisional view was that "the misconduct offences and adherence to directions do not sufficiently mitigate the risk of prejudice" because seriously prejudicial information in the public domain "may reach jurors through other means and through no fault of their own".[160] We said that "this should not mean that every archive must be 'sanitised' upon relevant proceedings being active", and thus provisionally concluded that publishers should not be required to monitor and remove content proactively.[161] Instead, we suggested that the appropriate balance would be struck by imposing liability only where the publisher had notice that proceedings were active and of the specific material in question.

4.202 We explained that a publisher might be put on notice by a party to the relevant proceedings, given that they may be best placed to do so, or by the AG, given its function as guardian of the public interest in the administration of justice.[162]

4.203 Finally, we provisionally concluded that previously published print material should be excluded from this form of liability. We considered it had less potential reach than online publications and so was less likely to create the requisite risk of serious impediment or prejudice to proceedings. We said that practical issues arise which mean such a publisher may be insufficiently culpable were publication of printed material to be treated as a continuing act. We said that in circumstances where such

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158 *R v Harwood* [2012] EW Misc 27 at [11].

159 Our 2012 report included recommendations for a scheme under which: (1) the AG would have been required to notify publishers of offending material, and a publisher who failed to remove material would be liable for contempt; (2) the AG would have been required to notify publishers when relevant proceedings were no longer active; and (3) the CCA 1981 would have been amended to clarify that publication is continuous: CP 262, para 5.42, summarising the relevant recommendations of Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340. These recommendations were never implemented by Government.

160 CP 262, para 5.44.

161 Above, paras 5.44 and 5.48.

162 We also explained that this position differed from the one taken in our earlier contempt work in 2012, and that this departure is based on our view that imposing a duty on the AGO to notify publishers would be too burdensome: Above, para 5.45.

printed material may carry the requisite risk of interference, jury directions and liability under existing juror misconduct offences and contempt law are sufficient.

4.204 Ultimately, in CQ 32 we made the following provisional proposal:

> We provisionally propose that a publisher may be liable for contempt of court:
>
> (1) where previously published online material subsequently creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced;
>
> (2) the publisher has notice that relevant proceedings are active; and
>
> (3) the publisher has notice of the specific material that is potentially prejudicial to those active proceedings.
>
> Do consultees agree?[163]

Consultation

4.205 The 40 responses to CQ 32 showed very mixed views: 14 consultees agreed with the provisional proposal, 13 consultees disagreed, and 13 consultees gave an answer categorised as "other". Comments provided in support of our provisional proposal were not extensive and tended to indicate agreement in brief terms. We heard a distinct point from CoPPA that material published before proceedings were active may enable jigsaw identification of parties, which "can be a significant risk" in CoP proceedings. CoPPA said that "the specific facts and outline of the person's conduct, the local authority, and names of hospitals or services working with the person" may make it "relatively straightforward" for them to be identified by "people in their communities".

4.206 However, most of the comments we received were detailed and indicated strong criticism of and disagreement with our provisional proposal, particularly – but not only – among media consultees. The BBC's statement about public interests captures well the tone and views of many stakeholders who disagreed with the proposal or responded with "other": there is a "clear public interest in the media fairly and accurately reporting on criminal investigations and court proceedings and a public interest in reporting which remains accessible to the public".[164] The overarching concern was that our provisional proposal would have the effect of interfering with article 10 rights by imposing an unnecessary and disproportionate burden on publishers to monitor and remove content from their archives. In conveying this argument, consultees raised eight key points.[165]

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163 CP 262, para 5.48.

164 BBC.

165 Consultees with positions that fell broadly into this group included: GNM; the MLA; the BBC; PA Media; the News Media Association (NMA); Reach; Charles Thompson; Professor Rowbottom; University of Sheffield CFOM; the CIoJ.

Juror research and the risk of inadvertent access to prejudicial online material

4.207 Several consultees argued that there is little risk of a juror coming across relevant previously published material without seeking it out, and where they do seek it out then they may be liable for criminal offences under the Juries Act 1974.[166]

4.208 Professor Rowbottom described the risk of jurors inadvertently encountering archived material as "relatively low in most cases". He considered that the risk "is greater where there is a high-profile crime and people conduct searches on the defendant's name (though it is not clear how many people would see any prejudicial content)". The BBC described the odds of a juror inadvertently coming across relevant material online to be "infinitesimal". The BBC also argued that audio and video material (as opposed to written material) "cannot be inadvertently viewed in the same way. Rather, a juror would need to actively choose to play content to view it". Consequently, the BBC said that such material "should be seen in a different category than archived online articles".

4.209 Professor Rowbottom said the "relatively low risk is also reflected in the lack of cases concerning internet archives". Consultees from media organisations expressed similar views. The BBC told us that it was "not aware of recent cases which have collapsed due to jurors viewing archived material" and noted that the consultation paper did not provide "any statistical evidence or even examples to point to this being a significant or widespread issue which warrants a radical change in the law relating to archive material". The CBA, which agreed with our provisional proposal, considered that previously published material is unlikely to interfere with active proceedings: "We have experience of undertaking trials linked to earlier proceedings that had attracted considerable publicity, … without such publicity interfering with the new proceedings". The MLA argued that:

> the presence of prejudicial material in an online archive does not as a general rule create a substantial risk of serious prejudice as jurors would not inadvertently come across it … but would need to conduct research into a defendant that would be contrary to judicial directions and a criminal offence.

4.210 There were strong views that the risk of jurors finding previously published prejudicial material can be mitigated through judicial directions.[167] The MLA said that "research and judges continue to suggest that juries are robust and that a properly directed jury will disregard outside reporting and consider only the evidence presented in court".[168] The BBC cited the Judicial College guidance, *Reporting Restrictions in the Criminal Courts*:

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166 Examples include the Juries Act 1974, s 20A (research by jurors). Those who pointed to the offences included: PA Media; GNM; the MLA.

167 These included: PA Media; Reach; GNM; the CBA; Charles Thomson; University of Sheffield CFOM.

168 See, for example, *R v Sarker (In re BBC)* [2018] EWCA Crim 1341, [2018] 1 WLR 6023 at [32]; *R v B* [2006] EWCA Crim 2692 at [31]; *R v Linton* (28 June 2021, unreported).

> The court must proceed on the basis that the jury will abide by the standard, express directions which they are given, … not to carry out their own research and to ignore any media reports.[169]

4.211 It was acknowledged that a juror may be more likely to inadvertently see archived material if it has been republished, for example, by publishing a link to the archived material. Professor Rowbottom pointed out that if proceedings are active at the time of the republication then liability for contempt by publication when proceedings are active would arise in the ordinary way. Similarly, the MLA and GNM argued that liability should lie with the republisher and not with the original publisher.

4.212 The overall positions rejected the provisional proposal in unequivocal terms. PA Media described it as "a 'solution' to a problem that does not exist". The BBC said it was "both unnecessary and disproportionate to the risk of either of the identified concerns". GNM argued that "it is not clear that there is any pressing need to implement a proposal like the one suggested sufficient to justify the harm it will do to the public interest in freedom of expression".

Current media practice and take-down orders

4.213 It was argued by the MLA that the precautions currently taken by the media once proceedings become active "are sufficient to protect the administration of justice". It explained:

> Under the current law once proceedings become "active" most, if not all, national news organisations take reasonable, practical steps to ensure that historic material is not linked to current online news coverage where such material could create a substantial risk of serious impediment or prejudice to those active proceedings. The general practice of MLA members once a trial commences is that it will publish fair and accurate online reports of the proceedings, but those articles will not contain hyperlinks to articles published before the trial commenced. As a result such material can only be accessed by tailored or specific searches being made for subject matter within that material.[170]

4.214 Where there are concerns that previously published material creates a substantial risk of serious prejudice, Greg Callus and several media consultees[171] considered that the appropriate course of action is for the AG or a party to the proceedings to apply to the court for a take-down order under section 45(4) of the Senior Courts Act 1981.[172] The

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169 Judicial College, *Reporting Restrictions in the Criminal Courts* (July 2023) p 34.

170 This is also consistent with GNM's description of its own general practice when reporting on active proceedings.

171 These included: the MLA; the BBC; GNM.

172 Senior Courts Act 1981, s 45(4): "Subject to section 8 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (substitution in criminal cases of procedure in that Act for procedure by way of subpoena) and to any provision contained in or having effect under this Act, the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court".

MLA argued that this approach "reflects the correct balance between the importance of the integrity of online archives and the interests of justice".[173]

4.215 We heard from consultees that such orders are made infrequently.[174] The MLA explained that it is "not aware of any examples of archived journalistic material being held to create a substantial risk of serious prejudice or impediment to the course of justice or of any take-down orders being made" since 2012.[175] Consultees suggested that the infrequency of take-down orders being granted can be attributed to the courts' reluctance to interfere with the media's article 10 rights by ensuring that a sufficiently high threshold is met before allowing such an application. GNM noted that the High Court said recently (in the analogous context of RROs) that retrospective orders which require a person to cease publishing something that it had otherwise been lawful to publish up to that point are "effectively a mandatory injunction" and that "cast in those terms, the very serious article 10 implications are obvious".[176]

The value of archives

4.216 Many consultees highlighted the importance of archives and argued that our provisional proposal risks undermining the public interest in maintaining previously published reports for public access.[177] The MLA, endorsed by the News Media Association (NMA), said:

> Over the past decade a consensus has emerged as to the significant contribution online archives maintained by the media make to a modern participatory democracy in preserving and making news and information available – and the critical importance of maintaining their integrity, both as a permanent record and to ensure the continued availability of information.[178]

4.217 The University of Sheffield CFOM noted that our recommendation in 2012 was rejected by the government at the time,[179] and considered it "necessary to ask the question once more whether the current proposal strikes the right balance between the right to a fair trial and the right to information and press freedom". It argued:

> The bar for limiting access to information which the public has the right to receive would need to be set very high. The information in question, even if deemed prejudicial at present, was perfectly lawful at the time of publication. If access to lawful information in the public interest is to be restricted, there needs to be a pressing justification.

4.218 Though we provisionally concluded that publishers should not be required to review their archives for relevant material, the University of Sheffield CFOM argued that "this

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173 See also the BBC's response: "on the rare occasions where archived material presents concerns, the existing law provides an adequate and procedurally fair remedy".

174 These included: Reach; the BBC; the MLA.

175 *R v Harwood* [2012] EW Misc 27.

176 *PMC v A Local Health Board* [2024] EWHC 2969 (KB) at [58].

177 These included: the MLA; the NMA; GNM; the BBC; Charles Thomson.

178 See, for example, *Hurbain v Belgium* (App No 57292/16) [2023] 77 EHRR 34 at [180]-[186].

179 See *Hansard (HC)* 30 June 2014, vol 583, col 41 (Dominic Grieve MP).

alone does not adequately protect the value of news archives"[180] and that the "prospect of being put on notice by the Attorney-General could give rise to a chilling effect".[181] The response concluded that the imposition of liability under our provisional proposal "is both an inadequate safeguard of the right to a fair trial and a disproportionate restriction of publishers' press freedom".

A formal obligation to monitor and/or remove online content

4.219 Three consultees misinterpreted the effect of our provisional proposal as imposing an obligation on publishers to monitor their archives, which they considered to be onerous and disproportionate.[182] Our provisional proposal would not have the effect that publishers would be required to review their archives when they learn that proceedings are active or proactively monitor their archives and remove material. We explained in the consultation paper that we do not think that "every archive must be 'sanitised' upon relevant proceedings being active".[183] In fact, we provisionally proposed that a publisher should only be liable where they have notice (a) that relevant proceedings are active, and (b) of the specific material that is potentially prejudicial to those active proceedings. Consequently, awareness of active proceedings (without awareness of the specific material that is potentially prejudicial to those proceedings) would be insufficient to impose liability. An obligation to remove the material would arise only once ordered to do so by the court.

A de facto obligation to remove content with the effect of permanent removal

4.220 A separate but related point was raised by other consultees, who argued that in practice the provisional proposal "will lead to the frequent and permanent removal of content from online archives".[184] Professor Rowbottom described this as "a system of notice and takedown". This is distinct from the issue discussed immediately above; here, the concern is about imposing a de facto duty on publishers to remove content *once put on notice*, rather than a duty to monitor and remove content *proactively*. Professor Rowbottom explained:

> By increasing the risk of being in contempt, the receipt of a notice may incentivise a takedown. If the Attorney General provides a notice in relation to potentially prejudicial content in an archive, then I imagine the publisher will remove the content as a matter of course. A decision to ignore such notice would be more likely to result in an application for contempt. The proposal may thereby lead to the removal of more content than under the status quo (even though the current rules expose archives to a greater theoretical risk of liability). In practice, the proposed system may prove to be similar to the Law Commission's previous proposals [in 2012] on archives, which were abandoned following objections from media representatives.

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180 See *ML and WW v Germany*, App nos 60798/10 and 65599/10, 28 June 2018 at [101].

181 See above at [103]-[104].

182 Greg Callus; Paul Foster; David Toomer.

183 CP 262, para 5.44.

184 The MLA.

Similarly, the MLA said that, on receiving notice, publishers “are likely to err on the side of caution rather than risk proceedings for contempt”.

4.221 Many media consultees considered the impracticality of having to remove content once put on notice. The NMA, MLA and BBC argued that our provisional proposal will open the floodgates and lead to the media being inundated with requests to remove content from their archives. The MLA explained:

> The MLA apprehend that notices will be deployed in respect of any material where there might be a potential risk rather than in respect of material which creates a substantial risk of serious prejudice or impediment as per the current threshold test, leaving the publisher in the invidious position of having to decide on necessarily limited information (and very likely the incomplete information provided by the requester giving notice) whether to refuse the request and risk proceedings for contempt. The complexity and uncertainty in the law, coupled with the professional reality that media law is not a specialism for most criminal lawyers is likely to result in ambiguous and misconceived notices, which will nonetheless have to be properly explored because of the severity of the consequences.

4.222 The MLA, the NMA, PA Media, GNM and the Chartered Institute of Journalists (CIoJ) described the process of reviewing requests and removing content as time-consuming, costly, and disproportionate. PA Media explained that it has three different areas (the wire, ‘Create’, and ‘Ready’) and that the process for following a notice regarding its archive “would cause substantial difficulty”:

> Our current process would be to first identify and remove the content from our system. We would then kill the content on the wire, Create and Ready. We would then issue a series of advisories on the wire, which would be repeated several times, in which we would inform customers that the copy was being removed and ask them to do the same. We would also follow this up with an email to customers advising them of the copy kill and asking them to remove it from their site and any archived/cached versions. After an hour or so, we would then use an online search engine to track down any instances where the copy was still showing, and – where we have contact details – we would manually contact them individually to ask them to remove the content.
>
> However, we have no way of manually removing the content ourselves, even though it may carry our byline/be our content. Some customers are more responsive than others. And some online sites steal our content and we have no contacts for them – so we have previously been in the situation where we’re cold-calling editors of some sites to say, “We know you stole this from us, unfortunately there’s a legal issue and we need it removed, please would you take down the PA copy you used without our permission”. Unfortunately, there are some sites which prove difficult/impossible to contact – and some sites which are very slow to remove content.
>
> It’d be tricky to put an accurate cost/time against this, but it would be a manual resource-heavy time-consuming process which would involve senior editors as well as our customer services team throughout – it might only take an hour or so to find our content, kill it and send out the various advisories and emails, but that’s when the time-consuming manual work starts as we track down those responsible for any sites which continue to carry the content even after we’ve killed it.

4.223 The BBC explained that its content management system is "a complex and dynamic publishing platform, designed to support online content being created, developed and published, not simply stored as an archive". It considered some of the practical difficulties it would face if required to remove (and later permitted to reinstate) content:

> The BBC's current content management system has been being rolled out across the divisions of the BBC since the early 2020s, but has only been in operation for BBC News in the last year. All previously published BBC online material is stored on the legacy system. This is a separate system which would require its own separate solution if archived content were to be removed and reinstated, requiring further time and resource.
>
> The BBC's content management system is able to take-down material from a URL in a way that takes effect immediately. However, even when a URL has been taken-down, an extract known as the 'slice', usually consisting of the headline and a few lines of text, will remain available to those searching online until the search engines trawl the online archive and recognise that the content has been removed, a process which is not in the control of the publisher. A 'slice' relating to recently published material is likely to disappear quickly whereas that relating to older articles may remain visible in the longer term, even months.
>
> While the 'slice' is available, it is likely to be more prejudicial to the proceedings as a viewer will read it out of context and without the balance included in the article as a whole.

4.224 Consultees suggested that the removal of material from the archives is likely to be permanent.[185] We were told about the technical difficulties with removing content from the archive and then reinstating it,[186] and the resource-intensive process of reviewing the risks of restoring material once proceedings are no longer active.[187]

4.225 An important point was made about the interaction between the law of contempt and defamation law – specifically, the implications of the "single publication rule".[188] Under section 8 of the Defamation Act 2013, the single publication rule prevents a person from bringing a defamation claim "in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public".[189] The MLA said:

> When a trial or retrial has finished, the content then needs to be reviewed again for risks which might militate against the republication of the removed content. The single publication rule in defamation law will no longer apply and therefore in respect of defamatory content, as well as private or confidential information, the potential defences and risks need to be re-assessed. Therefore, although, in principle, articles taken down following notification of "potentially prejudicial material" can be

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185 These included: the NMA; the MLA; the BBC; GNM.

186 These included: the BBC.

187 These included: the MLA; GNM; the BBC; Reach.

188 This issue was also raised by stakeholders during a consultation roundtable with lawyers and academics specialising in media law.

189 Explanatory notes to the Defamation Act 2013, para 60.

republished at the end of a trial, this is of itself so time-consuming and expensive that removal is likely be permanent in practice.

Here the problem identified by consultees is that material reuploaded once proceedings ceased to be active for contempt purposes may constitute a new publication under defamation law. If that were the case, in practice, publishers would not be able to reupload the material without risking liability for defamation. We return to this below.[190]

4.226 In a related vein, the BBC argued that imposing on publishers a requirement to remove archived content "potentially places the BBC in conflict with a core regulatory duty". This is because the BBC's constitutional basis lies in a Royal Charter which requires that its activities be carried out in accordance with an Agreement.[191] The Agreement requires the BBC to comply with its Editorial Guidelines,[192] which state that the BBC's archive of online content is "a permanent public record and its existence is in the public interest", and that it "should not normally be removed or amended". Where it is expected that content will be available permanently, the guidelines provide that "it should only be removed in exceptional circumstances".[193] The accompanying editorial guidance states that "the BBC should be very reluctant to change an accurate report of a court case for any reason", and that it "should normally refuse requests to remove" where the information "is available in public records or was put in the public domain by authorities such as the police".[194]

De-indexing as an alternative

4.227 A number of consultees considered alternatives to requiring material to be removed.[195] The BBC and Dr Danbury suggested that, instead, online material could be de-indexed. De-indexing refers to the process of removing a webpage from the results pages of a search engine, which means it will not appear when a person searches for relevant keywords. Dr Danbury argued that this "reduce[s] the risk" of a juror "coming across the information that may contaminate their forensic thought process". He considered that this approach "may be a better way to strike a balance" between protecting jurors from accessing prejudicial publications and preventing the potential harm caused by removing archived material. The BBC noted, however, that de-indexing "will only take effect once search engines have trawled the archive", meaning that "there will be a delay which could be a few days, weeks or months and this is not in the control of the publisher". It explained:

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190 See para 4.243-4.244 below.

191 *Royal Charter for the continuance of the British Broadcasting Corporation* (2016) Cm 9365, art 7(2).

192 *An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation* (2016) Cm 9366, sch 3, para 2(1).

193 BBC, *The BBC's Editorial Standards* (June 2019), para 13.3.25; see now *BBC Editorial Guidelines 2025*, para 13.2.24.

194 BBC, *Guidance: Removal of BBC Online Content* (updated 23 June 2025).

195 These included: the BBC; Dr Richard Danbury; Gavin Sutter; Open University Law Reform Clinic Open Justice Centre.

There are two options for 'de-indexing', both of which temporarily 'de-index' content. The standard 'de-indexing' period is 90 days, though this can either be revoked early or extended:

(i) The BBC can manually de-index content, however, as this involves multiple processes it is rarely undertaken and there is an inherent risk of human error. The BBC's current platform does not have the capability of tracking de-indexed material or indicating that the 90 day period is coming up for renewal. Manual de-indexing on a routine basis would require the development of the BBC's content management platform to automate the process and make it fit for purpose.

(ii) The second option is that the BBC can make a request to larger search engines such as Google, Bing and DuckDuckGo for temporary de-indexing, following which the content is automatically re-instated. This is less onerous on the BBC and more reliable, but not offered by all search engines. As with manual de-indexing, the BBC does not currently have a system of monitoring this type of take-down.

Continuous publication

4.228 Several consultees argued against a definition that treats publication as continuous. Some took this view on the basis that both online and print publications create the same level of risk and thus the former should be treated similarly to the latter. Reach said that there "is very little difference in reality with online content, where older stories effectively become part of the digital publisher's archive". Similarly, the MLA argued that the "existence of material in an archive should not be held to constitute publication as a continuing act", contrary to the case law,[196] because:

> news archives are best viewed by analogy with a newspaper library. Contemporary publications on the internet can be distinguished from archives due to the necessity with the latter to apply search criteria which is a quite deliberate and directed act and in most cases a member of the public would need some degree of background knowledge and persistence for it to become available.

4.229 The BBC argued that to treat publication as continuous would be "a significant change in the interpretation of s2(3) CCA 1981" which it "strongly opposes". The BBC said that the judgment in *HM Advocate v Beggs (No 2)*[197] cannot be seen as authority for treating online publication as continuous in the context of contempt because it was concerned with defamation and pre-dated the introduction of the single publication rule, "which provides that the limitation period for defamation accrues on the date of first publication". The BBC therefore argued that the court's observation that it was "unrealistic" to distinguish between "the moment when the material is first published on the website and the succeeding period of time when it is available for access on demand by members of the public" is now outdated. The BBC concluded that the single publication rule "has stood the test of time and now clearly accords with how

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196 *HM Advocate v Beggs (No 2)* [2002] SLT 139; *R v Harwood* [2012] EW Misc 27 (CC).

197 *HM Advocate v Beggs (No 2)* [2002] SLT 139.

the public view and understand publications online" and urged us to reconsider our position on defining publication as continuous in this light.

4.230 Given the concern about exposure to defamation liability (discussed above),[198] consultees argued that the law should make clear that material reuploaded once proceedings cease to be active would not constitute a new publication for defamation purposes.[199] However, by contrast, Gavin Sutter argued that the single publication rule is not appropriate in the context of contempt because it "presents a different proportionality consideration". He suggested that a publication which creates the requisite risk of interference with active proceedings should not be exempt from contempt liability solely because it was published some time ago. Consequently, he considered it "desirable" to define online publication as continuous in statute.

Notice

4.231 Some consultees supported our provisional view that liability for previously published material should arise only where the publisher had notice that the relevant proceedings were active and notice of the specific material that is potentially prejudicial to those active proceedings.[200] Both Impress and Hacked Off suggested that it would serve as a useful safeguard against unfairly or inappropriately imposing liability on publishers. Hacked Off said that the notice requirement "ensures that any interference with [article] 10 is proportionate to the legitimate aim to be achieved by this provision".

4.232 However, other consultees raised several concerns. First, we were told that it is unclear what would constitute notice for these purposes, who would be responsible for giving notice, and how this requirement relates to the fault element.[201] The Bar Council was concerned that requiring notice would mean that liability would arise only where a publisher had actual knowledge that proceedings were active, which would impose a higher threshold than our provisionally proposed fault element for material published when proceedings are active (which requires awareness/knowledge of a *risk* that proceedings were active):

> For contemporary material, … the test is recklessness (or knowledge/reasonable grounds for suspicion). Whilst of course a publisher may be vested with actual knowledge, because the Attorney-General has taken appropriate steps to publicise the fact, a publisher is equally culpable if they are reckless. Retaining liability for a state of mind short of knowledge is important for the deterrent effect of the contempt jurisdiction. Also to link criminal liability to the decision (not duty) of the AGO to put a publisher on notice in respect of one set of proceedings but not another, appears arbitrary. Additionally, it will not encourage good practice on the part of publishers to establish appropriate procedures to determine whether proceedings are active.

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198 See para 4.225 above.

199 These included: Reach; GNM; Greg Callus.

200 These included: Impress; Hacked Off.

201 These included: Paul Foster; Professor Bailey; the Bar Council; the CBA; Dr Richard Jones; GNM; Reach; the MLA; the BBC.

Presumably the question of notice is not limited to a formal notice issued via the AGO. A publisher could be on notice if, for example, the parties to a case communicated with a particular publisher or a Judge informs the press in open court in associated proceedings or in other circumstances. The test should be centred on the state of mind of the publisher not the means of notification.

4.233 GNM argued that it would be inappropriate for the responsibility to lie with the police or prosecution because their view "is likely to be overly restrictive and incompatible with safeguarding freedom of expression". It also argued that the responsibility should not lie with the defence because they may "try and use the process to seek the removal of material damaging to their client's reputation from the internet". Other media consultees, such as the MLA and BBC, had similar concerns about the exploitation of this system by lawyers who want to protect their client's reputation.

4.234 Secondly, media consultees argued that our provisionally proposed requirement that a publisher must have "notice of the specific material that is potentially prejudicial to [the] active proceedings"[202] sets too low a threshold.[203] Reach described it as "a disproportionate departure from the current position". Both Reach and the BBC said that it should be necessary to meet the current conduct threshold for publications when proceedings are active: that the material creates a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced.

4.235 Finally, there was concern about the absence of a provisionally proposed mechanism for a publisher to challenge a notice.[204] For example, the BBC argued that a route of appeal against notices "will be necessary in light of the likely number of unmeritorious or at least disputed notices being issued".

Discussion

4.236 We have considered carefully the responses to CQ 32, and the feedback received during consultation events, particularly the substantial pushback from media consultees. We are persuaded by consultees that a publisher should not be liable for online material published before proceedings were active, even where they have been given notice that proceedings are now active and of the specific material that is potentially prejudicial. This is a departure from our provisional proposal in the consultation paper and from our recommendation in 2012.

4.237 Our provisional proposal in the consultation paper was underpinned by concern that jurors may come across previously published prejudicial material, either inadvertently or deliberately. However, the evidence from consultees overwhelmingly suggested that the risk of this is very low. Media consultees emphasised that this is because search engines do not readily display results from the archives and because media organisations are committed to ensuring that material published when proceedings are active does not contain links to any previous publications that may now be potentially prejudicial.

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202 CP 262, para 5.48(3).

203 These included: Reach; GNM; the BBC.

204 These included: GNM; the BBC.

4.238 Where such a risk does arise, we have been persuaded that existing measures are adequate. These measures include judicial directions to jurors to disregard media reporting, and juror misconduct offences where a juror deliberately seeks out relevant material. The passage from the Judicial College guidance, *Reporting Restrictions in the Criminal Courts*, cited by the BBC, is a part of the College's guidance on pre-existing material.[205] Although directed towards judicial decision making on reporting restrictions, the principle is correct and we re-state it in full here as it appears in the guidance:

> The court must proceed on the basis that the jury will abide by the standard, express directions which they are given, to try the case on the evidence presented during the trial, not to carry out their own research and to ignore any media reports.[206]

4.239 The guidance points to the juror research offences (just as consultees did). It continues: "In the *exceptional case* where in spite of these safeguards the online material is deemed to pose a substantial risk of serious prejudice", a take-down order may be appropriate, but it will be "a last resort".[207] A failure to comply with such an order would expose a publisher to liability for contempt by breach of order.

4.240 Where material was published originally before proceedings were active and is then republished once proceedings have become active, those who republish the material should be liable for contempt because such conduct can present a risk to a defendant's fair trial rights. Here we use the term "republication" in the same way we use it at paragraph 4.195 above – that is, to describe making previously published material available to the public or a section of the public in a way that goes beyond the availability of the original publication before proceedings were active. Provided that all the elements are proved, a person who has republished the material would have committed contempt by publication when proceedings are active on the basis that their conduct satisfies the definition of publication.

4.241 Consultees made a compelling argument that the implications of our provisional proposal on publishers may render it impractical and thus undermine its purpose. Media consultees were clear and convincing in their explanations that the process of removing material from online archives is so complex, time-consuming, and costly that most media organisations would not have the resources to comply with their obligations under our provisional proposal in a timely and efficient manner (if at all). In light of this, we agree that our provisional proposal would impose a disproportionate burden on publishers. Consequently, it would not serve its intended aim of meaningfully reducing what we accept is a low risk to the administration of justice that is posed by previously published prejudicial material remaining online. The provisionally proposed reform would risk disproportionately interfering with freedom of expression.

4.242 Therefore, we conclude that liability for contempt should not arise in respect of material that was first published when there were no relevant active proceedings, but which remains accessible online and creates a substantial risk of seriously impeding

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205 Judicial College, *Reporting Restrictions in the Criminal Courts* (July 2023) p 34.

206 Above.

207 Above, p 35 (emphasis added).

or prejudicing the course of justice in proceedings that have since become active. To give effect to that conclusion we recommend that, for the purposes of contempt liability, the act of publication should not be understood as continuous and instead should be defined as having been completed when the material is made available.

4.243 We recognise that material may be temporarily taken down by a publisher to prevent or reduce a substantial risk of seriously impeding or prejudicing the course of justice in proceedings that have since become active (whether pursuant to a court order, a request by, for example, the AG or a party, or whether of their own volition). We have considered the implications this might have for the single publication rule under section 8 of the Defamation Act 2013 in circumstances where a publisher reinstates that material once proceedings are no longer active. Our conclusion is that reinstated material would amount to a subsequent publication that is substantially the same as the first publication, falling within section 8(1)(b). The protection thus would apply to that subsequent publication, subject to the requirement in section 8(4) that the manner of the subsequent publication was not materially different from the manner of the first publication. Under section 8(1)(5), in determining whether the manner of subsequent publication was materially different, the court may have regard to, "among other matters – (a) "the level of prominence that a statement is given; [and] (b) the extent of the subsequent publication". In our view, where material is removed from a website and later restored, the manner in which the reinstated material is published would not be materially different from the manner in which it was first published. In *Parish v Wikimedia Foundation Inc*, Steyn J considered a case where material had been removed from a Wikipedia entry and then reappeared.[208] It was held that the first and subsequent publications were:

> a paradigm example of two publications made in the same manner. The publications are two versions of the same webpage: they were published in precisely the same manner to the same extent and with the same prominence.[209]

4.244 We think that the same could clearly be said of reinstated material and the protection of the single publication rule thus would apply. Where material is reinstated, if the level of prominence and the extent of the publication (for example) are such that the manner of publication is materially different then the protection may be lost, but that would be an assessment for the court depending on the circumstances.

Recommendation 16.

4.245 We recommend that, for the purposes of contempt liability, the act of publication should not be understood as continuous and instead should be defined as having been completed when the material is made available.

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208 *Parish v Wikimedia Foundation Inc* [2024] EWHC 2301 (KB).

209 Above at [80].

WHEN ARE PROCEEDINGS ACTIVE?

4.246 Under the existing law, the strict liability rule in the CCA 1981 applies to a publication only if the proceedings to which it relates are "active".[210] This means that, where a publication relates to proceedings that are not active, liability cannot arise for this form of contempt.[211] Schedule 1 to the CCA 1981 sets out when criminal, appellate, and other proceedings are considered active for these purposes.

4.247 This places an important and appropriate limitation on the scope of liability so as not to interfere disproportionately with the right to freedom of expression under article 10 of the ECHR. Our recommendations for this form of liability similarly limit its scope to material published in respect of active proceedings.

4.248 In this part of the chapter, we consider the appropriate points at which particular types of proceedings should become active and cease to be active. First, we deal with criminal proceedings and recommend that they should be treated as active from the point at which a defendant is charged with an offence until the point of verdict or guilty plea. Secondly, we consider extradition proceedings and recommend that they should be treated as active from the point at which the suspect first appears in a court in England and Wales. Next, we discuss coronial proceedings and recommend that they should continue to be treated as active from the point at which an inquest is opened. We also recommend that coroners should be required to announce publicly their decision not to resume an inquest following an adjournment. Finally, we consider family and CoP proceedings and conclude that there is no need to reform the law relating to the active period. We deal with each of these types of proceedings either because they were considered in our 2012 review of contempt, but the issue of the active period was left unresolved in our report, or because in our pre-consultation engagement for our current review we heard from stakeholders that these jurisdictions face particular problems relating to the active period.

Criminal proceedings

Starting point of the active period

4.249 As explained, a publication which creates a substantial risk of seriously impeding or prejudicing the course of justice in particular criminal proceedings will only be subject to contempt liability under the CCA 1981 where those proceedings are active. For these purposes, criminal proceedings are considered active from the earliest of the following points:

(1) there has been an arrest (with or without warrant) or the issue of an arrest warrant or summons;

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210 CCA 1981, s 2(3)-(4).

211 Note, however, that liability may arise currently for contempt by publication at common law. This would also be the case under our recommended form of general contempt, discussed in chapter 6.

(2) an indictment or other document specifying the charge has been served, or an oral charge communicated;[212]

(3) a certification is made under section 54 of the Criminal Procedure and Investigations Act 1996 (which may result in new proceedings against a person whose acquittal had been tainted by an offence involving witness or juror intimidation); or

(4) an appellate court has remitted the case to the court below or ordered a new trial.[213]

4.250 In circumstances where criminal proceedings have become active upon an arrest warrant being issued, they will cease to be active if the person is not arrested within one year. However, proceedings will become active again once the arrest is eventually made.[214]

Consultation

4.251 In the consultation paper we recognised that for years there have been arguments that criminal proceedings should not be treated as active from the point of arrest, but rather from the point of charge. For example, we noted that the Phillimore Committee recommended in 1974 that proceedings should be considered active from the point of charge.[215]

4.252 We explained that these arguments were addressed in our earlier work on contempt of court in 2012. At that time, we provisionally proposed that proceedings should continue to become active at arrest because moving to charge "could increase the risk of serious prejudice to the proceedings, particularly in cases of notoriety or if there were only a short period of time between charge and trial". In our 2012 consultation we heard mixed views, but media consultees unanimously said that there can be many months between a person's arrest and their trial. They argued that, therefore, imposing reporting restrictions over such long time periods disproportionately infringes freedom of expression.[216]

4.253 In our 2024 consultation paper, we noted that similar concerns were again raised by media stakeholders in our pre-consultation engagement for our current contempt project. We explained that two new issues had been raised:

(1) First:

> police no longer name a suspect who has been arrested and so the media cannot ascertain in practice whether proceedings are active, unless they know

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212 CCA 1981, sch 1, para 4(e) refers to "oral charge", though this may now be outdated following the enactment of the Police and Criminal Evidence Act 1984.

213 Above, sch 1, paras 4-4A.

214 Above, sch 1, para 11.

215 Report of the Committee on Contempt of Court (1974) Cmnd 5794, para 123.

216 CP 262, para 5.92.

through other sources who has been arrested (which may happen if, for instance, the arrest was made in a public place).[217]

(2) Secondly, that paragraph 7(ca) of schedule 1 to the CCA 1981 provides that proceedings commenced by arrest without warrant cease to be active "if the person arrested is notified that the person is not to be prosecuted". The stakeholder concern was that "there may be a lengthy period between arrest and the decision not to prosecute" and that it can be difficult to find out that a decision has been made not to prosecute.[218]

4.254 We explained that the police policy not to release information about an arrest follows a recommendation of the Leveson Inquiry in 2012 that:

> save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.[219]

4.255 This recommendation is reflected in CofP guidance on media relations, which states:

> Suspects should not be identified to the media (by disclosing names or other identifying information) prior to the point of charge, except where justified by clear circumstances, such as a threat to life, the prevention or detection of crime, or a matter of public interest and confidence.[220]

The CofP is currently consulting on an updated version of this guidance, which similarly states:

> In situations where releasing some information [on arrest] would confirm the identify of an individual, this information should not be released. …
>
> If a name is provided to the police with a request for confirmation of an arrest, the response should be, "we neither confirm nor deny". No guidance should be given. Communications officers should not respond by supplying other information that has the effect of confirming the person's identity.[221]

4.256 We also explained that the decision of the Supreme Court in *Bloomberg LP v ZXC*[222] established that "in general, a person under criminal investigation [has], prior to being

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217 CP 262, para 5.93.

218 Above, para 5.100.

219 The Leveson Inquiry, *Inquiry into the Culture, Practices and Ethics of the Press* (2012) Pt G, ch 3, para 2.39.

220 CofP, *Guidance on Media Relations* (first published 24 May 2017, updated 27 July 2022). This is accompanied by recent interim guidance on releasing information about the ethnicity and nationality of suspects: NPCC and CofP, *Interim guidance relating to ethnicity and/or nationality of suspects* (11 August 2025).

221 CofP, *Media and communications: Authorised professional practice (APP) – consultation* (November 2025), 6.3 and 6.7. This draft guidance incorporates the recent interim guidance on releasing information about the ethnicity and nationality of suspects: NPCC and CofP, *Interim guidance relating to ethnicity and/or nationality of suspects* (11 August 2025).

222 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

charged, a reasonable expectation of privacy under article 8 of the ECHR in respect of information relating to that investigation".[223]

4.257 In the consultation paper we noted media stakeholders' concern that, consequently, "there is a chilling effect because the media cannot publish information about a person for fear that the person may be under arrest, but there is no way they can know with any certainty".[224] We recognised that this concern:

> may be particularly important if a publisher is trying to resist an argument that they were reckless as to whether proceedings were active. For example, the existing law … presumes that a journalist can avail themselves of the defence of innocent publication if they have made an enquiry of police. However, if police will not disclose the identity of an arrestee, including potentially neither confirming nor denying that the person about whom the media is enquiring has been arrested, then there is a question about whether that defence will be meaningful in practice. The same argument would apply to our provisional proposal that places on the applicant the burden of proving recklessness as to whether proceedings are active.[225]

4.258 However, we suggested that this may not justify changing the point at which criminal proceedings are considered to be active. We gave the following reasons:

> For the active period to commence at charge may significantly increase the risk of serious prejudice to proceedings as a result of reporting between arrest and charge, particularly in high-profile cases and where the identity of the arrestee is known to the public from the very point of arrest. We also note that the fact proceedings are active does not mean that all publications are prohibited; rather, the law of contempt will only capture publications that carry a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Where there may be a considerable period of time between arrest and trial, which may be a consideration where a suspect has been released on police bail pending further investigation, then the "fade factor" may make it less likely that the contempt threshold will be crossed.[226]

4.259 Ultimately, we recognised that treating criminal proceedings as active from the point of arrest may have a chilling effect where information is not published even though it would not have any serious prejudicial effect or any effect at all. However, given the reasons set out above, we considered that such restriction is arguably "necessary and proportionate to protect the fair trial rights of the person who has been arrested" and thus "it may be appropriate to continue treating criminal proceedings as active from the point of arrest".[227]

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223 CP 262, para 5.96.

224 Above, para 5.97.

225 Above, para 5.98.

226 Above, para 5.99.

227 Above, para 5.101.

4.260 We did not make a provisional proposal for reform in relation to this issue but invited views from consultees in CQ 36:

> We invite consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest.[228]

4.261 The majority of consultees who responded to CQ 36 said that criminal proceedings should continue to be considered active from the point of arrest.[229] Consultees considered it necessary for this form of contempt liability to apply from the point of arrest because of the risk of prejudicial publication following a suspect's arrest, which may undermine their right to a fair trial (in the event that ultimately they are charged and prosecuted).[230] Policing consultees said that prejudicial publication following a suspect's arrest may undermine the integrity of the police investigation,[231] which was described as "perhaps most acute at the point of arrest".[232] The Bar Council said that the "dearth of [contempt proceedings] and (anecdotally) the relative few occasions where trials are aborted due to prejudicial publicity suggest that the current 'cut off' point is fair and is effective as a deterrent".

4.262 Three consultees highlighted that criminal proceedings may be commenced without an arrest[233] and considered how the law should apply in such cases.[234] In light of this, the CBA proposed that criminal proceedings should be considered active from the earliest of the following: arrest; issuing of a warrant of arrest; issuing of a summons; issuing of a written charge by the prosecutor; charge; service of an indictment. Similarly, JLACOS argued that where a defendant has not been arrested, criminal proceedings should be treated as active at least from the point at which "the prosecutor has issued a written charge or submitted an information to a justice". These suggestions appear to reflect the current law under schedule 1 to the CCA 1981.[235] However, JLACOS expressed concern that if proceedings become active from the point at which a prosecutor has issued a written charge or submitted an information to a justice then they would not be active while the police are investigating the offence. JLACOS suggested that this would be unsatisfactory: "there should be

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228 CP 262, para 5.102.

229 Of the 40 consultees who responded to CQ 36, 24 said that criminal proceedings should continue to be considered active from the point of arrest, 8 consultees said that criminal proceedings should not continue to be considered active from the point of arrest, and 8 consultees gave an answer categorised as "other".

230 These included: Professor Bailey; the Criminal Law Solicitors' Association (CLSA); the Law Society of England and Wales (the Law Society); Professor Hungerford-Welch.

231 Joint response from the APComm and NPCC; joint response from the NPCC, CofP and CTP.

232 Joint response from the NPCC, CofP and CTP.

233 Defendants in criminal proceedings are not arrested in all cases because certain conditions must be met to arrest a suspect without a warrant: PACE 1984, ss 24 and 24A.

234 JLACOS; the CBA; the MLA. The MLA described the point of arrest as "arbitrary" because "suspects may be interviewed under caution (if they do not meet the PACE criteria for arrest) which does not trigger active proceedings". It described this as "not uncommon in high profile cases", such as in the recent cases of BBC Radio 1 DJ Tim Westwood (see BBC, *Prosecutors to consider bringing charges against Tim Westwood* (7 November 2024)) and Russell Brand (see BBC, *Police send Brand file to CPS to consider charges* (2 November 2024)).

235 CCA 1981, sch 1, paras 4-4A. See para 4.249 above.

equality with an arrested defendant - there is no justification for treating these defendants differently".

4.263 Almost all consultees who said that criminal proceedings should not continue to be considered active from the point of arrest expressly said that instead they should become active at the point of charge,[236] citing three main reasons. First, consultees argued that there are practical difficulties in getting relevant information from police to determine whether particular proceedings are active. Media consultees explained that it is difficult to ascertain from police whether an arrest has been made and, if so, the suspect's name.[237] The MLA, BBC and GNM attributed these difficulties to College of Policing guidance (which reflects the recommendation of the Leveson Inquiry and the Supreme Court's decision in *ZXC*).[238] The effect of this practice is that, as argued by the MLA, the media "cannot as a general rule ascertain whether proceedings are active unless they know through non-police sources who has been arrested".[239] Both the MLA and BBC were concerned that a publisher would be liable under the current law, which is consistent with what we heard from consultees in pre-consultation, and under our provisionally proposed reforms.

4.264 The MLA said that "it is of paramount importance" that the law's "boundaries be defined with such certainty as is practicable" and considered it "essential that the starting point and end point [are] readily ascertainable". Similarly, GNM argued that the "lack of certainty is dangerous and has a chilling effect on the media given the severity of consequences for breaching the strict liability rule". It suggested that if proceedings continue to be treated as active from the point of arrest, then "reporters should be able to access information that confirms the status of criminal proceedings in relation to any particular individual". In a related vein, Dr Clive Dolphin proposed that proceedings should be active from the point of charge but that if there are concerns about prejudicial reporting pre-charge in a particular case, then it should be raised with the AG. He argued that the AG, "in their public interest role, should be able to declare a case active for reporting purposes prior to charge", and that these declarations, "(current and historical), should be on a publicly available website".

4.265 Media consultees also highlighted difficulties in ascertaining when proceedings are no longer active in circumstances where an arrested person has been notified by police that they will not be charged.[240] The MLA said that the police and CPS "are constrained" from releasing such information because "to do so would be to publicly acknowledge the arrest in potential breach of the former suspect's reasonable expectations of privacy". GNM said that the individual themselves "may be reluctant to confirm that proceedings have come to an end because it is beneficial to them for the media to believe that proceedings remain active". Given this reality, the MLA argued that "[t]here is a real danger that the end of the strict liability period is indeterminate and remains in effect long after it should, if not indefinitely".

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236 These included: PA Media; the MLA; the NMA; the BBC; GNM.

237 These included: the MLA; Charles Thomson; PA Media; the NMA; Dr Dolphin.

238 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

239 PA Media, Dr Dolphin and Charles Thomson expressed similar concerns.

240 These included: the BBC; the MLA; GNM.

4.266 However, Impress explained that it "has not encountered any issues following the decision in [*Bloomberg LP v ZXC*]" with its members and argued that a potential chilling effect "does not justify moving the point at which criminal proceedings are considered to become active". Professor Rowbottom said that in most cases "it is possible to know that proceedings are active without knowing the name of the suspect" and where the police "state that an unnamed person has been arrested, a publisher will know not to reveal specific prejudicial details about the crime". Ultimately, he "was not convinced that the [police] practice of not naming suspects prior to charge poses a significant additional risk [of liability]" and thus concluded that there is "not … a strong argument for changing the current rules". Moreover, Professor Rowbottom argued that the defence of innocent publication in section 3 of the CCA 1981 would be available in most cases to a publisher who publishes "allegations of criminal wrongdoing" about a particular person despite being unsure whether that person has been arrested. He did not indicate whether, in his view, the same could be said of our provisional proposal in the consultation paper (which we now recommend) that, instead of leaving the defendant to rely on such a defence, the applicant should be required to prove that the publisher was reckless as to whether proceedings were active.

4.267 Secondly, media consultees expressed concern that the length of time between an arrest and the conclusion of a trial means that the restrictions on reporting can last for years in some cases, which results in a disproportionate interference with freedom of expression.[241] The MLA said that it now "takes an average of more than 300 days from the time of charge to the completion of a case", citing data from the Ministry of Justice (MoJ).[242] The MLA referred to the case of Lucy Letby where almost two and a half years passed between her arrest and charge (and a further two years and ten months between charge and the conclusion of her first trial).[243] GNM considered it "a disproportionate restriction on the media's freedom of expression rights" for contempt liability to arise "for the whole of this period". Similarly, the MLA said that it is "much harder to discuss issues of public interest and to scrutinise the police and courts" because of the length of the active period, "meaning that restrictions on the media's article 10 rights are of very lengthy duration". Moreover, the MLA argued that delaying publication of reports that address issues of public interest (until after proceedings have concluded) "may invite uninformed speculation that it has been deferred to serve undisclosed interests, the cumulative effect of which is to sap confidence in the administration of justice".

4.268 The MLA and NMA urged us to adopt the approach recommended by the Phillimore Committee in 1974: that the active period should commence upon charge on the grounds that an arrest may not be immediately announced.[244] The MLA suggested that, because at the time of that recommendation "the time scale for criminal proceedings was 'not usually very long'" (according to the Phillimore Committee), the

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241 These included: GNM; the MLA; PA Media.

242 *Criminal justice system delivery data dashboard* (updated on 8 September 2025).

243 See, for example, BBC, *Nurse Lucy Letby guilty of murdering seven babies on neonatal unit* (18 August 2023).

244 Report of the Committee on Contempt of Court (1974) Cmnd 5794, para 123.

case for treating proceedings as active from the point of charge is even more compelling now given that the timescale is longer.

4.269 Thirdly, media consultees argued that the risk of pre-charge publications influencing jurors' decision making is mitigated by various factors, suggesting that the mischief with which contempt liability is concerned is unlikely to arise at that stage of proceedings. We heard that:

(1) as a result of developments in other areas of law, particularly relating to defamation and privacy, the media is significantly restricted in what it can publish about suspects before they are charged;[245]

(2) the length of time between arrest, charge and trial means that the fade factor is significant;[246] and

(3) judicial directions to the jury to disregard prejudicial publicity, reinforced by the juror misconduct offences in the Juries Act 1974, are widely accepted to be effective in mitigating the effect of such publications.[247]

4.270 The BBC said that the combination of these factors "greatly reduce[s] the risk of media reporting undermining the criminal process, such that contempt rules at [the pre-charge] stage are disproportionate". GNM and the MLA concluded that to apply the strict liability rule "from the time of arrest stifles legitimate freedom of expression for an unreasonable length of time and is unnecessary either for the proper protection of the defendant or the administration of justice".[248] However, Professor Rowbottom made a similar point to some of those raised by media consultees, but he did so *in support* of retaining the current law. He said that "the fade factor means that publications prior to charge are generally less likely to prejudice a notional juror". Similarly, the Bar Council indicated that the fade factor will be a consideration for the applicant (in this case, the AG) when deciding whether to bring contempt proceedings: "the longer the time between publication and trial, the less the risk of actionable prejudice". These responses suggest that the conduct threshold is doing much of the heavy lifting: the risk that material published pre-charge will satisfy the conduct threshold is low because of the length of time between that period and a trial, and thus so is the risk of liability.

Discussion

4.271 Our conclusion is that the point at which criminal proceedings become active should be moved from arrest to charge. Though the majority of consultees considered it appropriate to retain the current law, we are persuaded that reform is needed to address the problems arising from the difficulties in ascertaining from police the necessary information about an arrest to determine whether proceedings are active.

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245 These included: PA Media; GNM; the BBC; the MLA.

246 These included: the MLA; the BBC; GNM.

247 These included: the MLA; GNM. The effectiveness of judicial directions is discussed in more depth at paras 4.210 and 4.238-4.239 above.

248 The MLA and GNM made a similar statement.

4.272 We agree with media consultees' concerns that where a publisher asks police whether a particular suspect has been arrested, and police refuse to confirm or deny, our recommended fault requirement of recklessness may be satisfied. The issue is that, because police policy is not to release information regardless of whether the arrest has taken place, receiving such a response from police is unlikely to be enough to enable the publisher to conclude that there is no risk that proceedings are active. Consequently, contempt liability may arise despite the fact there is no reliable way for a publisher to establish whether or not particular proceedings are active.[249]

4.273 This raises a concern about whether this aspect of the law of contempt interferes with freedom of expression in a way that is incompatible with article 10 of the ECHR. An interference with freedom of expression will comply with article 10 where it is prescribed by law, seeks to pursue one of the legitimate aims listed in article 10(2), and is necessary in a democratic society.[250] For our purposes, the first of these criteria – whether the interference is prescribed by law – is relevant. An interference will be prescribed by law where:

(1) it has some basis in domestic law;

(2) the law is adequately accessible; and

(3) the law is formulated so that its application is sufficiently foreseeable.[251]

4.274 Here we are concerned with the third of these requirements: the fact that publishers face significant difficulties in determining whether proceedings are active suggests that the law may not be formulated in a way that makes its application sufficiently foreseeable.

4.275 We have considered the ECtHR jurisprudence on this in previous Law Commission projects. In our consultation paper on harmful online communications,[252] we explained that the ECtHR held that article 301 of the Turkish Criminal Code, under which it was an offence to "publicly degrade the Turkish nation",[253] violated the applicant's article 10 rights because its scope was:

> too wide and vague and thus the provision constitute[d] a continuing threat to the exercise of the right to freedom of expression. In other words, the wording of the provision [did] not enable individuals to regulate their conduct or to foresee the consequences of their acts.[254]

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249 See para 4.406 below.

250 ECHR, art 10(2).

251 *Akçam v Turkey* (2011) 62 EHRR 12 (App No 27520/07) at [91]; *Grigoriades v Greece* (1999) 27 EHRR 464 (App No 24348/94) at [37]. See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn 2010) 15.299.

252 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248, paras 2.34-2.48.

253 Turkish Criminal Code, article 301.

254 *Akçam v Turkey* (2011) 62 EHRR 12 (App No 27520/07) at [93].

4.276 We explained that the ECtHR appeared to have been persuaded "by the vague language of the provision itself", but also "by contextual factors: the high volume of prosecutions brought under article 301 and the nature of the behaviour prosecuted".[255] Further, we said that the judgment in *Karácsony v Hungary*[256] "makes plain the fact-sensitive nature of the inquiry".[257] In that case, the ECtHR held that a vague provision may be sufficiently precise if it is "interpreted and applied according to practice".[258] Consequently, it held that the imposition of a fine for conduct "gravely offensive to parliamentary order"[259] was compatible with article 10 because the phrase "gravely offensive" was rendered more precise by parliamentary practice:

> By reason of their specific status, members of Parliament should normally be aware of the disciplinary rules which are aimed at ensuring the orderly functioning of Parliament… The Court considers that the applicants, on account of their professional status of parliamentarians, must have been able to foresee, to a reasonable degree, the consequences which their conduct could entail, even in the absence of previous application of the impugned provision.[260]

4.277 We concluded that this suggests that whether a "criminal law provision couched in vague terms" is compatible with article 10 will depend in part on:

> the practice according to which the provision is interpreted and whether this renders it sufficiently precise, such that the consequences of a defendant's conduct could have been reasonably foreseen.[261]

4.278 Though the CCA 1981 is clear that liability for this form of contempt arises only where the relevant proceedings are active and that, in the case of criminal proceedings, this means from the point of arrest,[262] arguably the law is rendered insufficiently precise by police practice. Given that the police are the only body that is in a position to confirm or deny whether an arrest has taken place, yet its policy is to refuse to do so, it is not possible for a publisher to ascertain such information reliably. Consequently, in practice a publisher cannot identify the point at which proceedings become active and thus the point from which the law applies. In light of these contextual factors, our view is that the provision in paragraphs 3 and 4(a) of schedule 1 to the CCA 1981 that criminal proceedings become active from the point of arrest does not enable individuals to regulate or foresee the consequences of their conduct. Therefore, we

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255 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248, para 2.42.

256 *Karácsony v Hungary* (2016) 64 EHRR 10 (App No 42461/13).

257 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248, para 2.43.

258 *Karácsony v Hungary* (2016) 64 EHRR 10 (App No 42461/13) at [124].

259 Above at [17].

260 Above at [126].

261 Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248, para 2.44.

262 CCA 1981, s 2(3)-(4) and sch 1, para 4.

think that the restriction on publication from the point of arrest may constitute a violation of a publisher's article 10 rights.

4.279 We recognise that this police practice is in part the result of developments in privacy law: following the Supreme Court's decision in *Bloomberg LP v ZXC*,[263] police are wary of releasing information that may constitute a violation of the reasonable expectation of privacy afforded to a suspect, prior to being charged with an offence, under article 8. This issue is outside the scope of the terms of reference for our review of the law of contempt and therefore we do not consider reform in relation to it.

4.280 As we explain at paragraph 4.406 below, we do not think the problem should be resolved by introducing a different fault element. Instead, the point at which criminal proceedings become active should be moved from arrest to charge. A person who is charged with an offence will first appear at a magistrates' court (whether from custody or on police bail, or in response to a requisition), at which point the information that charges have been brought will become publicly available (unless the proceedings are subject to reporting restrictions). The police also tend to release public statements when a suspect is charged in high-profile cases, and thus in those circumstances a publisher can determine that charges have been brought even before a suspect's first court appearance. Therefore, generally information about charges is available publicly (albeit not in all cases). Consequently, if proceedings were to become active at charge, the law would be sufficiently precise in practice to enable publishers to regulate and foresee the consequences of their conduct.

4.281 Such reform would be consistent with the position in the Republic of Ireland[264] and the approach taken by the House of Commons resolution on sub judice matters.[265] Further, it would deal with two other issues raised by consultees. First, it would resolve the complication that arises where criminal proceedings are not commenced by arrest, discussed at paragraph 4.262 above. By treating proceedings as active from the point of charge there would be a clear and identifiable starting point independent of how proceedings were commenced in a particular case. This certainty and consistency is preferrable to the current approach of the law. Secondly, it would resolve the difficulties faced by publishers in determining when proceedings are no longer active in circumstances where an arrested person is notified by police that they will not be charged. Under the current law, proceedings cease to be active at that point; however, we heard that police refuse to confirm this information because such confirmation may breach the person's reasonable expectation of privacy. This problem would not arise if proceedings were to be treated as active only from the point of charge.

4.282 Our view is that moving the point at which criminal proceedings become active from arrest to charge would not risk violating a defendant's fair trial rights under article 6. This is for three main reasons. First, as argued by consultees, the risk of prejudicial

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263 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

264 See, for example, *DPP v Independent Newspapers (Irl) Ltd* [2003] IEHC 624, [2003] 2 IR 367.

265 See the House of Commons *Resolution on Matters Sub Judice* (15 November 2001), para (1)(a)(i). Note that the Commons Procedure Committee is currently conducting an inquiry into this resolution.

publicity prior to charge is mitigated by the fact that, in light of the decision in *ZXC*,[266] police must be cautious about disclosing information about an arrest to avoid violating a suspect's reasonable expectation of privacy prior to being charged. Secondly, where there is prejudicial publicity, the risk that it may influence jurors is mitigated by what is called the "fade factor", the effectiveness of judicial directions such that material should be disregarded, and the availability of juror misconduct offences to deter jurors from seeking it out. It is well accepted that the fade factor and these other measures are effective.[267] Finally, liability for our recommended form of general contempt, which we consider in chapter 6, may arise in respect of material published prior to charge. Therefore, reporting in the period between arrest and charge would not be unrestricted.

4.283 We note that, in reaching our conclusion that reform is necessary, we were not persuaded by consultees' arguments that the current active period is so long that the interference with freedom of expression is unjustifiable and that this would be remedied by moving the starting point to charge. As noted at paragraph 4.267 above, the MLA cited MoJ data to support the statement that it "takes an average of more than 300 days from the time of charge to the completion of a case".[268] Not only is it unclear on what data that figure is based, but in any case the relevant data for our purposes is the time between arrest and charge compared to the time between charge and completion of the case. This would enable us to determine whether shifting the starting point of the active period from arrest to charge would reduce its duration meaningfully. Unfortunately, such information does not appear to be readily available. According to the MoJ data cited by the MLA, from January to December 2024 the median number of days between the police recording a particular offence to the police charging a defendant was 41 in cases with a specific victim and 46 in cases with no specific victim.[269] However, there does not seem to be data indicating the corresponding time between charge and completion in those particular cases. Therefore, it cannot be said with certainty that changing the point at which proceedings become active from arrest to charge would reduce the length of the active period in any significant way.

4.284 As we have explained, our conclusion that the current law may constitute a violation of a publisher's article 10 rights is made in light of contextual factors – that is, the effect of the judgment in *ZXC*[270] and the consequential police practice not to confirm or deny whether there has been an arrest. In the event that the law of privacy develops in a way that allows police to release such information, the restriction on publication from the point of arrest would become sufficiently precise to enable publishers to regulate their behaviour. The need to restrict publication to protect the article 6 rights of suspects who may face trial, given the risk of prejudicial reporting prior to charge,

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266 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

267 See para 4.237-4.239 above.

268 *Criminal justice system delivery data dashboard: charge to case completion at court* (updated on 8 September 2025).

269 Above. We refer to the median, as opposed to the mean, because the mean is more susceptible to being skewed by extremes at either end of the range. The median is therefore a more reliable measure for these purposes.

270 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

would thus not be displaced by the risk of violating article 10. Our view is that, were the law of privacy to change as described, criminal proceedings should continue to be considered active from the point of arrest.

Recommendation 17.

4.285 We recommend that criminal proceedings should be considered active for contempt purposes from the point at which a defendant is charged with an offence.

End point of the active period

4.286 Having considered the starting point of the active period for criminal proceedings, we now turn to the end point. For the purpose of liability under the CCA 1981, criminal proceedings cease to be active at the point of acquittal, sentence, or "any other verdict, finding, order or decision which puts an end to the proceedings".[271]

Consultation

4.287 In the consultation paper, we considered whether criminal proceedings should continue to be treated as active until sentence or whether they should cease to be active at the point of verdict (or guilty plea).

4.288 We explained that in our 2012 work on contempt we noted that it is less likely that a publication between verdict and sentence will create a substantial risk of seriously impeding or prejudicing the proceedings because by that stage the decision makers in a case will be a judge or magistrates. We also said that in practice the media tends to treat proceedings as inactive from the point of verdict and that arguably this should be reflected by the law.[272] However, in 2012 we warned against creating a climate "that might give rise to the perception that a judge or magistrate has been inappropriately influenced by prejudicial material when passing sentence".[273] We received mixed responses from consultees. In the final report we did not make a recommendation on when proceedings should cease to be active.

4.289 In the consultation paper, we said that media stakeholders had told us about one case where "a judge warned journalists that in the eight-week period between conviction and sentencing they should not publish anything that had not been said in open court".[274] We noted, however, that it is widely accepted that "judges are unlikely to be influenced by commentary".[275] Our provisional view was that the issue of perception was more significant. We said that where there is campaigning on the appropriate sentence in a case, and the sentence ultimately imposed by the court corresponds with that, "there is a risk that judges will be perceived to have been influenced and it is

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271 CCA 1981, sch 1, para 5.

272 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.23-2.24. See also CP 262, para 5.109.

273 Above, para 2.24.

274 CP 262, para 5.111.

275 Above.

conceivable that campaigners could claim to have had influence, regardless of whether there is evidence to that effect".[276] These risks are mitigated to an extent by the ability of judges to make clear in their sentencing remarks that "they are aware of media speculation but that it has not been a consideration", and by the "increasing transparency of sentencing in high profile cases".[277]

4.290 We provisionally concluded that, though the risk of interference is lower in the period between verdict and sentence, proceedings should continue to be treated as active until sentence. Therefore, in CQ 38 we said:

> We provisionally propose that in criminal cases where there has been a conviction, proceedings should be considered active until sentencing has been handed down, which maintains the current law.
>
> Do consultees agree?[278]

4.291 The majority of consultees who responded to CQ 38 agreed that criminal proceedings should be considered active until sentence.[279] Of the consultees who disagreed, almost all argued that criminal proceedings should cease to be active at the point of verdict (or guilty plea).[280]

4.292 Greg Callus and the Bar Council recognised that the risk of interference with proceedings after the point of verdict is low but nevertheless concluded that the current law should be retained. The Bar Council considered this necessary to prevent any public perception that a sentencing judge may have been influenced by publicity surrounding the case. The CBA noted that in some cases proceedings may take place after sentence – for example, where variations in sentence are made under the "slip rule" within 56 days of sentence,[281] and confiscation proceedings under the Proceeds of Crime Act 2002 – suggesting that there may be a gap in protection because the proceedings would not be considered active in the interim.[282] Ultimately, the CBA concluded that "on balance [it does] not think the prospect of further hearings should delay the stage at which active proceedings are deemed to cease for these purposes". However, it suggested that as a safeguard "legislation could provide for the power to restrict reporting of particular matters until conclusion of confiscation proceedings".

4.293 Consultees who argued that criminal proceedings should cease to be active at the point of verdict (or guilty plea) made several points in support of this position. First,

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276 CP 262, para 5.112.

277 Above.

278 Above, para 5.114.

279 Of the 31 responses to CQ 38, 19 consultees agreed with the proposal, 9 consultees disagreed, and 3 consultees gave an answer categorised as "other".

280 7 out of 9, all of whom were media or academic consultees.

281 Sentencing Code, s 385.

282 In response to CQ 39, the CBA also identified cases where a judge "may review compliance with a drug treatment and testing requirement as part of a community order". It explained that these reviews are announced at sentence, the hearings are often "more informal … than court proceedings up to and including sentence", and a defendant typically appears without needing representation. The CBA concluded that this should not prevent proceedings "from being deemed inactive at sentence".

almost all emphasised that there is little or no risk of interference with proceedings after the point of verdict because a jury is no longer involved in the decision making and "judges cannot be influenced by reporting".[283] Secondly, we heard that the law should reflect journalistic practice, which is "to effectively use conviction as the end of the active period".[284] Thirdly, media consultees considered the public interest in reporting on criminal proceedings from the point of verdict without being subject to contempt restrictions.[285] PA Meda and the MLA suggested that this is in the interests of the victims of the crime and/or their families, and public confidence in the administration of justice.

4.294 Fourthly, several consultees criticised our suggestion in the consultation paper that proceedings should be active until sentence to prevent any public perception that judges have been influenced by publicity.[286] David Toomer argued that the "issue of the perception of the impact there might be to a judge is not relevant to the actual risk of prejudice", and that it should have "no place in law". PA Media said that "actual evidence shows that when campaigners have attempted to sway a judge's sentencing exercise, they have been robustly told that this is inappropriate". It referred to the recent example of Pepperall J's sentencing remarks in *R v Foster*, in which he described the fact that a number of medical organisations wrote to the court about the sentencing as inappropriate.[287]

4.295 Fifthly, consultees suggested that concerns about a *perceived* risk of interference with sentencing can be mitigated through other measures. We heard that judges can state in their sentencing remarks that they have not taken into account or been influenced by anything other than the factors relevant to sentencing.[288] By way of example, PA Media cited Fulford LJ's comment in *R v Couzens* that it was "vital" that he "focus[ed] solely on the factors that [were] properly relevant to determining the correct sentence, and nothing else".[289] Further, PA Media argued that concerns about a perceived risk of interference should be dealt with "by increasing public understanding of how sentencing works", such as by broadcasting the delivery of sentencing remarks in court. Finally, but in a related vein, we were told that concerns about an *actual* risk of interference in a particular case should be dealt with by courts imposing an order to postpone reporting under section 4(2) of the CCA 1981.[290]

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283 These included: Paul Foster; the MLA; David Toomer; GNM; the CIoJ; PA Media.

284 These included: Paul Foster; David Toomer; the MLA.

285 These included: PA Media; the MLA.

286 These included: David Toomer; Paul Foster; PA Media.

287 *R v Foster* (12 June 2023) at [9]. Pepperall J's comments about the letter were endorsed by the PKBD on appeal: *Foster v R* [2023] EWCA Crim 1196 at [53].

288 These included: University of Sheffield CFOM; PA Media.

289 *R v Couzens* (30 September 2021) at [1].

290 These included: Paul Foster; David Toomer.

Discussion

4.296 Though the majority of consultees agreed that criminal proceedings should be treated as active until sentence, we are persuaded by the arguments made in favour of treating proceedings as active until verdict (or guilty plea).

4.297 In particular, we agree that the law of contempt should not be used as a tool to address concerns about *perceived* (risks of) interference; its purpose is to deal with *actual* (risks of) interference. As we recognised in the consultation paper, and as consultees reiterated in their responses, there are adequate alternative measures available to mitigate the perception of interference with sentencing. For example, judges can include comments in their sentencing remarks that they have not been influenced by anything other than the factors relevant to sentencing, and public understanding of sentencing can be improved by increasing transparency (such as by continuing to broadcast sentencing remarks).

4.298 We agree that the risk of seriously prejudicing proceedings in the period between verdict (or guilty plea) and sentence is qualitatively different from the risk in the period before that. Consultees generally made this argument on the basis that a jury is no longer involved, and judges are expected to be far less susceptible to influence. While we agree that these factors reduce the likelihood of interference with proceedings, in our view the crucial difference between these stages of proceedings is not the fact that there is no longer a jury. To adopt that position would cast doubt on the need for the law of contempt to apply to various types of proceedings, such as those in magistrates' courts, coroners' courts or the CoP. Such a radical argument has not been made by any consultee. Instead, we consider the crucial difference to be that, once the verdict has been given, the defendant has been tried and thus their fair trial rights under article 6 become less acutely engaged. Therefore, the case for restricting publication at that point and interfering with freedom of expression is less compelling.[291]

4.299 Where a judge has concerns in a particular case about the potential impact of publicity between verdict and sentence, they may be able to exercise existing powers to postpone reporting. For example, under section 4(2) of the CCA 1981 the court can postpone reporting in the proceedings before it "or in any other proceedings pending or imminent". This power applies where the court considers that such a restriction is "necessary for avoiding a substantial risk of prejudice to the administration of justice" in the proceedings,[292] and thus it would cover circumstances in which the court is concerned about material that may meet the conduct threshold for this form of contempt.

4.300 Ultimately, we recommend that criminal proceedings should be considered active for contempt purposes until the point of verdict or guilty plea. Our view is that this would

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[291] We note that the Bar Council argued that publicity after a guilty plea may create the requisite risk of seriously prejudicing the course of justice in the future trial of a defendant who vacates their guilty plea (which can happen up until sentence), and then enters a plea of not guilty and is tried for the offence. Given that such cases are very rare and that liability for our recommended form of general contempt may nevertheless arise in these circumstances (see chapter 6), we do not consider this a sufficiently persuasive objection to treating criminal proceedings as inactive from the point of verdict or guilty plea.

[292] CCA 1981, s 4(2).

not represent a significant practical change in light of media consultees' comments that in practice journalists tend to treat the verdict (or guilty plea) as the point at which proceedings cease to be active. The reform of the law would largely serve to reflect the reality that, in general, the risk of seriously prejudicing proceedings in the period after verdict (or guilty plea) is assessed to be so low that publication would not constitute contempt.

Recommendation 18.

4.301 We recommend that criminal proceedings should be considered active for contempt purposes until the point of verdict or guilty plea.

Extradition proceedings

4.302 Extradition is the process for requesting that a person be surrendered from one jurisdiction to another in order for them to be prosecuted, to be sentenced for an offence of which they have been convicted, or to serve a sentence which has already been imposed.[293]

4.303 For the purposes of the active period under the CCA 1981, extradition proceedings are treated the same as any other type of criminal proceedings.[294] This means that they are active in the circumstances set out at paragraphs 4.249 to 4.250 above.

4.304 In the following discussion we consider only the point at which extradition proceedings should become active. We do not deal with the point at which they should cease to be active. This is because in our pre-consultation engagement we did not hear any concerns from stakeholders about the end point of the active period for extradition proceedings, nor did any consultees raise concerns in response to the consultation paper. In any event, extradition proceedings into the jurisdiction will, by definition, result in a criminal trial and so the same rationale as above would apply to those proceedings.

Starting point of the active period

4.305 In circumstances where a person is outside the jurisdiction, the authorities may request their extradition to England and Wales by obtaining from a court in England and Wales a warrant for their arrest. The warrant is then forwarded to the foreign country with any other relevant information or evidence. Extradition from that other jurisdiction may be governed by treaty with the United Kingdom, or dealt with on an ad hoc basis by the foreign country. Once the person is extradited to the UK, they must be brought "promptly" before the court. No further arrest is necessary.[295]

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293 CPS, *Prosecution Guidance: Extradition – To the UK* (first published 5 October 2022, updated 13 June 2025).

294 CCA 1981, sch 1, paras 4-4A.

295 CPS, *Prosecution Guidance: Extradition – To the UK* (first published 5 October 2022, updated 13 June 2025).

4.306 Similarly, where authorities in England and Wales receive a request for the extradition of a person from this jurisdiction to another, a warrant for their arrest can be obtained from a court in England and Wales. Once the person is arrested, they must be brought to Westminster Magistrates' Court as soon as practicable. The judge may either remand the person in custody or on bail. Depending on the circumstances, the court will decide whether to discharge the case, order extradition, or send the case to the Home Secretary to consider extradition.[296]

4.307 Given that the extradition process generally begins with a court issuing an arrest warrant, which is the earliest of the trigger points listed in paragraph 4 of schedule 1 to the CCA 1981,[297] that is the point at which extradition proceedings tend to become active for contempt purposes.

Consultation

4.308 In the consultation paper we explained that in our 2012 work on contempt, we considered whether extradition proceedings should continue to be treated as active from the time a warrant is issued. We heard concerns that a "significant delay may occur before the suspect can be apprehended and returned to this jurisdiction", which may result in "an extended period during which media coverage is restricted". In 2012, we provisionally concluded that these concerns about publication being restricted for too long a period were alleviated by the fade factor and the fact that the active period ends if an arrest is not made within a year. Consequently, we provisionally proposed that the current law should be retained.[298] While many consultees agreed, media consultees argued that extradition proceedings should become active either at the point of arrest or when the extradition subject arrives and is charged in the jurisdiction.[299]

4.309 We did not hear views on this in our pre-consultation engagement for our current contempt project. Nevertheless, in the consultation paper we provisionally concluded that the current position should be retained because the "restriction on freedom to publish is mitigated in the ways we describe" above, and "consistency, rather than exceptions, is to be preferred".[300]

4.310 Therefore, in CQ 37 we said:

> We provisionally propose that in extradition cases the current position should be maintained and proceedings should be active from the time a warrant for arrest is issued in England and Wales.
>
> Do consultees agree?[301]

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296 CPS, *Prosecution Guidance: Extradition – From the UK* (first published 5 October 2022, updated 20 February 2023).

297 See para 4.248 above.

298 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.22.

299 CP 262, para 5.105.

300 Above, para 5.106.

301 Above, para 5.107.

4.311 The majority of consultees who responded to CQ 37 agreed that in extradition cases the current position should be maintained and proceedings should be active from the time a warrant for arrest is issued in England and Wales.[302] Those who agreed with our provisional proposal did not elaborate on their views, other than the Bar Council, which simply stated that it endorsed the reasons given in the consultation paper.

4.312 All consultees who disagreed said that extradition proceedings should be treated as active from the point of charge,[303] citing reasons similar to those given by consultees who argued that criminal proceedings should be active from the point of charge. We heard that the issuing of an arrest warrant is not necessarily disclosed publicly, suggesting that publishers may face difficulties in determining whether proceedings are active.[304] The CBA, whose response was categorised as "other", noted that the "difficulty" in extradition cases is that "the issuing of warrants is confidential, and unlikely to be verifiable on enquiry". It cited the CPS legal guidance on extradition to the UK, which states:

> It is the policy of His Majesty's Government and all operational partners to 'neither confirm nor deny' (NCND) the existence of a European Arrest Warrant (EAW), [Trade and Cooperation Agreement] warrant, extradition request, provisional arrest request or Interpol Red Notice/Wanted Diffusion made by or received by the UK where the requested person sought has not been arrested.[305]

4.313 Both GNM and the MLA, who disagreed with our provisional proposal, cited the same concerns as those raised by media stakeholders in our 2012 review of contempt, as set out in the consultation paper. They argued that there can be "significant delay" between an arrest warrant being issued and the relevant person returning to the jurisdiction.[306] The MLA said that this "results in an extended period during which reporting is restricted" and thus the current law "inhibits publication here even where no proceedings in the jurisdiction are imminent and the story is being published freely online by the foreign press". Further, GNM and the MLA argued that the current law is uncertain because the active period can lapse after a year and recommence upon arrest. The MLA considered that, as a result, "responsible publishers are likely to err on the side of caution" and thus there is "a chilling effect caused by uncertainty, which is not justified".

4.314 GNM concluded that the law "would be much more straightforward" if proceedings in extradition cases were considered active from the point of charge. The CBA suggested that proceedings may be deemed to be active in extradition cases either when an arrest is made (outside the jurisdiction), or when the person first appears at a domestic court after extradition to the UK.

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302 Of the 27 responses submitted to CQ 37, 19 consultees agreed, 4 consultees disagreed, and 4 consultees gave an answer categorised as "other".

303 Charles Thomson; Dr Dolphin; GNM; the MLA.

304 Charles Thomson; Dr Dolphin.

305 CPS, *Prosecution Guidance: Extradition – To the UK* (first published 5 October 2022, updated 13 June 2025).

306 GNM; the MLA.

Discussion

4.315 For reasons similar to those that underpin our recommendation that criminal proceedings should be treated as active from the point of charge (instead of arrest), we conclude that extradition proceedings should be considered active from the point at which the person first appears before a court in England and Wales, whether they have been extradited *to* the UK or are being extradited *from* the UK.

4.316 As discussed in respect of criminal proceedings, the inability of publishers to ascertain from authorities whether an arrest warrant has been issued renders the law insufficiently precise and thus risks violating article 10 of the ECHR. In our view, the appropriate starting point of the active period in extradition proceedings is the point at which the person first appears before a court in England and Wales because such hearings are open to the public. It is thus possible for publishers to determine that proceedings are active at that stage. This is consistent with our position that the appropriate starting point of the active period in criminal proceedings is charge, on the basis that generally information about charges is made public.

4.317 The effect of our conclusion is that proceedings would become active from:

(1) the point at which a person appears before the court, having been extradited *to* the UK; or

(2) the point at which a person appears before the court, having been arrested to be extradited *from* the UK.

Recommendation 19.

4.318 We recommend that extradition proceedings should be considered active for contempt purposes from the point at which a person first appears before a court in England and Wales, whether they have been extradited *to* the UK or are being extradited *from* the UK.

Coroners' courts proceedings

4.319 Coroners are judicial officers who are responsible for investigating the causes and circumstances of a death when they are informed that the body of a person is within their geographical jurisdiction. They do not consider criminal liability in the course of their investigations.[307]

4.320 Under the Coroners and Justice Act 2009 (CJA 2009), the framework for considering deaths referred to coroners involves a three-stage process. This enables coroners to make preliminary inquiries into a death to determine whether an investigation is necessary; and, if necessary, to conduct an investigation with or without holding an inquest.[308] A coroner is expected to conduct an investigation where they have reason

[307] CPS, *Coroners: Legal Guidance* (updated 2 February 2021).

[308] Courts and Tribunals Judiciary, *Chief Coroner's Guidance for Coroners on the Bench* (1 January 2025), ch 1, para 1.

to suspect that "the deceased died a violent or unnatural death, the cause of death is unknown, or the deceased died while in custody or otherwise in state detention".[309] Where a coroner conducts an investigation into a death, they are under a duty to open an inquest unless the investigation is discontinued.[310] Once a coroner determines that their duty to open an inquest applies, they must open an inquest "as soon as reasonably practicable".[311]

4.321 For the purposes of the CCA 1981, coronial proceedings are categorised as proceedings other than criminal and appellate proceedings. Such proceedings are treated as active:

> from the time when arrangements for the hearing are made or, if no such arrangements are previously made, from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn; and for the purposes of this paragraph any motion or application made in or for the purposes of any proceedings, and any pre-trial review in the County Court, is to be treated as a distinct proceeding.[312]

Arrangements for the hearing are made "when a date for the trial or hearing is fixed".[313]

4.322 In this section we are concerned primarily with the point at which coronial proceedings become active. However, some of the options for reform of the starting point necessitate consideration of the suitability of the end point of the active period in coronial proceedings.

Starting point of the active period

4.323 In practice, coronial proceedings tend to be treated as active once the hearing begins. It has been held that, for the purposes of the CCA 1981, the hearing is said to begin when an inquest is opened.[314]

Consultation

4.324 In the consultation paper we did not address the starting point of the active period for proceedings other than criminal and extradition proceedings. However, in response to CQ 39 on the status of proceedings in "family, [CoP] or other proceedings",[315] four consultees commented on the suitability of the point at which proceedings in coroners' courts become active under the current law. These consultees were the Chief Coroner (HHJ Alexia Durran), GNM, the MLA, and Greg Callus.

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309 Coroners and Justice Act 2009 (CJA 2009), s 1(1)-(2).

310 CJA 2009, ss 4 and 6.

311 Coroners (Inquests) Rules, r 5(1).

312 CCA 1981, sch 1, para 12.

313 Above, sch 1, para 13(b).

314 *Peacock v London Weekend Television Ltd* (1986) WL 406691. See also Paul Matthews and others, *Jervis on the Office and Duties of Coroners* (15th ed 2024), para 11-94.

315 CP 262, paras 5.118-5.119. See discussion of this CQ at para 4.356 below.

4.325 Since consultation, we have conducted further engagement with coroners to develop our understanding of the operation of the current law, the concerns that coroners have, and whether there is a need for reform. That engagement has complemented the consultation responses we received and has informed our policy development, as the discussion below indicates.

4.326 The main argument from coroners was that proceedings should become active before an inquest has been opened. The Chief Coroner argued that proceedings should become active "once a death has been referred to a coroner … as at that point the coroner is required to make decisions in connection with the death". Deputy Chief Coroner (HHJ Georgina Sharkey) and HHJ Paul Matthews (the author of *Jervis on Coroners*)[316] agreed that liability for contempt by publication when proceedings are active should apply in the period between the referral of a death and the opening of an inquest. HHJ Matthews described such a change as a "restoration" of the position prior to the implementation of the CJA 2009. He said that, previously, the usual practice was for an inquest to be opened very shortly after the referral of a death. This was because at the time an "inquest" also encompassed what is now described as the investigation. As explained in the Explanatory Notes to the CJA 2009, the previous framework for coroners in the Coroners Act 1988:

> was drafted almost exclusively in terms of "inquests" to refer to coroners' work. However, a significant amount of work goes on which does not lead to court proceedings and which was largely unrecognised in the [Coroners Act 1988]. This work is reflected in the [CJA 2009] as it imposes a duty on a senior coroner to conduct an "investigation" into a death – it also reflects that a senior coroner may need to make preliminary inquiries to establish whether the death comes within his or her jurisdiction.[317]

We heard from two regional lead coroners that proceedings should become active when an investigation is opened. One of these coroners commented that the "protections offered by contempt are equally as necessary at that stage as they are at the opening of an inquest". In light of the above, it seems that this approach would have the same practical effect as returning to the position prior to the CJA 2009.

4.327 Coroners cited various reasons in support of treating proceedings as active from a point earlier than the opening of an inquest. We heard concern that before an inquest is opened there can be publicity in high profile cases that may be prejudicial.[318] The Chief Coroner explained:

> A death may be the topic of extensive press speculation whilst a search for a missing person is taking place, or after a body has been found (see for example the news stories about the death of Nicola Bulley prior to the inquest in June 2023). …
>
> Coroners' courts need to have a means to deal with contempt by publication where there is press reporting in relation to a death before a coroner case is currently

316 Paul Matthews and others, *Jervis on the Office and Duties of Coroners* (15th ed 2024).

317 Explanatory Notes to the CJA 2009, para 5.

318 Chief Coroner; Deputy Chief Coroner; HHJ Matthews; a regional lead coroner.

active for contempt purposes (eg, cases like the Nicola Bulley case referenced above).

4.328 The concern appeared primarily to be the impact of such publicity on potential jurors[319] and witnesses in an inquest. Further, HHJ Matthews explained that material (whether true or not) published before an inquest is opened can lead the public to develop preconceptions about a case which can fuel public disorder at the opening of an inquest. He suggested that restricting publication from an earlier point might reduce the likelihood of this happening.

4.329 Coroners considered it inadequate to deal with this conduct by relying on contempt at common law in the period before proceedings become active (which would correspond with general contempt under our recommendations). Almost all commented that in their experience coroners do not rely on their common law protections. Both the Deputy Chief Coroner and HHJ Matthews suggested that this may be attributed to coroners' lack of familiarity with this form of protection and their powers to refer such conduct to the AG (and the procedure for doing so).

4.330 We heard some mixed views from coroners about the duration of the period between the referral of a death and the opening of an inquest. On the one hand, HHJ Matthews observed that there can be a significant gap and the period is certainly longer in all cases than it was before the changes implemented by the CJA 2009. Similarly, the Chief Coroner said that "an investigation may proceed for some time before the inquest is opened". On the other hand, a regional lead coroner told us that generally "inquests are opened very quickly". We also heard that, on the whole, the period between the referral of a death and the conclusion of an inquest is generally relatively short (at least in comparison to criminal proceedings). This process should be completed within six months,[320] but HHJ Matthews explained that usually a non-jury inquest will conclude within three months or less, and a jury inquest may take roughly three to nine months.

4.331 Several coroners accepted that treating proceedings as active from the opening of an inquest has the benefit of a clearly defined starting point.[321] While coroners "must open an inquest in public",[322] there is no obligation on the coroner to announce the referral of a death or the opening of an investigation (nor is there any obvious mechanism for doing so).

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319 Inquests generally are held without a jury. An inquest must be held with a jury where the coroner has reason to suspect that the deceased died a violent or unnatural death in custody or state detention, the death resulted from an act or omission of a police officer or member of a service police force in the purported execution of their duty, or the death was caused by a notifiable accident, poisoning or disease: see Courts and Tribunals Judiciary, *Chief Coroner's Guidance for Coroners on the Bench* (1 January 2025), ch 11, paras 1 and 3; and CJA 2009, s 7(2).

320 Coroners (Inquests) Rules, r 8: an inquest must be completed "within six months of the date on which the coroner is made aware of the death, or as soon as is reasonably practicable after that date".

321 These included: HHJ Matthews; a regional lead coroner; Deputy Chief Coroner.

322 Coroners (Inquests) Rules, r 11(1)-(2): this applies unless the coroner does "not have immediate access to a court room or other appropriate premises", in which case "the coroner may open the inquest privately and then announce that the inquest has been opened at the next inquest hearing held in public".

4.332 By contrast, the main argument from media consultees –GNM and the MLA – was that the point at which proceedings in coroners' courts become active is too early. The MLA described it as "problematic", noting that coroners "often open inquests at an early stage". In particular, both consultees commented on the fact that sometimes inquests are opened and then adjourned pending the conclusion of concurrent criminal proceedings or an inquiry (during which time coroners' courts proceedings remain active).[323] The MLA said that in some cases "the adjournment is effectively permanent as the inquest is not resumed, although this may not be clear for many months or even years". Consequently, the MLA argued, "it can be unclear what will be considered prejudicial over an extended period of time".

4.333 It was not suggested that contempt by publication when proceedings are active should not apply in coroners' courts, but GNM suggested that inquests involving a jury are more likely to need contempt protection than those without a jury. However, GNM added that whether an inquest will have a jury "is not always clear". It said:

> Although there is guidance in the [CJA 2009] which states that in certain categories of death the inquest should have a jury there is considerable discretion given to coroners that where they have "sufficient reason" a jury may be appointed. The cases where a jury is likely to be appointed are also those cases most likely to engage the public interest.

Greg Callus similarly commented that there "could perhaps be a little more clarity in relation to coroners' inquests where a jury may or may not be assembled".

4.334 Given these concerns about the potentially long and uncertain duration of the active period, and whether there will be a jury, the MLA and GNM argued that proceedings in coroners' courts should be treated as active from the point at which "it has been determined that a jury will hear the inquest" and "the coroner has specified a date for the beginning of its final hearing". In circumstances where an inquest has been adjourned, we understand the "final hearing" to mean the hearing of the inquest once resumed. The MLA and GNM said that their suggested approach would improve clarity and certainty.

4.335 Some coroners rejected the idea that proceedings should be active only once an adjourned inquest is resumed.[324] For example, HHJ Matthews explained that it is not possible to predict whether an adjourned inquest will need to be resumed once the criminal proceedings have concluded. He argued that it is thus important that contempt protections persist while the inquest is adjourned in order to prevent the publication of material that may prejudice the inquest in the event that it is ultimately resumed. HHJ Matthews gave the example of a case where potential witnesses in the inquest may not have been witnesses in the criminal proceedings, and their evidence may be influenced by material published about the criminal proceedings. However, two regional lead coroners told us that, if resumed, an inquest will not deal with issues

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323 See Paul Matthews and others, *Jervis on the Office and Duties of Coroners* (15th ed 2024), paras 10-79–10-97, and 11-37–11-57. See also Coroners (Inquests) Rules, r 25(4).

324 These included: Chief Coroner; Deputy Chief Coroner; HHJ Matthews.

that were resolved in the criminal proceedings[325] – for example, "in a domestic homicide case the inquest deals with state agency actions before the murder whereas the criminal cases focuses on the murder".[326] These coroners suggested that it is thus unlikely that publicity relating to the criminal proceedings will be relevant to the matters being determined in the inquest:

> An inquest would only be resumed where there were wider issues which need looking into that have not been aired in criminal processes. Coroners also cannot go behind the findings of the Criminal Court. It therefore seems to me unlikely that reporting a criminal trial or outcome leads to prejudice in a Coroner's court due to the different focus.[327]

4.336 With respect to the media's suggestion that liability for contempt by publication when proceedings are active should arise only where a jury is involved, two regional lead coroners said that they understood the reasoning behind the position but ultimately disagreed. Both noted that it would be a departure from the approach in other courts. Additionally, one highlighted a practical difficulty with limiting liability to cases involving juries, which is "predicting which cases will in fact sit with a jury as that decision will be made by a coroner some time after the commencement of [the inquest]".

Discussion

4.337 Given the three-stage approach to the framework for considering deaths referred to a coroner in the CJA 2009, and what we heard from consultees and stakeholders, there appear to be four options for the point at which coronial proceedings could become active: when a death is referred to a coroner; when an investigation is opened; when an inquest is opened; and when a date for hearing the inquest is set. Having considered consultees' responses and comments from stakeholders, we are not persuaded of the need to reform the point at which proceedings in coroners' courts become active. These proceedings should continue to be considered active at the point at which an inquest is opened.

4.338 First, we have considered the argument from coroners that proceedings should be treated as active before an inquest is opened – for example, when a death is referred to a coroner or when an investigation is opened. It is not clear that the risk of prejudicial publicity in the period between either of those points and the opening of an inquest is sufficient to warrant expanding this form of contempt protection. The primary example cited by coroners in support of treating proceedings as active from the referral of a coroner was the case of Nicola Bulley. However, much of the relevant publication occurred before her body had been found (and thus before a death could

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325 See Paul Matthews and others, *Jervis on the Office and Duties of Coroners* (15th ed 2024), paras 10-91–10-92: the main issue is "whether other procedures have answered the statutory questions (including how the deceased came to die) in a manner which adequately serves the public interest. … Thus where the criminal proceedings have already gone thoroughly into the facts surrounding the death, as in, eg, a murder trial that goes to the jury (whatever the result), the coroner may well consider that no useful purpose would be served by resuming the inquest. But if the criminal proceedings did not reach a substantive conclusion, or terminated on technical grounds, so that the evidence relating to the death itself was not heard, the matter may be otherwise".

326 A regional lead coroner.

327 A regional lead coroner.

be confirmed).[328] The Chief Coroner's concern that there may be potentially prejudicial publication "whilst a search for a missing person is taking place" would not be resolved by treating proceedings as active once a death is referred. That concern could be addressed only by deeming proceedings as active much earlier than that point – for example, when a person is reported as missing to the police. Such an approach would be inappropriate and unworkable for several reasons, as explained by a former senior coroner:

> Until there is a body in a particular coroner's area, you would not know which coroner had jurisdiction. If a power existed for contempt prior to a body being found, firstly, this would be contrary to the general jurisprudence of jurisdiction being contingent upon an unnatural death/cause of death unknown, a body and a certain geographical location of the body, all of which would be unknown until the body is found, and secondly, on a practical level, two or more coroners could issue different rulings saying that a body could at a future point in time be found in their coroner area.[329]

4.339 In any case, we have concerns that moving the start of the active period to a point before the opening of an inquest may risk unjustifiably interfering with freedom of expression under article 10. This is because there is no earlier point that is publicised and therefore the restriction on publication may be insufficiently precise to enable individuals to regulate their behaviour. This problem could be resolved by requiring coroners to announce publicly (for example, on their website) when a death is referred or when they open an investigation. However, as we have said, we are not persuaded that there is a need for proceedings to become active at that point.

4.340 Given that an inquest should be completed within six months of the referral of a death to a coroner, the length of time between a referral and the point at which a jury is empanelled and/or witnesses give evidence may be very short. We accept that this may mean that material published before the inquest is opened might be fresh in jurors' minds. Therefore, the fade factor would be far weaker in this context than, for example, in the context of criminal proceedings, which tend to have greater delays. In turn, it may be more difficult for jurors or witnesses to disregard prejudicial publicity. However, we have not received sufficient evidence to conclude that the extent of this problem in practice is such that reform is warranted. There are existing measures and mechanisms in place to deal with the potential impact of publicity on a witness or juror. For example, the integrity of a witness' evidence can be tested through questioning, and a coroner can direct jurors to disregard any prejudicial publicity.

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328 BBC, *Six things we learned about the Nicola Bulley story* (2024): in the weeks between her disappearance on 27 January 2023 and the discovery of her body on 17 February 2023, the publicity relating to the case included "statements by Nicola's family and friends, searches by a private diving company, and the release of new photographs". Additionally, Lancashire Police had released information about her "health issues with alcohol and the menopause".

329 An additional consideration is the potential chilling effect on reporting by local media outlets in the event that coronial proceedings were treated as active before a body has been discovered in the case of a missing person. Local media play an important role in appealing to the public for information in such cases, but if there were a risk of contempt liability at that stage the media – especially local media, who are less likely to be well-resourced with respect to legal advice – may take an unnecessarily cautious approach to reporting.

4.341 General contempt would still apply before the opening of an inquest under our recommendations. This requires proof of an intent to interfere with the administration of justice, but will nevertheless capture particularly culpable cases and mitigate the risk of deliberate attempts to influence coronial proceedings. Coroners do not currently rely on the equivalent form of contempt liability under the current law – that is, common law contempt – because they are unfamiliar with it and with their powers to refer such conduct to the AG (and the procedure for doing so). However, it is likely that this would change given our recommendations seek to clarify and simplify the liability framework and contempt regime more broadly. This should enable coroners to feel more confident relying on general contempt where appropriate.

4.342 Secondly, we have considered the media's proposition that liability for this form of contempt should arise only where a jury is involved and that proceedings should become active at the point at which the coroner decides to empanel a jury. Our conclusion is that such an approach would be inappropriate, primarily on the basis that we reject the underlying assumption that prejudicial publicity only poses a risk of affecting *jurors*. Not only is it inconsistent with the views we heard from coroners, but to take the view that liability should apply only in cases involving juries is also to cast doubt on the need for liability to arise under the CCA 1981 in respect of other types of non-jury proceedings (for example, proceedings in the High Court or CoP). We consider this above in the context of whether criminal proceedings should cease to be active after verdict, given that a jury is no longer involved at that point. Though we conclude there that criminal proceedings should indeed cease to be active after verdict, we reject that reasoning and instead argue that the crucial difference is that:

> once the verdict has been given, the defendant has been tried and thus their fair trial rights under article 6 become less acutely engaged. Therefore, the case for restricting publication at that point and interfering with freedom of expression is less compelling.[330]

4.343 By contrast, the risk of seriously prejudicing coroners' courts proceedings in the period before it has been determined that a jury will hear the inquest is *not* qualitatively different to the risk afterwards because in both periods the coroner is yet to come to a conclusion on the matters in issue in the inquest. In our view, restricting publication in these circumstances may interfere with freedom of expression under article 10 but this interference is justifiable. This is because the restriction applies only to material that meets the conduct threshold – that is, publications which create a substantial risk of seriously impeding or prejudicing the course of justice in the relevant proceedings. Further, as we heard from coroners, inquests generally deal with different issues to those dealt with in, for example, criminal proceedings. In light of the high conduct threshold and the distinct focus of inquests, the restriction on publicity relating to coronial proceedings will potentially affect only a narrow category of material. The fact that proceedings can only be brought by or with the consent of the AG further alleviates concern about a potential interference with article 10.[331]

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330 See para 4.298 above.

331 For the purposes of clarity and certainty as to when the restriction applies, we also recommend that coroners should be required to announce publicly their decision not to resume an inquest following an adjournment: see paras 4.348 and 4.350 below.

4.344 Thirdly, we have considered the media's view that proceedings should become active only once the coroner sets a date for the hearing of the inquest. As we understand it, this suggestion seeks to address the media's concern about the restriction on publication while an inquest is adjourned – often for a long period of time – pending the conclusion of concurrent criminal proceedings. It appears that the media's preference is that proceedings should not be active in that period and that their preferred solution is that they should become active only once a date for the inquest hearing is set, which would not be until after an adjourned inquest has been resumed (after the criminal proceedings have concluded). We have considered this point alongside a closely related proposition that, if coroners' courts proceedings are to be treated as active when, for example, an inquest is opened, they should cease to be active in the event that the inquest is adjourned. They would then become active again if it is resumed and a hearing date is set.

4.345 We agree with the concern of some coroners, discussed at paragraph 4.335 above, that the risk of prejudicial publication before an adjourned inquest is resumed, and the potential impact on the resumed inquest, warrants this form of contempt protection. It is also unduly complicated for proceedings to be active; then "inactive" and treated as though they had never been active; then to become active again. We recognise that, because an inquest may be opened long before charges are brought in corresponding criminal proceedings, the effect is that coroners' courts proceedings will become active earlier than the criminal proceedings. Treating criminal proceedings as active from charge may thus be undermined by the treatment of coroners' courts proceedings as active from the opening of an inquest. Our view is that this does not present a significant barrier. As we explain at paragraph 4.343 above, the restriction on publication when coroners' courts proceedings are active applies only to publications that create a substantial risk of seriously impeding or prejudicing the course of justice in the relevant proceedings. The risks are inherently lower in coroners' courts proceedings than criminal proceedings, particularly where they do not involve a jury. Further, given that inquests deal with distinct issues to those addressed in criminal proceedings, publications relating to the potential criminal proceedings may be less likely to be relevant to the inquest. For these reasons, it will be less likely that a publication about the criminal proceedings will meet the conduct threshold with respect to active coroners' courts proceedings.

4.346 We consider the risk to coroners' court proceedings to be inherently lower than the risk to criminal proceedings because a defendant's article 6 rights are engaged only in the latter (as there is no defendant in an inquest). Given this it may be thought that our conclusion that coroners' court proceedings should be active from the opening of an inquest is inconsistent with our conclusion that criminal proceedings should become active at charge. However, these are two very different contexts. As explained at paragraphs 4.279 to 4.848 above, our recommendation that the starting point in criminal proceedings should be moved to charge is made in light of the judgment in *ZXC*,[332] which has led the police to limit the disclosure of information prior to charge in order to avoid interfering with a suspect's right to privacy under article 8. The effect is that it is not possible to ascertain information about an arrest, and thus the restriction on publication is unclear and imprecise. This raises concerns about compliance with article 10, which in our view necessitates moving the point at which proceedings

[332] *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158.

become active to charge. Further, we conclude that this change will not jeopardise a defendant's article 6 rights. This is because the difficulties in ascertaining information about an arrest means that the media's ability to report on these cases is more limited, and thus the risk of prejudicial publication prior to charge is reduced. By contrast, the risk of prejudicial publication prior to the opening of an inquest is not mitigated in the same way because the judgment in *ZXC* concerned the publication of information relating specifically to the criminal investigation of a suspect (and thus generally would not have the effect of limiting publicity about coroners' courts proceedings). Consequently, recognising the need for contempt liability to apply from an earlier point in coronial proceedings is not necessarily at odds with the conclusion that it should apply from a later point in criminal proceedings.

4.347 We have also considered whether treating coroners' courts proceedings as active whilst they are adjourned may be undermined by the fact that criminal proceedings cease to be active after sentence under the current law (which, under our recommendations, would change to guilty plea/verdict). As discussed at paragraph 4.335 above, a resumed inquest will not look at issues that were resolved in the criminal proceedings and must accept the findings of the criminal court. For these reasons, we consider it unlikely that publications about the criminal proceedings will create a substantial risk of seriously impeding or prejudicing the course of justice in the coronial proceedings. For example, in our view, it will be difficult for publications relating to the sentencing remarks of the judge to meet that threshold.

4.348 Ultimately, we conclude that coronial proceedings should continue to be treated as active from the point at which an inquest is opened, and that they should remain active while adjourned. In light of these positions, we also conclude that coroners should be required to announce publicly their decision not to resume an inquest following an adjournment. This is necessary to make it clear to the public that the coronial proceedings are no longer active. This may be achieved by, for example, requiring coroners to publish their decision on their website (which we understand is the current practice in respect of decisions to resume an inquest), and by circulating the information to HMCTS media lists.

Recommendation 20.

4.349 We recommend that coronial proceedings should continue to be treated as active from the point at which an inquest is opened.

Recommendation 21.

4.350 We recommend that coroners should be required to announce publicly their decision not to resume an inquest following an adjournment.

Family and Court of Protection proceedings

4.351 For the purposes of the active period under the CCA 1981, family and CoP proceedings are proceedings other than criminal and appellate proceedings. Consequently, they are treated as active in the circumstances set out at paragraph 4.321 above in the discussion of coronial proceedings.

4.352 Whereas above in respect of extradition and coronial proceedings we focused on the point at which they become active, here, with respect to family and CoP proceedings, we deal only with the point at which they cease to be active. Stakeholders did not identify concerns with the starting point of the active period during our pre-consultation engagement, nor did consultees in response to the consultation paper.

End point of the active period

4.353 As a type of non-criminal proceedings, family and CoP proceedings cease to be active when they are "disposed of or discontinued or withdrawn".[333]

Consultation

4.354 In the consultation paper, we noted that our pre-consultation engagement with stakeholders revealed "a deal of uncertainty about when it can be said that proceedings cease to be active in family cases".[334] In particular, we heard that "sometimes proceedings are paused and then subsequently reactivated, and that there may be multiple proceedings" – for example, where the court makes a child maintenance order and schedules a hearing to review the order "many months in the future".[335] Stakeholders indicated that it is therefore "difficult for parties or members of the family to know when they may speak publicly about their cases".[336]

4.355 Our provisional view was that "proceedings are likely to remain active in such instances"[337] because the CCA 1981 states that proceedings are "active from the time when arrangements for the hearing are made … until the proceedings are disposed of or discontinued or withdrawn".[338] Therefore, we acknowledged that "it appears that parties and family members are hampered in discussion of their cases".[339]

4.356 We did not make any provisional proposals for reform in relation to this issue, but we sought evidence about "whether and how the status of proceedings in such matters (or in any similar circumstances) might be addressed".[340] In CQ 39 we said:

> In family, Court of Protection or other proceedings where orders may be made and review hearings set down for the future, or in similar circumstances where the nature

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333 CCA 1981, sch 1, para 12.

334 CP 262, para 5.115.

335 Above.

336 Above.

337 Above, para 5.116.

338 CCA 1981, sch 1, para 12.

339 CP 262, para 5.117.

340 Above.

of proceedings is that they may be dormant for some time, what should be the status of proceedings between the hearings?

Where there is uncertainty about whether proceedings are active, how might that most effectively be addressed?[341]

4.357 There were 30 consultees who responded to one or both parts of CQ 39. There were some conflicting views from consultees about the extent to which it is difficult to determine whether family or CoP proceedings are active in the circumstances described in the consultation paper. On the one hand, the Court of Protection Bar Association (CPBA) said that it is a problem in the CoP. It referred to cases where the court has made an order depriving a person of their liberty, which must be reviewed yearly:

> It is clear that practitioner[s] and judges are not at one about when it can be said that cases in the Court of Protection have concluded. In some cases, this demarcation can be made easily such as where the court has made final best interests orders in welfare cases or serious medical treatment cases. The final order is made and there is no review by the court at all. In other cases, such as where a person is deprived of their liberty, a review must take place at the latest every 12 months from when the final order was made to ensure … compliance with article 5(4) of the ECHR. However, the court is likely to have finally determined the primary welfare matters such as residence and care upon which the deprivation of liberty order is then made.

4.358 On the other hand, several consultees did not consider there to be an issue with determining when family or CoP proceedings are active.[342] Sir James Munby and Rights of Women said that they had never heard of any such concerns. The Transparency Project commented that "proceedings are active until final orders are made, even if there are prolonged gaps between hearings". Rights of Women explained that when families return to court to vary or enforce an existing order this is a new application: "The case concludes, is no longer active and a new application is made, sometimes years later". Rights of Women considered child arrangement cases in Pathfinder courts,[343] which involve a review within 6 to 12 months of the final order being made. It argued that such proceedings operate in a way that means "it would be very obvious that the case is already concluded". Sir James Munby, Rights of Women, the Transparency Project and the Family Division of the High Court argued that, in reality, restrictions on discussing such proceedings are imposed by section 12 of the Administration of Justice Act 1960 and/or section 97 of the Children Act 1989, rather than by the strict liability rule in the CCA 1981.

4.359 Concerning consultees' views on what should be the status of proceedings in the circumstances described in the consultation paper, again there were mixed views. Some legal consultees said that the period between hearings should be treated as

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341 CP 262, paras 5.118-5.119.

342 These included: Rights of Women; Sir James Munby; Transparency Project.

343 This is a programme to pilot "a less adversarial and more problem-solving approach" to child arrangement proceedings. See MoJ, *Private Law Pathfinder: An update on the implementation of the Government's Pathfinder programme for private law reform* (March 2025) p 4.

active,[344] whereas media and academic consultees argued that they should cease to be active in the interim unless otherwise directed by the court.[345] We heard that there is a need for information about the status of proceedings to be accessible, particularly for the media.[346] Consultees suggested that the courts should be required to state at the end of a hearing whether another has been scheduled and/or whether proceedings remain active for contempt purposes.[347] Others argued that information about the status of proceedings should be available online.[348]

4.360 Regarding family and CoP proceedings specifically, there was some support for treating proceedings relating to a court order depriving a person of their liberty as active in the period between yearly review hearings.[349] The Family Division said that CoP proceedings should be treated as active "wherever there has been a direction for a review, up to conclusion of that review (and so, continuing if no review application is made as directed)". Furthermore, the Transparency Project considered the practice of adjourning proceedings with liberty to restore. It noted that this practice "is no longer routinely used", but suggested that the law could clarify the status of proceedings in such cases:

> any general contempt provision could make clear that where proceedings are adjourned generally without a hearing being fixed the proceeding[s] are considered to be live for a fixed period after the last hearing (for example, six months), unless the court has made an order expressly extending the duration of any restraints on publication.

Discussion

4.361 The evidence we received from consultees strongly suggests that there is little confusion about when family or CoP proceedings are concluded (and thus when they cease to be active for contempt purposes). It is sufficiently clear that the effect of paragraph 12 of schedule 1 to the CCA 1981 is that:

(1) proceedings involving multiple hearings remain active regardless of how much time passes between each hearing;

(2) where the court makes an order and directs that it must be reviewed at a later point, proceedings remain active until the conclusion of that review; and

(3) where the court makes an order that does not require a review, proceedings will become active again only if an application is made to, for example, vary or enforce that order.

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344 These included: CLSA; CILEX.

345 These included: Dr Dolphin; Gavin Sutter; the CIoJ.

346 These included: Charles Thomson; Dr Jones; Dr Dolphin; Gavin Sutter.

347 These included: Dr Dolphin; the CIoJ.

348 These included: Dr Dolphin; Gavin Sutter; Charles Thomson.

349 These included: CPBA; Family Division of the High Court.

4.362 Therefore, we conclude that there is no need to reform the law relating to the active period for such proceedings.

4.363 Though we view the current law as adequate, we have considered whether the court should be required to make clear the status of proceedings at the end of a relevant hearing in order to avoid any doubt about whether they remain active for contempt purposes. For example, where a second hearing is scheduled to take place sometime after the first hearing, the court may consider it appropriate and necessary to clarify at the end of the first hearing that proceedings continue to be active in the interim. Our view is that imposing such an obligation on judges may create more problems instead of resolving them. In particular, it would carry the risk of human error – a judge may accidentally fail to clarify that status of proceedings at the end of a hearing. That failure may be misinterpreted by the public to mean that proceedings are no longer active, and a person who publishes material that creates a substantial risk of seriously impeding or prejudicing the proceedings might seek to argue that, consequently, they did not have the requisite fault to establish liability. In our view, the risk of creating additional problems outweighs the minimal benefit that might be gained from requiring courts to make a statement about the status of proceedings.

4.364 We have also considered whether, in circumstances where a future hearing may take place but a time and date has not yet been scheduled at the conclusion of the previous hearing, proceedings should remain active for a default period of time (for example, six months). A similar provision currently exists relating to criminal proceedings which become active when an arrest warrant is issued.[350] We are not persuaded that such a provision is appropriate in these circumstances. This is because there may be cases where the court makes an order relating to a child and it will not revisit the matter for years because, given the specific facts and the nature of the order, the relevant decision can only be made once the child is a certain age.

FAULT

Current law

4.365 Under the current law, the applicant (which, for this form of contempt, will ordinarily be the AG)[351] does not need to prove any fault on the part of the defendant. They only need to satisfy the conduct requirement. This means that they must prove, beyond reasonable doubt, that the defendant published material which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

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350 CCA 1981, sch 1, para 11: "Criminal proceedings against a person which become active on the issue or the grant of a warrant for his arrest cease to be active at the end of the period of twelve months beginning with the date of the warrant unless he has been arrested within that period, but become active again if he is subsequently arrested".

351 Currently, proceedings for strict liability contempt under the CCA 1981 can only be instituted by, or with consent of, the AG (unless they are instituted by the court itself): CCA 1981, s 7. This means that the AG may grant (or refuse) consent to another person or body seeking to bring such proceedings. However, we are not aware of any case in which the AG's consent to bring proceedings has been sought. We discuss this further in chapter 8, where we also recommend that proceedings for contempt by publication when proceedings are active may be brought only with the consent of the AG.

4.366 A defendant's fault is nevertheless relevant to liability by operation of the defence of innocent publication or distribution in section 3 of the CCA 1981. The effect of this defence is that a publisher would not be liable if, having taken all reasonable care, they had not known and had no reason to suspect that relevant proceedings were active.[352] Similarly, a distributor will not be liable if, having taken all reasonable care, they did not know that the publication contained relevant prejudicial material and had no reason to suspect that it was likely to contain such material.[353] The defendant bears the burden of proving, on the balance of probabilities, the defence in section 3.[354] This is known as a reverse burden.

Consultation

4.367 Our provisional view in the consultation paper was that the current law was unsatisfactory and, instead, the applicant should bear the burden of proving, beyond reasonable doubt, that the defendant was at fault. This would mean that fault, in addition to the requisite conduct, would be an element of this form of contempt, rather than an absence of fault being a defence. We justified this on the following basis:

> The effect of changing the law so that the applicant must prove that the defendant was at fault by establishing recklessness is not simply to change who bears the burden of proof but to shift the balance towards freedom of expression, by requiring that any infringement be justified by the party seeking to restrict expression. It also aligns with orthodox principles of criminal responsibility that demand proof of fault, especially where the consequence may be imprisonment.[355]

4.368 Next, we provisionally concluded that fault should be established by proving that the defendant was reckless. In the case of a defendant publisher, they would need to be reckless as to whether proceedings were active. This means that they would be liable if they were aware there was a risk that proceedings were active, and in the circumstances known to them, had unreasonably taken that risk by publishing the material. In the case of a defendant distributor, they would need to be reckless as to whether the material created a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced. This means that they would be liable if they were aware the material created a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced, and in the circumstances known to them, had unreasonably taken that risk by distributing the material. We considered it reasonable to expect that a publisher or distributor would not be reckless when proceedings were active because the fair trial rights of the defendant, protected under article 6 of the ECHR, are acutely engaged at that time.

4.369 Finally, we provisionally concluded that, as a distributor, internet content platforms such as Facebook, Instagram or the like should not have an obligation to monitor

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352 CCA 1981, s 3(1).

353 Above, s 3(2).

354 Above, s 3(3).

355 CP 262, para 5.17.

content for any publications that might relate to active proceedings. We considered such an obligation to be "impractical and too onerous".[356]

4.370 In light of the above, we made the following provisional proposal in CQ 29:

> We provisionally propose that for contempt by publication where proceedings are active, a defendant may be liable for contempt regardless of whether there was an intent to interfere with the administration of justice, but the applicant should be required to prove that:
>
> (1) a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect proceedings were active; and
>
> (2) a defendant distributor was reckless as to whether the distributed material "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced", in the sense that they knew there was such a risk and unreasonably took that risk by distributing the material.
>
> Do consultees agree?[357]

4.371 Responses to CQ 29 were mixed.[358] This range of responses must be viewed in light of the way our provisional proposal was presented in the consultation paper. Specifically, when we explained our provisional proposal we said that a defendant should be liable where they were reckless in the sense established by the House of Lords in *R v G*.[359] A person will be reckless under that test where they were aware of a risk that a particular circumstance exists, or where they were aware of a risk that a particular result will occur and it was unreasonable to take that risk in the circumstances known to them. Unfortunately, that was not reflected in the wording of our provisional proposal in CQ 29. As a result, the responses from some consultees have made presumptions about our position which we had not intended. However, as almost all consultees who responded to this question provided comments, consultees' views regarding fault in contempt by publication when proceedings are active have been conveyed both clearly and comprehensively.

4.372 The main issues addressed by consultees in response to this question were:

(1) whether requiring the applicant to prove fault (rather than requiring the defendant to establish absence of fault) would enhance the protection of freedom of expression;

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356 CP 262, para 5.18.

357 Above, para 5.19.

358 Of the 41 consultees who responded to CQ 29, 18 consultees agreed with our proposal, 8 consultees disagreed, and 15 consultees gave responses categorised as "other".

359 *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

(2) whether placing the burden of proof on the applicant is necessary for the purpose of aligning the law of contempt with orthodox principles of criminal responsibility;

(3) whether the defendant is better placed than the applicant to prove the matters relevant to fault;

(4) whether a recklessness requirement would set too high a threshold for liability;

(5) whether a recklessness requirement would set too low a threshold for liability; and

(6) whether distributors should have a positive obligation to monitor content for material that might relate to active proceedings.

The following discussion takes each of these issues in turn.

Shifting the balance towards freedom of expression

4.373 Consultees who expressed support for our provisional view that the burden of establishing fault should lie with the applicant generally considered it necessary in order to shift the balance towards freedom of expression.[360] However, Professor Rowbottom questioned whether the evidence suggests that "the current law does not sufficiently protect freedom of expression" and that "such a rebalance is necessary (and if so, whether the proposal would achieve that goal)".

Alignment with orthodox principles of criminal responsibility

4.374 The University of Sheffield CFOM, who agreed with our provisional proposal, said that the applicant should be required to prove fault because it would provide defendants in contempt proceedings with the same protections afforded in criminal proceedings.

4.375 Others suggested that it is not necessary to require the applicant to prove fault for the purposes of aligning the law of contempt with orthodox principles of criminal responsibility:

(1) The CBA said that "there is nothing wrong in principle with the reverse burden, which has stood the test of time". It argued that the CCA 1981 "is hardly unique in imposing liability and risk of imprisonment without requirement of specific intent or recklessness, and with a reverse burden on the defence". The CBA referred, for example, to offences relating to failing to discharge duties in section 33 of the Health and Safety at Work etc. Act 1974.

(2) Similarly, the Bar Council commented that there are "a number of criminal offences which contain a fault element where the burden of proof rests on [the defendant] to prove, to the civil standard, that s/he was not at fault". It said that this route to liability "has frequently been found to be compliant with [the presumption of innocence protected by] article 6(2) ECHR, notwithstanding the penalty on conviction". The Bar Council cited as examples the offences relating

[360] These included: techUK; GNM; Impress.

to the unauthorised use of a trademark under section 92 of the Trade Marks Act 1994.

Proving fault or proving an absence of fault

4.376 A consideration raised by consultees was "the extent to which the matters relevant to proof of the fault element are within [the defendant's] own knowledge and, correspondingly, will be difficult for the prosecution to prove".[361] Several argued that the defendant is better placed to prove that they had taken all reasonable care (to ensure that proceedings were not active or that the publication did not contain prejudicial material) than an applicant is to prove that the defendant was reckless, and thus the defendant should have the burden of proving a lack of fault.[362] For example, JLACOS said:

> It is a general principle that the person best capable (or the only person capable) of proving a key element should prove it (for example, the burden of proving exceptions in criminal proceedings). The publisher is in a much better position to show what care they took and whether it was reasonable. We struggle to visualise how a prosecutor could ever prove that the steps which the publisher took were reasonable, given that they rarely know what those steps (if any) were.

Recklessness as too high a threshold

4.377 A number of consultees suggested that a recklessness requirement would set too high a threshold, making it too difficult to establish liability.[363] These consultees supported retaining the current law. For example, the CBA said that it favours "the status quo, that is the strict liability rule … and the defence in section 3" of the CCA 1981 "which caters for when publishers do not know proceeding are active". The CBA considered it "vital for the administration of justice that there are strong safeguards to prevent prejudicial publicity directly relating to factual issues to be determined in active proceedings" and said that the "current law works well" to achieve this.

4.378 The Bar Council said that applying a recklessness requirement "means that a publisher who wilfully shuts his eyes to the objectively obvious would escape liability", and warned that it "would also benefit non-responsible publishers who do not have procedures in place to identify whether proceedings were active". The Bar Council thus suggested that a test which simply requires that the defendant *had reason to suspect* proceedings were active "may be considered more appropriate" than a test which requires *actual awareness* of a risk that proceedings were active. Similarly, Hacked Off expressed concern that requiring proof of recklessness would enable distributors inappropriately to escape liability on the basis that they were ignorant "of the effect of the words" distributed. It suggested that it should not be necessary to establish fault in these circumstances: "If the words create a substantial risk of serious prejudice it is not entirely clear why it should matter that this was done 'innocently'".

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361 The Bar Council.

362 These included: JLACOS; the CBA; APComm and NPCC.

363 These included: the CBA; DJ Rachel Watkin; Gavin Sutter; APComm and NPCC; JLACOS.

Recklessness as too low a threshold

4.379 While some media consultees were in favour of a recklessness requirement for this form of liability,[364] others indicated that it would set too low a threshold.[365] For example, the CIoJ argued that intent to interfere with the administration of justice should be required instead. The MLA suggested that our proposed reforms do not go far enough to protect responsible journalists who take steps to determine whether proceedings are active:

> The MLA's concern that journalists are unfairly at risk of contempt by publishing matters about a suspect whom the journalist is unaware has been arrested is not sufficiently mitigated by the [Law Commission's] proposal to reverse the burden of proof or that the requisite fault element is recklessness. It is noted that at para 5.15 of the [consultation paper] the [Law Commission] states that "our provisional view is that, if liability is to be avoided, publishers should have made direct and specific enquiries about whether proceedings are active" but it remains unclear whether, once a journalist has made a "direct and specific" enquiry of the police and the police have refused to answer (in accordance with the College of Policing guidance) the [Law Commission] envisage that a journalist would be able to establish that they were not reckless as to whether proceedings were "active"?

4.380 In addition to the concerns raised by media consultees, the Official Solicitor argued that a recklessness test may be too easily satisfied where a defendant lacks capacity:

> I am cautious that a party lacking capacity could be found to be 'reckless' in the proceedings notwithstanding that they lack capacity to understand the information relevant to the proceedings/the risk of proceedings being prejudiced by distributing material and/or they lacked mental capacity to retain the relevant information and/or weigh that information in making a decision to distribute material.

A positive obligation on distributors to monitor content

4.381 Some consultees disagreed with our provisional conclusion that distributors should not have a positive obligation to monitor content for material that might relate to active proceedings. The joint response from the Association of Police Communicators (APComm) and the NPCC argued that "social media corporations … demonstrate no accountability or scrutiny of the content of their platforms" and that imposing such an obligation on distributors would help to "ensure they take their social responsibility for the content on their platforms seriously". GNM suggested that the current law already imposes this type of obligation on "media publishers" and thus our proposal "could feed into the creation of a two-tier system" by not requiring the same of those who, for example, host material. It argued that the "expectations on social media platforms should be the same as for media organisations". In a related vein, the MLA disagreed with our distinction between publishers and distributors for the purposes of this form of contempt liability. It said that online platforms are "more than mere 'distributors' of information" because they have commercial interests, benefit from user-generated content, and arrange and promote content to enhance their product.

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364 These included: techUK; Impress.

365 These included: the CIoJ; MLA; Charles Thomson.

4.382 The APComm and NPCC also said that they "fundamentally disagree" with our position in the consultation paper that an obligation to monitor content would be "too onerous".[366] They argued that social media corporations "employ a global network of staff" and "enjoy the benefits of the most sophisticated software and algorithms that … would enable them to easily monitor and scrutinise content to ensure it was lawful". The APComm and NPCC concluded that such corporations "simply choose not to do this".

4.383 A different perspective was offered by techUK. Though it "welcome[d]" our provisional conclusion that distributors should not be obligated to monitor content, techUK worried that our proposals may impose such an obligation "inadvertently". In light of our comment in the consultation paper that distributors of material that may carry the requisite risk "should have systems in place to prevent publication",[367] techUK said:

> On a technical and operational level, the volume of content available online would make it impossible for intermediaries to "prevent" the upload of potentially contemptuous material. As the Law Commission acknowledged in its previous paper on Juror Misconduct and Internet Publications, it would not be possible (or desirable) to "cleanse" the internet of all prejudicial material relating to every trial [para 2.121]. Instead, the law of contempt should attempt to mitigate, where realistically possible, the risk of serious impediment or prejudice to active legal proceedings.

4.384 There was some suggestion from media consultees that a notice-and-takedown model for liability would be desirable. techUK argued that, to ensure compliance with the right to freedom of expression under article 10 of the ECHR, the recklessness requirement should apply to distributors in a way that is consistent with the existing regime for intermediary liability for user-generated content in the UK. techUK explained that, under that regime, an online intermediary (or distributor) may be liable for user-generated content only where it "has actual knowledge of unlawful activity or information" or where "upon obtaining such knowledge or awareness, [it] fails to act expeditiously to remove or to disable access to the information".[368] techUK commented that this "'notice and takedown' model" has operated effectively and should be mirrored by the contempt liability regime.

Distinction between publishers and distributors

4.385 The MLA disagreed with an approach to liability that distinguishes between publishers and distributors, and with our categorisation of (some) social media platforms as distributors in the consultation paper:

> The MLA disagree with the suggestion in paragraph 5.18 of the [consultation paper] that Facebook or Instagram are "distributors" or that the binary division between "publisher" and "distributor" is apposite in the digital age. Online platforms and apps are commercial enterprises who benefit from user-generated content and arrange

366 CP 262, para 5.18.

367 Above, para 5.15.

368 Electronic Commerce (EC Directive) Regulations 2002, reg 19(a).

and promote content to enhance their product. As such they are more than mere "distributors" of information.

4.386 Additionally, the MLA referred to the current defamation regime, under which publishers who innocently disseminate defamatory material may be liable where they fail to remove the material once put on notice.[369] The MLA explained that, by failing to take it down, such publishers "are taken to have acquiesced in or authorised the continued publication" of the material. It was not clear from the MLA's response whether it supports the same approach for the contempt regime.

4.387 The distinction between publishers and distributors was also raised by GNM. It agreed with our provisional proposal but, as discussed above, argued that the "expectations on social media platforms should be the same as for media organisations". This may suggest a preference more broadly for an approach to liability that does not apply a different fault requirement to publishers, on the one hand, and distributors, on the other.

Discussion

4.388 In this section we discuss our positions, in light of consultees' responses, on:

(1) Whether the applicant should bear the burden of proving fault, beyond reasonable doubt, as an element of this form of contempt. This would mean that the defendant would no longer have a reverse burden to prove an absence of fault, on the balance of probabilities, as a defence where the elements have been made out.

(2) What should be the fault requirement to establish liability.

Burden of proof

4.389 Consultees who expressed support for our provisional view that the burden should lie with the applicant generally reiterated the arguments given in the consultation paper. Other consultees identified two main concerns with our provisional proposal. The first was that it is not unusual in criminal law for a defendant to bear a reverse burden of proving a lack of fault, and that it is compliant with the presumption of innocence under article 6(2) of the ECHR.

4.390 We have considered reverse burdens and their compatibility with article 6(2) of the ECHR in previous Law Commission projects.[370] In our report on *Protection of Official Data*, we recognised that a reverse burden may constitute an interference with the presumption of innocence under article 6(2) because "the facts … are presumed against the defendant unless he or she can prove otherwise".[371] Such an interference may be justified, but it must be no more than is "reasonably proportionate to the legitimate aim sought to be achieved".[372]

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369 Defamation Act 2013, s 5.

370 See, for example, *Protection of Official Data: Report* (2020) Law Com No 395, paras 11.35-11.45.

371 Above, para 11.35.

372 *Janosevic v Sweden (34619/97)* (2004) 38 EHRR 473 at [101].

4.391 In this case, we are concerned that the interference is particularly difficult to justify. First, it is well established that an interference with article 6(2) is less likely to be justified where it relates to the essential elements of the offence rather than to an exception.[373] While "the language of the relevant statutory provision will be important" in determining what constitutes the essential elements, "what will be decisive will be the substance and reality of the language creating the offence rather than its form".[374] To establish liability under the CCA 1981, the only essential element of contempt is the conduct; the applicant need not prove fault to establish contempt. Where the conduct is proved, if the defendant is to avoid liability, then they must show that they lacked fault. By contrast, criminal offences tend to comprise both a conduct and fault element to be proved by the prosecution before a defence involving a reverse burden comes into play.[375] For example, where the prosecution proceeds to trial for an offence relating to the unauthorised use of a trade mark under section 92 of the Trade Marks Act 1994, cited in the Bar Council's consultation response, it bears the burden of proving the conduct and fault elements. It is only once the prosecution has discharged this burden that the judge or jury can then consider the defence in section 92(5). In the absence of a fault element for contempt, the applicant must prove only the conduct element before the defence comes into play. In these circumstances, a reverse burden on the defendant to prove a lack of fault as a defence is practically akin to a reverse burden on the defendant to disprove one of the essential elements. In this way, the "substance and reality of the language" of the CCA 1981 is best understood as imposing a burden of proof on the defendant in respect of an "essential ingredient" of liability rather than a defence. As such, the interference with the defendant's article 6(2) rights is less likely to be justifiable.

4.392 Secondly, relevant factors considered by the courts when determining whether a reverse burden justifiably interferes with article 6(2) include the maintenance of the rights of the defence and the importance of what is at stake.[376] While the restrictions on publication under the CCA 1981 serve to prevent the risk of interference with proceedings – and particularly aim to protect the fair trial rights of a defendant in criminal proceedings – this must be evaluated in light of the right to freedom of expression under article 10 of the ECHR. Liability for contempt by publication acutely engages this right by limiting public discussion of matters relating to the justice system. As we explained in the consultation paper, this warrants a form of liability which requires that "any infringement be justified by the party seeking to restrict expression".[377]

4.393 Thirdly, when considering whether a reverse burden justifiably interferes with article 6(2) the court may consider the evidential difficulty that the prosecution may

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373 *Attorney General of Hong Kong v Lee Kwong-Kut* [1993] AC 951 at 969.

374 Above at 969-970.

375 Though we conclude in chapter 2 that contempt is not a criminal offence and that this should remain the case, the comparison between contempt and criminal offences here is nevertheless appropriate because contempt proceedings are treated as criminal proceedings for the purposes of art 6 of the ECHR: see CP 262, paras 8.103-105. Therefore, we discuss the fault element for contempt in terms of the fair trial protections afforded by art 6 in criminal proceedings.

376 *Attorney General's Reference (Number 4 of 2002); Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264 at [21].

377 CP 262, para 5.17.

face if the burden were to rest on it.[378] This brings us to the second of the two main concerns raised by consultees: that a defendant is better placed than an applicant to evidence the matters relevant to fault in this context. Consultees did not provide compelling examples of the practical difficulties that might arise if the burden were on the applicant. In our view, a defendant's awareness of the relevant risk will often be obvious from the content of the publication in question. Consider, for example, a publication that discusses an ongoing police investigation and claims that a source within the police has revealed that a suspect is very soon to be charged. The fact that the publisher knew this shows that they were aware of a risk that the proceedings would in fact be active at the time of publication (unless the publication contains material that indicates otherwise). Where that material was republished by another person, again it would be clear from that same content that the person was aware of the risk that there are active proceedings. Consequently, we do not consider that the matters relevant to fault are so confined to the defendant's knowledge that there will be a practical barrier to the workability of the burden resting on the applicant.

4.394 Ultimately, we conclude that it is particularly difficult to justify the interference with article 6(2) created by a reverse burden in this circumstance. We do not think that the possible practical challenges that may be faced by the applicant in discharging the burden of proving fault are sufficiently severe to warrant such an interference.

Fault requirement

4.395 In light of our position that all conduct with which we are concerned here should be conceptualised in terms of "publication" and no conduct should be conceptualised as "distribution",[379] it follows that the fault requirement should not be based on a distinction between publishers and distributors. Instead, a single standard should apply to all defendants. This approach provides for a simpler and clearer regime by doing away with a distinction that does not reflect accurately the way that platforms and media outlets, for example, operate in the online space.

4.396 Our position on the appropriate fault requirement has not changed following consultation. In our view, liability should arise where a publisher was reckless, as established by the House of Lords in *R v G*.[380] As we explain above,[381] a person will be reckless where they were aware of a risk that a particular circumstance exists, or where they were aware of a risk that a particular result will occur and it was unreasonable to take that risk in the circumstances known to them. In the context of contempt liability, whether proceedings are active is a circumstance, and whether a publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced is a result. However, the effect of disposing of the distinction between publishers and distributors – and thus describing all defendants as publishers – is that it is only the circumstance component of the test in *G* that is relevant for our purposes. Therefore, to establish liability, a defendant

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[378] *Attorney General's Reference (Number 4 of 2002); Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264 at [21]; *R v DPP, ex parte Kebilene* [2000] 2 AC 326, [1999] 3 WLR 972.

[379] See para 4.195 above.

[380] *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41] (Lord Bingham).

[381] See para 4.371 above.

publisher must have been aware of a risk that proceedings were active. There is no requirement for it to have been unreasonable to take the risk.

4.397 This is a subjective test in that it requires proof of the defendant's actual awareness of the risk. A publisher may become aware of the risk in various ways – for example, by checking court listings to determine whether proceedings are active, or being put on notice by the AG that particular proceedings are active. It is not enough that they *should* have been aware of the relevant risk in the circumstances. As we explained in the consultation paper, this means that "a person is not treated as reckless where they did not turn their mind to the risk at all".[382] A subjective fault requirement is thus appropriate because it "may act as a safeguard against the over-criminalisation of people unfamiliar with the law and legal process".[383]

4.398 We recognise consultees' concerns with a subjective test. First, we heard that such a test might enable publishers inappropriately to escape liability where they wilfully turn a blind eye to the risk. However, in our view, this does not pose a barrier to establishing fault. This is because, in practice, in high-profile cases the AG tends to issue advisory notices to remind the media and public of the restrictions on publishing material which could prejudice proceedings under the law of contempt.[384] Additionally, high-profile lawyers and other commentators often publish similar reminders to their large audiences on social media.[385] The well-publicised nature of these reminders means that the media will often be alert to whether proceedings in such cases are, or may soon become, active. Further, if our recommendation that criminal proceedings be considered active from the point of charge (rather than arrest)[386] were to be implemented, proving awareness will be much more straightforward. This is because the fact that a person has been charged will be available publicly, and most likely publicised by police via media releases and social media posts in high-profile cases.

4.399 Moreover, wilfully turning a blind eye may be evidence that the defendant actually was aware of a risk but chose not to enquire too deeply. For example, consider the circumstances where a journalist who sometimes checks, but other times does not, court listings to confirm whether relevant proceedings are active before publishing material. Where that journalist publishes an article relating to proceedings but in this case chose not to check the listings to determine whether they were active, as a defendant in contempt proceedings a court may be more easily persuaded that the journalist was indeed aware of the risk that proceedings were active. By contrast, where a journalist mistakenly checks the wrong court listing and thus erroneously concludes that there are no relevant active proceedings, a court may be more inclined to accept that they were not in fact aware of the risk. It will be for the court to consider the circumstances in any given case to determine this issue. Ultimately, therefore, we

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382 CP 262, paras 3.88-3.89.

383 Above.

384 See, for example, the AG's media advisory notices in respect of publications relating to the allegations against Russell Brand in 2023 (*Media Advisory Notice: Russell Brand - GOV.UK*), the criminal proceedings against Wayne Couzens (*Media Advisory Notice - Wayne Couzens - GOV.UK*), and the criminal proceedings against Axel Rudakubana (*Media Advisory Notice – trial of Axel Rudakubana - GOV.UK*).

385 See, for example, Adam Wagner KC's post on X in respect of publications relating to the criminal proceedings against Axel Rudakubana (https://x.com/AdamWagner1/status/1881638770820231469).

386 See paras 4.285 above.

do not think that a defendant would be able to avoid liability by deliberately not turning their mind to the relevant risk.

4.400 While the checks conducted as part of a publisher's editorial process in the media context will be likely to be relevant to the court's assessment of the defendant's awareness of the risk, this does not mean that publishers are obliged proactively to monitor their content/platforms to prevent the publication of potentially contemptuous material. Where a publisher has in place adequate processes to determine whether proceedings are active, but nevertheless does not become alert to the risk, liability will not arise because awareness of the risk cannot be established. In this way, a recklessness requirement operates similarly to the notice-and-takedown model of liability favoured by techUK: only once a publisher becomes aware of the risk, such as by being put on notice, can liability arise. However, in this context it would not make sense for liability to depend on whether the material is removed expeditiously (as advocated for by techUK). This is because the publisher must have been reckless *at the time* of publication– where notice is given *after* the material has already been published, then the publisher would not have been aware of the risk at the time of publication. Consequently, liability is unlikely to arise. Importantly, however, if a court then orders the publisher to remove the material and they do not comply, liability for contempt by breach of order may arise.[387]

4.401 Secondly, there was concern from the Official Solicitor that a recklessness test may be too easily satisfied where a defendant lacks the capacity "to understand the information relevant to the proceedings/the risk of proceedings being prejudiced". Given that a defendant will not be treated as reckless where they did not turn their mind to the risk, such a test can act as a safeguard to prevent contempt findings being made against people who lack the capacity to understand that the relevant risk exists. Under our framework, a defendant publisher will not satisfy the fault requirement if they lack the capacity to understand, and thus to have an awareness, that there is a risk that there are active proceedings to which the material relates. Consequently, in these circumstances, a recklessness test protects against unfairly holding a person liable if they lack the capacity to understand the matters relevant to fault.

4.402 However, the fault requirement may be satisfied where a person is capable of understanding whether there is a risk that the material relates to active proceedings but cannot (whether because of age, maturity, lack of capacity, etc) understand the consequences of publishing that material. This is because the consequences of publication, and thus one's understanding of those consequences, are irrelevant to establishing fault under our framework. In our view, it is right that liability arises where a person is aware of a risk that proceedings are active, despite not understanding the consequences of publication. Such a threshold is appropriate because of the importance of protecting the fair trial rights of the defendant in the proceedings to which the publication relates.

4.403 In any case, in deciding whether to bring proceedings for this form of contempt (or to consent to the bringing of proceedings), the AG will consider whether it is in the public

[387] See chapter 3 above.

interest to do so.[388] This involves consideration of the defendant's culpability, including their capacity or vulnerability (due to, for example, age or maturity), and whether contempt proceedings are a proportionate response in the circumstances.[389] Therefore, where such matters arise in a particular case, it may not be in the public interest for the AG to bring proceedings. We consider that this serves as a safeguard against the imposition of liability on those who may be insufficiently culpable. In circumstances when proceedings are brought and a contempt finding is made, a person's degree of culpability can be taken into account at the sanctions stage.

4.404 Finally, we heard from media consultees that there is a lack of clarity as to what steps publishers (in this case, journalists) would be expected to take to ensure that they are not treated as reckless. This concern arises because currently criminal proceedings are considered active for contempt purposes from the point at which a suspect is arrested,[390] which means that contempt liability under the CCA 1981 applies from then. However, in accordance with College of Policing guidance, in practice the police will not release information about a suspect prior to charge.[391] We understand that this makes it very difficult for journalists to determine whether criminal proceedings are active. We considered this issue in the consultation paper and recognised that it "may be particularly important if a publisher is trying to resist an argument that they were reckless as to whether proceedings were active".[392] We said:

> The existing law … presumes that a journalist can avail themselves of the defence of innocent publication if they have made an enquiry of police. However, if police will not disclose the identity of an arrestee, including potentially neither confirming nor denying that the person about whom the media is enquiring has been arrested, then there is a question about whether that defence will be meaningful in practice. The same argument would apply to our provisional proposal that places on the applicant the burden of proving recklessness as to whether proceedings are active.[393]

4.405 We understand that the media approach the risk of contempt liability on the basis that where a publisher asks police whether a particular suspect has been arrested, and police refuse to confirm or deny, the publisher may be unable to prove that they did not know and had no reason to suspect that proceedings were active (which is what the defence in section 3 of the CCA 1981 requires). This is because the fact that the publisher enquired with police about the arrest indicates that the publisher is aware that proceedings *may* be active. Given that police policy is to refuse to disclose information regardless of whether the person in question has been arrested, the concern is that receiving such a response from police may not be enough to enable the publisher to conclude that there is no risk that proceedings are active.

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388 AGO, *Guidance: Contempt Public Interest Framework* (20 July 2022). See also chapter 8 on the role of the AG. In part two of the report, we will look at permission filters and standing to bring proceedings, including where a person other than the AG wishes to institute contempt proceedings.

389 Above.

390 CCA 1981, sch 1, para 4.

391 CofP, *Guidance on Media Relations* (first published 24 May 2017, updated 27 July 2022).

392 CP 262, para 5.98.

393 Above.

4.406 We do not think that a publisher should be treated as reckless in these circumstances, given that there is no way for them to know whether or not particular proceedings are active. However, in light of the unique context in which this problem arises, we do not think that it should be resolved by introducing a different fault requirement. We think that it is addressed most appropriately by moving the point at which criminal proceedings are considered active from the point of arrest to charge, as we recommend above.[394] If that recommendation were implemented, the concern raised by media consultees at paragraph 4.404 above would not arise because information about whether a person has been charged will be available publicly.

Recommendation

4.407 Our position is that the applicant should be required to prove that the defendant had the requisite fault in order to establish liability for this form of contempt. We consider it necessary for the burden of proving fault to lie with the applicant for the purposes of protecting the presumption of innocence and ensuring adequate protection of the right to freedom of expression, which is acutely engaged in this context. Further, we think that a fault requirement that a defendant was aware of a risk that proceedings were active sets an appropriate threshold for culpability and is workable in practice. We recognise consultees' concerns about the potential challenges posed by our approach to the burden of proof and the requisite fault, but we think that these do not present problems that warrant a departure from our position.

Recommendation 22.

4.408 We recommend that, to establish liability for contempt by publication when proceedings are active, the applicant should be required to prove that the defendant knew that proceedings were active or was aware of a risk that proceedings were active.

WHO CAN BE LIABLE?

Current law

4.409 The CCA 1981 does not impose restrictions on who may be the subject of contempt proceedings. Where a publication is within its scope, it is possible that various people or bodies may be liable – for example, the author of the publication; "proprietors; publishers; editors; other individuals who contributed to the published work (such as other journalists who contributed to a story); printers; and distributors".[395] While the author may be the obvious defendant, in the media context typically proceedings will also be brought against the media outlet responsible for publishing the material. It has been argued that the CCA 1981 was underpinned by a presumption that corporations would be held responsible for such publications.[396] The liability of the media outlet arises on the basis of its relationship with the author: it is treated as vicariously liable

394 See para 4.285 above.

395 CP 262, para 5.20, citing *Arlidge, Eady & Smith* (2019) paras 4-234–4-275.

396 CP 262, para 5.21.

for conduct committed by its employee while acting in the course of their employment.[397] In other words, the corporation is "responsible for the acts of the journalists whose work it publishes".[398]

Consultation

4.410 In the consultation paper, we considered the issue of whether certain potential defendants should be prioritised over others or excluded from liability. We explained that our pre-consultation stakeholder engagement revealed mixed views, but noted one view that "it is unfair to pursue proceedings against individual journalists or editors where a prosecution could be brought against a media corporation instead".[399] Our provisional conclusion was that "no potential defendant should be excluded from liability and that culpability may attach to any person or organisation responsible for publication and distribution".[400] This was based on the view that the risk of liability serves to deter the publication or distribution of potentially prejudicial material and thus to protect the fair trial rights of the defendant in the particular criminal proceedings.

4.411 We did not make a provisional proposal but invited consultees' views on this issue in CQ 30:

> In circumstances where more than one person or organisation may be the subject of proceedings for contempt by publication where proceedings are active, should the law prioritise some defendants over others? If so, which defendants should be prioritised and why?
>
> Should any potential defendants be excluded from liability for contempt by publication where proceedings are active? If so, which potential defendants should be excluded from liability and why?[401]

4.412 CQ 30 comprised two parts. The first part asked whether certain potential defendants should be prioritised over others, and the second part asked whether certain potential defendants should be excluded from liability. Consultees often responded to either the first or second part but provided further comments in which they addressed both. Consequently, although the quantitative data is of little assistance, the comments provided by consultees give a clear picture of their positions on both issues.

4.413 The main themes that emerged from consultees' responses included the following:

(1) There was very limited support for a blanket approach to prioritising and/or excluding certain potential defendants.

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397 See, for example, *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [7].

398 CP 262, para 5.21.

399 Above.

400 Above, para 5.22.

401 Above, paras 5.23-5.24.

(2) Consultees expressed a preference for a flexible approach (whereby the AG would exercise their discretion to determine the appropriate defendant on a case-by-case basis), rather than a prescriptive one.

(3) There was support for a general practice (but not a blanket rule) of prioritising media corporations as defendants over individual journalists/editors where the relevant material was published in the course of the individual's employment for that organisation.

Each of these is taken in turn below.

Support for a blanket approach

4.414 Only two consultees expressly supported a blanket approach to prioritising and/or excluding certain potential defendants. One of these was the CIoJ, which argued that "defendants should be limited to the employing media publisher and exclude the individual editor or journalists regarded as responsible in any way". The other was Charles Thomson, a media consultee. First, he said that "local press" should be excluded because they "have such limited resources that a single contempt fine could easily result in job losses or even closure of the whole title". He suggested that "they should at the very least be protected from any substantial fines". Secondly, Mr Thomson argued that a "media organisation which purchased a story from another party, such as a news agency, should … be excluded from liability for any contempt committed by the agency they are buying from". He explained:

> Twenty different media outlets could all commit contempt because they purchased the story from one agency that was in court. That agency may not necessarily have done anything wrong either. The court may have failed to flag reporting restrictions to the press, for example. But media organisations must be able to buy copy from agencies without fearing prosecution for those agencies' actions.

Flexibility over prescription

4.415 Many consultees indicated a preference for flexibility over prescription. The CBA, CoPPA and Professor Stephen Bailey argued that the appropriate defendant(s) in any given case will depend on the particular facts, and thus the prioritisation of defendants should be considered on a case-by-case basis. Several consultees suggested that this should continue to be left to the AG's discretion.[402] As explained by the AGO, the Law Officers "consider each case on its own facts, taking into account all circumstances and the public interest, and to fetter this overarching consideration would hinder the public interest assessment". Given that a blanket exclusion cannot account for the particular facts of a case in this way, the JLACOS described it as "a very blunt instrument".

4.416 Some consultees suggested that flexibility is preferable because both media corporations and individual journalists may be sufficiently culpable to warrant the imposition of liability.[403] Impress said that the suggestion of prioritising corporations "does not account for the harm that criminal contempt seeks to address; in the age of

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[402] These included: Greg Callus; Gavin Sutter; JLACOS.

[403] These included: Impress; CoPPA; Professor Bailey; JLACOS; the Bar Council.

social media, an individual journalist or reporter can have similar or greater reach and impact to any news organisation". It argued that "the law should apply equally to all publisher types", noting that its own regulatory scheme holds all members "to the same standards … regardless of their structure". The Bar Council said that "there would need to be compelling public interest reasons" for introducing "a specific rule for a particular cohort of society which effectively pre-emptively pardons them" from liability. We heard related concerns that a blanket approach to prioritising and/or excluding certain potential defendants may diminish the deterrent effect of the law of contempt.[404] For example, the Bar Council said that there "is a risk that individuals will rely on the deep pockets of their corporate employers and fail to take the necessary care both as to the existence of active proceedings and the risk of prejudice".

4.417 The CBA noted that legislation "does not specify priority of defendants in criminal prosecutions in this way" and argued that there "appears to be no need to do so for contempt proceedings". It warned that doing so "would add additional complication" – for example, there may be delays to proceedings "while arguments are mounted as to the application and interpretation of any provisions that relate to priority of defendants". Another consultee, the CPBA, considered that if a defendant "seeks to argue that they should be so excluded, that can be addressed within their response to an application, as opposed to a general exclusion of liability from the outset".

General practice of prioritisation of corporations

4.418 Several consultees (including media, legal and policing consultees) opposed a blanket rule of prioritising and/or excluding certain defendants but supported a general practice of prioritising media corporations over individual journalists or editors whose work they publish.[405] For example, the Criminal Law Solicitors' Association (CLSA) argued that "corporations should bear the brunt of the responsibility for material that is published" and that proceedings should be brought against an individual instead "only in an extreme and specific circumstance". GNM said that "it would be unfair to pursue contempt proceedings" against an individual who was "acting in the course of their employment and/or not acting negligently". Similarly, Paul Foster (on behalf of a group of media law academics) said that there are "limited reasons as to why an individual journalist" should be liable instead of the media organisation that published it, "given that it will have gone through the necessary checks … as part of the editorial process". The MLA commented that an organisation which "considers an employee/freelancer to be at fault" will have the "appropriate internal processes to deal with this (including dismissal, disciplinary action, requiring training) which are sufficient deterrent".

4.419 Two responses suggested that a general practice of prioritising media corporations over individuals already exists. The University of Sheffield said that there appears to be "established policy … not to institute proceedings, in respect of contempt by publication, under the 1981 Act against individual reporters, but against their editors and corporate employers". It considered this policy to be "correct". Further, Gavin Sutter described a "long established practice" that "it is typically the newspaper / publisher who is the defendant rather than the individual journalist". He said that a

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404 These included: University of Sheffield CFOM; the Bar Council; JLACOS.

405 These included: CLSA; GNM; the MLA; APComm and NPCC; University of Sheffield CFOM; Gavin Sutter; Paul Foster.

"statutory rule" reflecting this position "is a good starting point" but cautioned that "it would have to be extremely carefully worded in order to avoid any unforeseen consequences".

Discussion

4.420 There appear to be three options for the approach to determining the appropriate defendant in cases of contempt by publication when proceedings are active:

(1) a blanket statutory requirement to prioritise and/or exclude any particular category of potential defendants in all cases;

(2) a statutory requirement to prioritise and/or exclude any particular category of potential defendants in certain cases; or

(3) no statutory requirement to prioritise or exclude any particular category of potential defendants in any case.

4.421 We consider both the first and second options to be inappropriate. Only two consultees suggested that there should be a blanket exclusion from liability for certain potential defendants. The CIoJ argued that employed journalists should not be liable where their work is published by their employer. Charles Thomson said that local press should not be liable, and that a publisher should not be liable for a story purchased from an outlet. We do not consider that these arguments are persuasive. As discussed throughout this chapter, the protection of fair trial rights requires that publishers are suitably careful and cautious when proceedings are active. Under our recommended framework, they must not be reckless. Whether they have acted recklessly will depend on the facts of any given case. It would be inappropriate to apply a blanket exclusion from liability to a publisher who has otherwise satisfied the fault and conduct elements. Concerns about the implications of imposing a fine on a local media organisation (as expressed by Charles Thomson), after a finding of contempt has been made, should not (without more) dictate whether liability arises. Such concerns are relevant to the question of the most appropriate sanction (having established liability).[406]

4.422 Similarly, it would be inappropriate for the law to require that certain defendants be prioritised over others who may have also satisfied the fault and conduct elements. We recognise that consultees felt strongly that generally proceedings should be brought against media corporations rather than individual journalists or editors, and we heard from some that this appears to be the practice of the AG. The position of the AGO is that prioritising or excluding any particular category of potential defendants would not be appropriate and, as discussed at paragraph 4.415 above, that "the Law Officers consider each case on its own facts, taking into account all circumstances and the public interest". However, we are not aware of a case where the AG has

[406] Given that there is no limit on the fine that may be imposed by a superior court where a publisher has committed contempt, we recognise that there may be a chilling effect on local media for whom a fine may represent a higher proportion of their assets than larger media outlets (for example, regional or national media organisations). The issue of sanctions will be addressed in part two of the report, which will include consideration of the need for guidance about imposing fines for contempt.

brought proceedings for publication contempt under the CCA 1981 against an individual journalist.

4.423 While in some circumstances there may be good reasons to bring proceedings against some potential defendants but not others, in our view it should not be required by law. Given that the issue of whether a publication constitutes contempt is highly context-specific, and that various people or bodies may be sufficiently culpable, it is important that there is room for flexibility and discretion in deciding on the appropriate defendant(s) in a particular circumstance. The possibility of liability also arguably serves a valuable deterrent function against careless or reckless publication, including where judges can alert or warn journalists reporting on a case about the risk of contempt and the likelihood of facing proceedings in respect of a potentially contemptuous publication.

4.424 Ultimately, therefore, we conclude that there should not be a statutory requirement to prioritise or exclude any particular category of potential defendants in any case.

Chapter 5: Contempt by disrupting proceedings

INTRODUCTION

5.1 This chapter sets out the third form of liability in our recommended framework: contempt by disrupting proceedings. It is a form of contempt that did not feature in the provisional proposals in our consultation paper. After providing an overview of this form of liability we explain how this recommendation has emerged following consultation and then turn to the elements that must be proved to establish contempt by disrupting proceedings.

An overview of contempt by disrupting proceedings

5.2 Our recommendation is that to establish contempt by disrupting proceedings the court must be satisfied beyond reasonable doubt that the following conduct, circumstance and fault elements have been established:

- the defendant's conduct was abusive, threatening or disorderly behaviour that resulted in the disruption of proceedings;
- the defendant's conduct was witnessed by the judge or a court official (for example, it was seen or heard); and
- the defendant intentionally did the conduct and was aware at that time that legal proceedings were in existence.

5.3 We make a recommendation regarding "contempt by disrupting proceedings" rather than with reference to "contempt in the face of the court" because the former can be more clearly delineated, giving courts and the public greater clarity and certainty about what will be caught by this form of contempt.

5.4 Disruption is most often managed by judges without recourse to formal measures. However, the courts must have the necessary tools to control proceedings to ensure the effective and efficient administration of justice. It is reasonable to expect that those involved in or observing legal proceedings will act consistently with the proper administration of justice. Proceedings for this form of contempt will typically be instituted by a court on its own motion.[1] However, like any of the forms of contempt, proceedings may be sought to be instituted on application by a party or other person.[2]

DISRUPTION TO PROCEEDINGS AND OUR PROVISIONAL PROPOSALS

5.5 In the consultation paper we provisionally proposed three forms of contempt: general contempt; contempt by breach of order or undertaking; and contempt by publication

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1 We include here circumstances where a court or tribunal without power to deal with contempt itself refers a matter to a higher court that does have the power to deal with the matter, which we addressed in our consultation paper: Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), paras 8.158-8.164 and 8.252-8.257. We will discuss referral in part two of our report.

2 We will discuss procedure in part two of our report.

when proceedings are active. Within general contempt we provisionally proposed two strands: general contempt by publication, and general contempt by conduct other than publication. We discuss general contempt in detail in the next chapter but it is helpful to explain briefly the relevant aspects here.

5.6 Our provisionally proposed test for general contempt was that establishing the conduct element would require proof that there was a non-trivial interference with the administration of justice, or that a substantial risk of such an interference was created. Where the conduct involved publication, then establishing the fault element would require proof that the defendant intended to interfere with the administration of justice. This is proof of "specific intent", rather than proof of "basic intent", which would only require proof of intention to do the act. Where the conduct was other than publication, we provisionally proposed that fault would be established by proof of intention to interfere with the administration of justice and asked an open question about whether proof of recklessness should also be sufficient.[3]

5.7 We explained our view that disrupting proceedings fell within general contempt, whether committed by publication or (more typically) by conduct other than publication:

> The current law treats conduct that disrupts proceedings as an interference with the administration of justice. This may include taking photographs in court; refusing to sit in the appropriate seat in court, against the judge's directions; shouting and singing in court; and much more. In our view, such conduct should continue to be captured by the law of contempt to ensure that proceedings can progress fairly, efficiently and effectively. As the Court of Appeal (Criminal Division) stated recently:
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> > This part of the law is not about insults or other expressions of disrespect for judges or courts or their decisions. … [It is about] protecting the due administration of justice. The achievement of that aim is not only of interest to those directly involved in legal proceedings. Securing the efficient and fair administration of justice is intrinsic to upholding the rule of law, which is in the interests of the public generally.[4]
>
> We expect that disruption to court proceedings would be captured by the conduct element of general contempt on the grounds that it either carries a substantial risk of non-trivial interference with the administration of justice or has in fact interfered with the administration of justice in a non-trivial way.
>
> It does not appear to us to be a requirement that the conduct takes place inside the courtroom. For example, disruption may be caused by conduct that occurs in waiting spaces outside the courtroom or other parts of the premises, or outside the court building. Hearings may be disrupted by the conduct of those attending remotely online. The Criminal Procedure Rules refer to conduct that is "in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings".

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3 CP 262, CQs 3-6, 9, 11-13.

4 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [23].

In our pre-consultation engagement with stakeholders, we heard concerns about recent cases of protestors gluing themselves to furniture in the courtroom during proceedings brought against them for causing a public nuisance or breach of a protest-related injunction. In some of these cases, arrests for an offence of criminal damage under section 1(1) of the Criminal Damage Act 1971 were made. However, judges and lawyers told us that such conduct should be treated as contempt where it is primarily wrongful because of the interference with the administration of justice – for example, where the purpose of the behaviour is to delay proceedings.

The impact of this type of conduct on the course of justice was made clear by the High Court in *North Warwickshire Borough Council v Charlesworth*, a case in which the defendant glued herself to the dock and it took three hours to have her removed:

> [The contemnor's] actions in court… caused very significant disruption to the court process. The custodians could not remove [her]. The police had to be called who, in turn, had to call in specialist police officers with [expertise to dissolve the glue]. At the time of [her] actions, the court still had six other defendants' cases to deal with. Another court room had to be convened but the court could not immediately recommence as there were insufficient custodians to bring defendants from the cells into court as a result of the need of multiple officers to remain with [her].[5]

Gluing oneself to a courtroom fixture is a means of delaying proceedings and interrupting court and thus it seems plain that it is and should be captured by the law of contempt. One judge emphasised to us the importance of dealing with such conduct as contempt to "send a message that [the] solemnity of the court needs to be maintained" and suggested that this message is undermined by any failure to deal with these cases appropriately.[6]

Consultation

5.8 As we had presented the disruption of proceedings falling within general contempt, what we heard in consultation was directed towards what should be the test for general contempt. We explain these responses in detail in chapter 6 but three points are of note with respect to the views we heard about disrupting proceedings.

5.9 First, persuaded by consultees, we have not recommended a split between general contempt by publication and general contempt by conduct other than publication.[7] Accordingly, the test will be the same whether or not the disruptive conduct constitutes publication. Secondly, there was no dispute that the disruption of proceedings could constitute a non-trivial interference with the administration of justice. Thirdly, the point of contention was whether it was appropriate to require proof of specific intent where conduct disrupts proceedings. As such, the discussion below focuses on the fault element.

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5 *North Warwickshire Borough Council v Charlesworth* [2022] EWHC 1464 (QB) at [12].

6 CP 262, paras 3.122-3.127 (most references omitted).

7 See paras 6.98-6.107 below.

Intention

5.10 It was uncontentious that proof of intention to interfere with the administration of justice should be sufficient to establish fault.

5.11 What was contentious was whether requiring proof of that intention would make it inappropriately difficult to establish liability, and whether something less than intention would be a more appropriate threshold. These concerns were often linked. For example, CQ 9 provisionally proposed that the fault element of general contempt should be satisfied by proof of intention to interfere with the administration of justice.[8] Several consultees who disagreed or gave an answer categorised as "other" said that a lower threshold should also be available, often on the grounds that it would be difficult to prove that intention.[9] Some consultees who agreed also raised concerns about the difficulty of proving intention in some circumstances.

Support for an intention-only threshold

5.12 There was significant support for an intention-only threshold where contempt was committed by publication. Media consultees often expressed particularly strong views that the requirement of specific intent – that is, proof of an intent to interfere with the administration of justice – was important.[10]

5.13 There was also a clear level of support for an intention-only threshold for general contempt whether committed by publication or by conduct other than publication.[11] The reasons varied but included views that the seriousness of the contempt sanctions required specific intent as the test. The Attorney General's Office (AGO), for example, said "we consider intention only should suffice. The ultimate sanction for contempt is committal to prison, this serious sanction justifies the requirement for intention".

5.14 The Family Division of the High Court[12] and the Association of HM District Judges (ADJ) gave the following comments responding to CQ 9:

(1) The Family Division of the High Court:

> We are satisfied that the proposed general contempt by conduct will adequately cover what is now regarded as contempt in the face of the court. We raise no concerns about the proposals regarding this form of contempt.

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8 CP 262, para 3.76.

9 Those who disagreed included: the judiciary, on behalf of the courts of England and Wales (the judiciary); The Property Chamber of the First-tier Tribunal; HHJ Alexia Durran, Chief Coroner of England and Wales; and the Court of Protection Bar Association (CPBA). Those who answered "other" included: Greg Callus; the Criminal Bar Association (CBA).

10 For example: the Media Lawyers Association (MLA); Guardian News and Media Limited (GNM); Impress.

11 For example: Garden Court Chambers, Civil Liberties Team; GNM; the AGO; Kingsley Napley LLP (submitted by the Dispute Resolution Team); Central England Law Centre. There were 15 (of 39) consultees in favour of intention-only for conduct other than publication: see para 6.92 below.

12 This response was submitted by the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and from the senior judge of the Court of Protection. See para 1.34 above for further information about the Family Division response.

(2) The ADJ:

> We are partially satisfied that the proposed general contempt by conduct will adequately cover what is now regarded as contempt in the face of the court. Concern has been raised by some as to what is meant by intent. However, given the concept is well established in criminal law with proper training we do not think this raises an insurmountable hurdle.[13]

5.15 Some of the Commercial Bar Association (COMBAR) contributors:

> opposed the inclusion of recklessness in the fault element as they were concerned about potentially uncertain expansion of contempt liability and the potential for spurious or satellite litigation over what a [contempt defendant] understood or believed. One Contributor pointed out that adopting recklessness as a test would appear to move against the direction of travel of the Court of Appeal in *Norman v Adler* [2023] 1 WLR 4232 which deals with whether recklessness suffices in respect of allegedly dishonest witness evidence.[14]

Opposition to an intention-only threshold

5.16 Although there was majority support for an intention-only threshold where general contempt is committed by publication,[15] there was majority opposition to intention-only where contempt was committed by other conduct with 24 of 39 consultees preferring intention or recklessness. The primary concern of many consultees who, in different ways, opposed an intention-only threshold was that requiring proof of intention would make it too difficult to establish contempt. This was particularly so where disruptive conduct was in issue. The following comments are representative of how strongly the concern was held.[16]

5.17 The judiciary, on behalf of the courts of England and Wales (the judiciary) said:

> We consider that it should not be necessary to prove either an intention to interfere with the administration of justice or recklessness as to interference. A fault element in these terms will render such contempts harder to prove and will limit the effectiveness of the court's ability to protect itself from interference.
>
> Many of those who interfere impermissibly with legal proceedings do so because they believe that the court is failing to administer justice in one way or another. They would say that they were actually intending to ensure that justice was done.

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13 It was not clear whether this view was in any way contingent on or presumed the retention of the powers available to the County Court under section 118 of the County Courts Act 1984. With respect to those powers, see paras 5.49-5.52 and 6.199-6.212 below.

14 On false statements, see paras 6.188-6.198 below.

15 There were 24 (of 38) consultees in favour of intention only for general contempt by publication.

16 In addition to those cited here, Adam Gungah (magistrate) also took this view and Change for Children International made a similar point.

> Others behave aggressively towards the judge or other participants because they have lost their temper and are intending to cause fear and harm. They may not have the administration of justice in mind.[17]

5.18 The Chief Coroner of England and Wales, HHJ Alexia Duggan, said:

> Whilst I support the proposition of simplifying the law I think this is not straightforward. Most "contempt in the face of the court" in Coroner courts is not likely to be intended to cause an interference, but may be a significant disruptive and distressing event arising from conclusions or evidence with which an interested person is unhappy. Importing fault is likely to lead to contentious hearings that in an inquisitorial jurisdiction may be unhelpful.

5.19 The Criminal Bar Association (CBA) said:

> We fear that this does not adequately deal with the problem of defendants who wilfully partake in behaviour that disrupts criminal proceedings, but where it cannot be proved that they conceptualised the virtually certain risk of interference with the administration of justice.

5.20 The Property Chamber of the First-tier Tribunal said:

> If a person shouts abuse at a witness, should it really be necessary to prove that they knew that would cause a non-trivial interference with the administration of justice and intended to bring about that interference? Much easier to provide for certain types of conduct to be a contempt whatever the subjective intent of the actor.

5.21 Justices' Legal Advisers and Court Officers' Service said:

> Limiting fault to intention only significantly reduces the protection. With many contempts in the face of the court, the impact is a side issue, for example people fighting or arguing loudly in the public gallery are intent on their quarrel, albeit that it is obvious, had they thought of it, that they are interfering with the court's business. … Behaviour which distracts jurors or witnesses or otherwise interferes with justice or makes the experience of taking part in it unpleasant or threatening clearly should be curbed, whether or not the defendant intends those outcomes, provided the defendant is acting consciously and the outcome is foreseeable.

5.22 There was disagreement with the proposition that the seriousness of sanctions justified a specific intent requirement. The CBA, for instance, pointed out that offences carrying longer sentences may require proof only of basic intent.[18]

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[17] See para 1.33 above for further information about the judiciary response.

[18] The CBA noted that "unlawful act manslaughter, which attracts a maximum penalty of life imprisonment, requires proof of the mens rea for the unlawful act, which may be a crime of basic intent". Justices' Legal Advisers and Court Officers' Service made a similar point citing other offences.

Lower thresholds

5.23 One approach in responses was to suggest that there should be a different fault element for contempt in the face of the court.[19] The more common approach was to suggest reducing the fault threshold for all general contempt.

5.24 Some consultees were content with recklessness.[20] The Chancery Bar Association were among this group, provided that the defendant was subjectively aware of the risk. The Law Society and COMBAR both reported receiving conflicting views, with only some of their contributors supporting recklessness.

5.25 We received other suggestions. Gavin Sutter described recklessness as "a partial solution" and "favour[ed] … an objective standard based on what a defendant could reasonably have been expected to know, not what they in fact did know". The judiciary suggested "two alternative approaches", the first of which is a basic intent test with an additional awareness of proceedings, and the second strict liability tempered by a defence:

> a. In order to make a finding of contempt of this kind, the court would have to find that the alleged contemnor was aware of the existence of the legal proceedings and intentionally did the acts which created the interference or risk of interference (we understand this to be the effect of *Solicitor General v Cox* [2016] 2 Cr App R 15);[21] or
>
> b. That there should be no requirement of intent, but it would be a defence to prove that the alleged contemnor did not know and had no reasonable grounds to believe that their conduct would create any interference or risk of interference.

The decision in R v Jordan

5.26 The decision in *R v Jordan* was referred to by numerous consultees, especially during consultation meetings and events.[22] It was also cited by the CBA, along with *Solicitor General v Cox*, as a good explanation of why there needs to be a way of capturing

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19 The CBA, which in CQ 12 chose the "intention or recklessness" option, suggested this as a potential alternative.

20 For example: JLACOS; Forum of Insurance Lawyers (FOIL).

21 This is also the way that *Arlidge, Eady & Smith* read *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15: P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) (*Arlidge, Eady & Smith*). That text says at para 10-9 that the Divisional Court "held that it is not necessary to establish a specific intent to interfere with the administration of justice. It would suffice to show that the conduct which constituted the actus reus was carried out deliberately". As we explained in the consultation paper, in our view the case is authority for the position that it will be sufficient to prove that the acts are deliberate and no further specific intent will be required only in circumstances where the conduct "is in breach of the criminal law or a court order of which the person knows": [69]-[70]; CP 262, para 3.91. However, regardless of the position in that case, the Court of Appeal in *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 set a lower threshold (as we discuss in the next paragraph) and the point of significance in this chapter is what the test should be in a reformed contempt framework.

22 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30. The facts are outlined from [3]. The defendant was in a park next to a Crown Court where climate change protesters were being tried on public nuisance charges. He played recorded music through a megaphone pointed at the court. The trial judge considered the music to be a disturbance of the hearing.

contempt in the face of the court, and how the thresholds in *Jordan* do that effectively.[23]

5.27 In *Jordan* the Court of Appeal (Criminal Division) came to a clear view that proof of intent to disrupt proceedings is not required to establish contempt in the face of the court or, as they put it at [49], in *Yaxley-Lennon (No 2)* [2019] EWHC 1791 (QB):

> the Divisional Court held that specific intent was not an ingredient of contempt by "direct interference with the administration of justice" by filming outside court in breach of section 41 [of the Criminal Justice Act 1925] or by aggressively confronting defendants as they approached the court in such a way as to risk prejudice to their participation in their trial and to challenge the dignity of the court as an institution.[24]

5.28 The Court of Appeal in *Jordan* discussed *Cox* and its treatment of specific intent as not being a requirement of contempt where photographs have been taken, noting that the Divisional Court held: "It is sufficient *mens rea* that the acts must be deliberate and in breach of the criminal law or a court order of which the person knows. No specific intent is required beyond that".[25] However, the Court of Appeal in *Jordan* did not rely on or confine itself to the *Cox* requirement that the conduct must be a breach of the criminal law for liability to arise. Instead, the Court took a more expansive approach and concluded that in "cases of contempt in the face of the court generally and … related forms of contempt" there is no requirement to prove an intention to interfere with the administration of justice.[26]

5.29 In reaching the decision they cited as an "underlying rationale" the comments of Ouseley J in *Cox*:

> The intent required cannot depend on the foresight, knowledge or understanding which the ignorant or foolish might have of the ways in which his acts risk or actually do interfere with the administration of justice. The ignorant and foolish, who are unaware of the law or who read prohibitory notices but do not understand their purpose, and do not realise the risks which their acts may create for the trial or other court process, and who may be right when they say that the risk or the actual harm was not what they ever intended, could not be dealt with at all for contempt in the face of the court. Yet they may cause the most serious harm. A defence that the contemnor is not guilty because he did not realise what could happen, and intended no interference, would put the court proceedings at greater risk the more ill-informed the contemnor was prepared to say he was, or actually was. The power of the court to react swiftly to acts of this sort, which risk interference with the administration of justice, cannot be dependent on any further specific intent to interfere with the

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23 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15.

24 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [49]. Section 41 makes it a criminal offence to photograph a judge, juror or witness in the court or its precincts. This provision is discussed in paras 5.33, 5.37 and 6.223-6.245 below.

25 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [47], citing *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [69]-[70].

26 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [49]-[50].

course of justice, without creating a serious risk of neutering the court in the exercise of its powers when it may need them the most.[27]

Discussion

5.30 Undoubtedly the courts must be able to deal effectively with disruptive conduct. This is, rightly, a high priority for the judiciary and other consultees. The administration of justice and the rule of law require that disputes can be resolved effectively and efficiently, whether those disputes are non-criminal matters between parties or whether they are criminal cases.

5.31 We considered whether it is feasible to create within our framework a category of contempt in the face of the court. We reached the view that it is not. There would be uncertainty and challenge about what falls within this category. The decisions in *Cox* and *Jordan* show that there is no easily discernible boundary around the categories of cases to which they say a specific intent requirement does not apply at common law. This is not surprising; the authors of *Arlidge, Eady & Smith* note that the courts have long struggled to provide a definition of contempt in the face of the court.[28] In *Cox*, the scope of the category is described as "acts which fall into the broad category of contempt in the face of the court or contempt closely related to such contempt".[29] A similar statement is made in *Jordan*.[30] While this obviously enables courts to deploy their contempt powers in very broad circumstances, the lack of certainty at the boundaries of the category makes it unsuitable as the basis on which to apply a fault standard different from that to be applied in general contempt. There are clear lines between (on the one hand) general contempt and (on the other) contempt by breach of order or contempt by publication when proceedings are active. Each has distinct conduct and fault elements that must be proved to establish liability. There is no such clear line that demarcates from general contempt the categories of case described in *Cox* and *Jordan*. However, in our view, conduct that disrupts proceedings can be clearly demarcated. Accordingly, we have considered whether there is a case to do so, with a lower fault threshold applying.

Addressing disruptive conduct

5.32 Courts can address disruptive conduct in numerous ways. In our meetings with the judiciary during consultation we frequently discussed the various options. One is to take no action at all. As judges from different courts explained to us, litigants and their families can be angry and frustrated, often facing some of the most difficult challenges of their lives, and the possibility of consequences that will affect them and those close to them. Sometimes a part of judgecraft will involve recognising and accepting that, managing proceedings so that disruption is minimised. In short, even though a litigant may have clearly done something that is a contempt, that does not mean contempt

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27 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [50], citing *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [70]-[71].

28 *Arlidge, Eady & Smith* (2019) paras 10-12–10-16.

29 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [66].

30 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [50]: the category is "cases of contempt in the face of the court generally and … related forms of contempt".

powers will be used. Where those powers are used to deal with disruption, it will in practice be done on the court's own motion rather than on application.

5.33 Where a person is taking photographs in a court then, as we explained in the consultation paper, courts have the "power to deal immediately with a person who is taking photographs".[31] We said that "under the Courts Act 2003 a person may be excluded or removed from the courtroom, people may be searched, and articles may be seized "where they may be evidence of, or in relation to, an offence".[32]

5.34 Where a person is persistently or significantly disruptive, or continues to take photographs or engage in similar conduct, then a judge may warn that person that if the behaviour does not stop or change then there will be some consequence. That could, for example, be a warning that if they do not stop then they will be taken to the cells (where these are available)[33] or excluded from the court for a period[34] or that the court may institute contempt proceedings that could result in imprisonment. We were told by judges that contempt proceedings are often not necessary because the exercise of these powers, including immediate temporary detention (for example, for an hour or two hours), is very effective.[35]

5.35 Where there is disruption then proof of intention to interfere with the administration of justice will ordinarily be inferred without difficulty. As Ouseley J observed in *Cox*: "In the overwhelming majority of cases, it will no doubt be readily inferred that the person deliberately taking photographs intended to interfere with the due administration of justice".[36] The cases where intention cannot be proved, said Ouseley J, will be "rare".[37]

5.36 Giving a defendant a warning will be an important practical factor in addressing the concerns about proving intention, making those cases rarer still. This common practice ensures that, in most circumstances, it will be very easy to prove an intention to interfere with the administration of justice. Put simply, once a person has been told that their behaviour is causing an interference with the administration of justice, if they continue, intention to so interfere will be easily inferred from that knowledge. The person is now either deliberately causing an interference or, at the very least, knows

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31 CP 262, para 3.95.

32 Above; Courts Act 2003, ss 52-54 and 55. The offence would be taking photographs in court, which is an offence under the Criminal Justice Act 1925, s 41(1). We discussed the prohibition on taking photographs in CP 262, paras 3.90-3.97, and further in this report at paras 6.223-6.245 below.

33 In part two of the report, we will examine this aspect of the practicalities of immediate temporary detention. An issue that arose frequently during consultation discussions was that in many courts and tribunals there are no cells on the premises and so this is not a practical option. Immediate temporary detention is discussed in CP 262, paras 8.146-8.157.

34 In part two of the report, we will examine the practicalities of exclusion. A point made during consultation discussions was that court and security staff will not always be present and available to enforce exclusion.

35 See also CP 262, para 8.148.

36 Above, para 3.95, citing *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [68].

37 CP 262, para 3.95, citing *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [69].

that their behaviour is virtually certain to do so.[38] It seems to us that in almost every instance proof of intention will be unproblematic without any change to the existing ways that proceedings are handled.

5.37 What of the position where intention cannot be proved? This may be the position where a court encounters a person such as the one described by Ouseley J (above at paragraph 5.29), which was a passage we also reproduced in the consultation paper. There is a clear gap, which is where conduct that happens before a warning can be given and which occurs where intention cannot readily be proved or inferred in spite of warning signs in the court and its precincts. The most likely conduct will be photography or recording (including immediate publication of photographs or recordings) or live streaming. The law needs to ensure this gap is filled, which in our view should be done in two ways. First, there should be an expansion of the scope of the existing strict liability criminal offence for taking photographs in court.[39] In chapter 6, we look at that issue in more detail and make a recommendation to that effect.[40] Secondly, we have concluded that there should be a category of contempt by disrupting proceedings with a lower fault threshold.

5.38 The case for a separate category of contempt by disrupting proceedings rests not only on that gap in the criminal law but also on the need for courts to be able to deal swiftly with disruptive conduct. Sitting alongside immediate temporary detention and exclusion powers where these are available and it is practical to exercise them,[41] and subject always to the requirements of procedure, the ability to deal with disruptive conduct without the requirement of proof of specific intent is an important power in protecting the administration of justice.

CONTEMPT BY DISRUPTING PROCEEDINGS: THE ELEMENTS

5.39 In formulating the scope and limits of this form of contempt we have considered whether recklessness provides an appropriate threshold. As we explain above at paragraph 5.6, we asked an open question in the consultation paper about whether proof of recklessness should be sufficient for general contempt committed by conduct other than publication. We address the general contempt points in chapter 6, where we conclude that it is too low as a threshold for general contempt. Here, we have concluded that it does not provide an appropriate threshold for dealing specifically with disruptive conduct, but on the ground that recklessness is too high a threshold. It could allow a defendant to argue that their disruption was not reckless in the circumstances, and it is clear from what we heard in consultation that such an argument would often have no foundation at all and would merely consume court time and resources. The better approach, in our view, is to have a lower fault threshold, but

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38 See para 6.74 below.

39 Criminal Justice Act 1925, s 41.

40 See paras 6.223-6.245 below.

41 We will address these issues in part two of the report and take into account the concerns raised in responses to the questions we asked about the fault requirement for general contempt, but detention and exclusion are aspects of practice and procedure that address those concerns rather than being essential for the proof of intention.

to confine the scope of the category of contempt by reference to circumstance and conduct.

Fault

5.40 We have considered the views put to us that suggest a standard of strict liability would be appropriate. In our view that standard would be inappropriate because a defendant who is not at fault at all would be subject to liability for contempt and the potential sanctions that follow as a consequence. It is appropriate that only defendants who are at fault can be found liable for contempt.

5.41 In our view the appropriate standard of fault is that which has been suggested by the judiciary: a defendant must have intended to do an act (that is, proof of basic intent) and, at the time of the act, must have been aware that legal proceedings existed.

Circumstance

5.42 We have concluded that this form of contempt liability should only be available where a judge or court official has witnessed the conduct. That is, it must have been seen or heard by the judge or court official. Given the lower fault threshold, it is appropriate that those with key roles in the administration of justice have witnessed the conduct. It also makes it more likely that a disruptive person will be made aware that they are at risk of contempt proceedings, thus minimising the likelihood of the disruption continuing. This means that disruption that is caused within a court building, or outside one (such as in *Jordan*) would fall into this category. It does not have to occur within a court room whilst a judge is hearing a case.

5.43 Where proceedings have been disrupted but not witnessed by a judge or court official then this does not mean a potential defendant will escape contempt liability; it may be that general contempt can be established.

Conduct

5.44 In our view it is appropriate that the conduct must be abusive, threatening or disorderly, and that it must disrupt proceedings.

5.45 It will not be sufficient that the conduct creates a risk that proceedings are disrupted. Only where proceedings have been disrupted will it be possible to establish this form of contempt liability.

5.46 With respect to the nature of the conduct, we include “disorderly” conduct because it takes account of context and circumstances. We use the word “disorderly” in the sense that the conduct is (drawing on the Oxford English Dictionary definition) “opposed to or violating ... constituted authority or recognised rule or method”. As was observed recently in a public order case, “the surrounding circumstances are likely to be all important: conduct that might be seen as disorderly in an intensive care unit might not be if performed on the terraces of a football ground”.[42] Consideration of context and circumstances will help provide protection for freedom of expression. For example, if a protest can be heard from within a courtroom then it is conceivable that it

[42] *R v Hamit Coskun* (10 October 2025) Crown Court at Southwark (Bennathan J, T Guest JP, D Graves JP) at [19], [2025] WLR(D) 514.

could disrupt proceedings by (for instance) preventing witnesses or counsel being heard. However, that does not mean the conduct of all protesters can be characterised as disorderly. A protest by its nature may be noisy. Where authorised, as a street protest may be, then it is difficult to see it is violating authority. Even where not authorised, it will depend on all the circumstances as to whether conduct can be characterised as disorderly.

Application to proceedings

5.47 This form of liability is directed to the disruption of proceedings and so would apply to all proceedings, whatever their mode. In particular, its application would not be limited to proceedings held in courtrooms. For instance, it would also apply to proceedings held online, in a hybrid mode with both in-court and remote access or participation, or in a judge's chambers.

Recommendation 23.

5.48 We recommend that contempt by disrupting proceedings should be established by proof beyond reasonable doubt that:

(1) the defendant acted in a way that was abusive, threatening or disorderly and the act resulted in the disruption of proceedings;

(2) the defendant intended to do the act and, at the time of the act, was aware that legal proceedings existed; and

(3) the defendant's act was witnessed by the judge or a court official (for example it was seen or heard).

EXISTING PROVISIONS IN THE MAGISTRATES' COURTS AND COUNTY COURT

Section 12 of the Contempt of Court Act 1981 and section 118 of the County Courts Act 1984

5.49 Our conclusions raise the question of whether there should be reform to section 12(1)(b) of the Contempt of Court Act 1981 and section 118(1)(b) of the County Courts Act 1984. These sections deal with disruptive conduct in, respectively, magistrates' courts and the County Court.

5.50 Section 12(1)(b) and section 118(1)(b) give these courts the power to treat conduct as a contempt where a person "wilfully interrupts the proceedings" or "otherwise misbehaves in court". In the consultation paper we recognised that these powers may be valuable as they "assist the County Court and magistrates' courts in managing proceedings so that they are fair, efficient and effective". Given our recommendation above, these provisions on disruption and misbehaviour are unnecessary. Our recommendation ensures that the power to deal with disruption as contempt without proof of specific intent is not limited to the magistrates' courts and County Court as it has been under the existing statutory provisions. The conduct identified in those provisions falls within the province of contempt of court and should be dealt with under

contempt laws, rather than under a separate, overlapping statutory provision that would give rise to confusion.

5.51 Given these conclusions, we recommend repeal of these provisions.[43]

Recommendation 24.

5.52 We recommend that section 12(1)(b) of the Contempt of Court Act 1981 and section 118(1)(b) of the County Courts Act 1984 should be repealed.

[43] Sections 12 and 118 also include provisions regarding insults in these courts. At paras 6.201-6.212 below we discuss these aspects of the sections and recommend that the insult provisions should also be repealed.

Chapter 6: General contempt

INTRODUCTION

6.1 This chapter explains the final form of liability in our recommended framework: general contempt. We explain in chapter 2 that where conduct that would ordinarily fall to be considered under contempt by breach of order or undertaking, contempt by publication when proceedings are active, or contempt by disrupting proceedings, it may also give rise to liability under general contempt.[1] However, general contempt is very significant as a distinct and residual form of liability: it will capture contempts that do not fall within any of the other three forms of liability. A very wide range of conduct may fall within this category of contempt. It is a form of liability, with its own elements, that sits alongside the other three forms of contempt in our recommended liability framework.

6.2 This chapter sets out the conduct and fault elements of general contempt. Next, it considers whether liability can arise before legal proceedings have commenced and after legal proceedings have concluded. It then looks at the types of conduct that may be captured by this form of liability. It does this first by considering how, if at all, there should be a list or guidance provided that identifies categories or examples of conduct that may fall within general contempt. Secondly, it looks at how a category of general contempt brings about the need for clarification and/or reform in three areas: the making of false statements in, or in anticipation of, proceedings; statutory contempts in the County Court and magistrates' courts; and photography, audio recording, video recording and live-streaming.

An overview of this form of liability

6.3 Our recommendation is that to establish general contempt an applicant must prove a conduct element and a fault element. These are:

- that the defendant's conduct interfered with the administration of justice in a non-trivial way or created a substantial risk of a non-trivial interference with the administration of justice; and
- that the defendant had an intention to interfere with the administration of justice.

6.4 In the consultation paper we provisionally proposed that there should be a distinction between conduct that constituted publication and conduct that was other than publication. We have been persuaded that we should not make such a recommendation. Accordingly, our recommendations make no such distinction in the elements of this form of contempt.

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[1] See para 2.10-2.14 above. We also note in those paragraphs that a defendant may be liable for contempt on more than one basis but cannot be found in contempt more than once for the same conduct.

6.5 We do not recommend any time limit on when general contempt can apply. That is, it may apply before proceedings have commenced and after proceedings have concluded.

6.6 General contempt provides the basis on which a wide range of behaviour may be dealt with as contempt, provided of course that both the fault and conduct elements are proved. We recommend that Government arrange for clear and accessible guidance about general contempt to be issued for professional and lay users of the courts.

6.7 Our fault and conduct recommendations for general contempt have some notable effects on related laws. First, with a view to clarity in the law, we recommend the repeal of some statutory provisions that overlap with general contempt and are unnecessary. Secondly, we make recommendations with a view to modernisation and coherence, including a narrow expansion of some criminal offences.

CONDUCT AND FAULT IN GENERAL CONTEMPT

6.8 In our consultation paper we made some provisional proposals for the conduct and fault elements of general contempt, and also asked some open questions. Key among our provisional proposals were that:

- the conduct threshold should be a non-trivial interference with the administration of justice or a substantial risk of a non-trivial interference with the administration of justice;[2] and
- to establish fault there should be proof of intention to interfere with the administration of justice.[3]

6.9 As explained above, we also drew a distinction between circumstances where the defendant's conduct involved publication and where there was conduct other than publication. For the former, we provisionally proposed that only intention should suffice. For the latter we provisionally proposed that intention should suffice but asked an open question about whether proof of recklessness should also be sufficient.[4]

6.10 This combination of options meant that, in reaching a position on what should be our recommendations for the liability framework, the view we reached on some issues would necessarily affect the position reached on other issues. This was especially significant in two respects. If we reached a view that only intention should suffice for general contempt, then the distinction between publication and conduct other than publication would fall away. Similarly, if we reached a view that the distinction between publication and conduct other than publication was not appropriate then, if we retained our provisional view that only intention should suffice in circumstances where general

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2 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), paras 3.17, 3.22 and 3.28.

3 Above, para 3.76.

4 Above, paras 3.114-3.115.

contempt was committed by publication, the option of recklessness would inevitably fall away.

6.11 We begin our discussion by addressing the conduct element where, as we will explain, we now take the view that the distinction between publication and conduct other than publication should not form a part of liability for general contempt. While one consequence of this is that the option of recklessness falls away, we also explain in our subsequent discussion of fault that we are persuaded that recklessness is not an appropriate standard of fault in general contempt.

CONDUCT

6.12 Our provisional proposals on the conduct element were set out in CQs 3, 4, 5 and 6, each taking a different aspect of what must be proved to establish the conduct element.[5] The conduct element, we said, would be the same for general contempt by publication and general contempt by conduct other than publication. The overall effect was:

> We provisionally propose that the conduct element should be satisfied where a person's conduct interferes with the administration of justice in a non-trivial way or creates a substantial risk of non-trivial interference with the administration of justice.[6]

6.13 The component parts of the overall position were the following, with our provisional proposals being that the answer to each of these questions should be yes.

(1) whether the conduct element should require an "interference with the administration of justice" (CQ 3);

(2) whether an "actual interference" with the administration of justice should satisfy the conduct element of the general contempt liability threshold (CQ 4);

(3) whether a "risk of interference" with the administration of justice should satisfy the conduct element of the general contempt liability threshold (CQ 5);

(4) whether the degree of risk required where a person causes a risk of a (non-trivial) interference with the administration of justice should be "substantial", in the sense that it is "a risk that is not remote", and whether the same degree of risk should apply for the conduct elements for general contempt and contempt by publication when proceedings are active (CQ 6); and

(5) whether "non-trivial" is the appropriate threshold for the gravity of the interference (CQ 4 and CQ 5).

6.14 Around 40 consultees engaged directly with these consultation questions.

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5 CP 262, paras 3.12, 3.17, 3.22 and 3.28.

6 Above, para 3.3.

Interference with the administration of justice

Consultation

6.15 In the consultation paper we said that "the consequence risked by the conduct should be an interference with the administration of justice" and pointed out that this reflects "the current test for criminal contempt at common law".[7]

6.16 We accepted that the term "interference" has been criticised for being "too imprecise"[8] and that the term may be overinclusive, as it may capture conduct that does not adversely interfere with the administration of justice.[9] As a result, we said, it may be better to proscribe a "narrower category of conduct" by, for example, ensuring that only undesirable interferences could attract liability or providing an exhaustive list of all types of conduct that would constitute general contempt.[10] However, we said that neither of these options would be appropriate:

> Given that it is not possible to contemplate every example of conduct that may interfere with the administration of justice, limiting liability in either way might unintentionally cause some sufficiently harmful and serious conduct to be excluded from scope.[11]

6.17 A narrower test, for example, "seriously impeding or prejudicing the course of justice", we said, could "potentially limit the scope of contempt so that it did not capture some conduct, such as insults or even threats".[12]

6.18 We said that "the conduct element should be defined broadly" and that the nature of the consequence should be an interference with the administration of justice.[13] We observed that "this concept is sufficiently broad to capture the variety of existing challenges to the administration of justice, and to allow the law to respond and adapt to technological developments that may pose a threat in the future".[14] We concluded that it is not necessary to stipulate that the interference has to be undesirable,[15] and that although some uncertainty might remain as to what conduct would meet the conduct threshold, greater certainty to the law can be achieved through the fault element.[16]

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7 CP 262, para 3.6.

8 Above, para 3.7, citing *Report of the Committee on Contempt of Court*, Cmnd 5794 (1974) (Phillimore Report), para 113.

9 CP 262, para 3.7.

10 Above.

11 Above, para 3.8.

12 Above, para 3.9.

13 Above, para 3.11.

14 Above, para 3.6.

15 Above, para 3.11.

16 Above.

6.19 We provisionally proposed that "to establish the conduct element of general contempt, there should be a requirement to prove that the actual or risked consequence of the defendant's conduct was an interference with the administration of justice".[17]

6.20 On the whole, there was support for this provisional proposal and it was largely uncontentious. Of the 43 consultees who responded to CQ 3, 27 agreed, while nine disagreed, and seven gave an answer categorised as "other". However, comments from those who did not agree indicated that most did not take issue with the substance of the proposal that "interference with the administration of justice" was an appropriate component. Instead, comments were directed to three main issues which we set out below.

Should the test be "interference with the administration of justice"?

6.21 We received some concerns about the requirement being an "interference with the administration of justice".

6.22 First, the Commercial Bar Association (COMBAR) had:

> concerns about "interference with the administration of justice" being adopted at the expense of any acknowledgment of the role that even "general contempt" law should have in protecting and vindicating applicants' private law rights.[18]

COMBAR said that although general contempt does not arise often in commercial cases, "it still does have a part to play". It gave as examples: subverting an order of the court by destroying the subject matter of an action; encouraging or assisting another to disobey a court order; or providing false statements or disclosures to a court, which "potentially engage private interests to coerce parties to litigation to behave properly".[19]

6.23 Second, the Law Society of England and Wales (the Law Society) was concerned that the wording provisionally proposed "could be problematic in some situations". It said that "for example, attacking or intimidating judges after a hearing may not necessarily create an actual or risked interference with administration of justice". The Law Society also said that under the test provisionally proposed, what constitutes an interference is "subjective". For example, in the family courts, abuse of a judge might be considered merely "a run of the mill event" and not an interference, while "the Court of Appeal might conclude that swearing was an interference".

Is the scope of "interference with the administration of justice" appropriate?

6.24 Consultees who agreed tended to think that the wording is sufficiently broad. Academic Gavin Sutter said that "the focus on the conduct posing a threat to the integrity of the justice process is appropriate". The Crown Prosecution Service (CPS) said:

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17 CP 262, para 3.12.

18 The COMBAR response was prepared by a sub-committee and represents the views of that group rather than the views of COMBAR as a whole. We refer to it as the COMBAR response for convenience.

19 The response referred to the list of examples we gave in the consultation paper: CP 262, para 3.179. We discuss these in Appendix 1.

> We consider that protecting the administration of justice requires a broad definition. We think there is a sound rationale in distinguishing this from the serious offence of perverting the course of justice. The provision of non-exhaustive examples of what conduct can amount to interference, and the fault element, are important qualifications to this broad conduct element.

6.25 Two consultees noted that the test we provisionally proposed would maintain the current law. Greg Callus (barrister and editor of the contempt section of the White Book[20]) agreed that the conduct element should reflect the conduct element of criminal contempt and "should be in broadly this form".[21] The General Council of the Bar of England and Wales (the Bar Council) similarly acknowledged that our provisional proposal "would maintain the test which presently applies to the conduct which the Law Commission seeks to define as 'general contempt', and which is presently understood as criminal contempt".

Should the interference be "undesirable"?

6.26 Several consultees concurred that the interference need not be specified as "undesirable". The Bar Council said that "in particular, we agree that 'interference' connotes undesirability and that no further gloss is required". The Attorney General's Office (AGO) made a similar point, saying that "there is no need to define the consequence element of the proposed category of general contempt more narrowly". Finally, the Criminal Bar Association (CBA) said:

> We agree that the test should refer to the actual or risked consequence as being "interference with the administration of justice". Adding qualifiers to the "interference", such as "undesirable", is unnecessary.

6.27 Sam Hussaini, a barrister, said that "'interfering with the administration of justice' is fine as a conduct element". He agreed that there is no need to specify that the interference must be "undesirable", though preferred the words "prejudices the administration of justice" rather than "interferes with the administration of justice". He said that "more accurately captures what … contempt is or should be about" and did "not agree with the suggestion in paragraph 3.9 [of the consultation paper] that 'prejudices' would be too narrow and unduly limit the scope of contempt". A similar point was made by the First-tier Tribunal (Property Chamber), which suggested that an "interference" does not inherently mean an "undesirable interference", and "some words are needed to make it clear that what is covered is an interference prejudicing a fair hearing or a just outcome". Guardian News and Media (GNM) preferred something narrower to ensure that "only undesirable interventions can be prosecuted as a contempt".[22]

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20 The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

21 On Greg Callus' position generally, which was not supportive of the overall thrust of our provisional proposals for reform, see para 2.31 above and accompanying footnote.

22 GNM referred to an example of an alternative in the consultation paper of a test that referred to, for example, conduct where a person perverts, impedes or prejudices the administration of justice: CP 262, para 3.7.

Discussion

6.28 The proposal received significant and direct support. The words "interference with the administration of justice" are appropriately broad in scope to capture the conduct that ought to be caught while signifying that the mischief sought to be addressed is of public, rather than private, interest. Regarding the COMBAR concerns, this would not preclude a commercial litigant using the law of contempt to enforce private interests, though the law of contempt is, and should remain, fundamentally concerned with the public interest in the administration of justice. We are not persuaded by the Law Society's concern; whether judges invoke contempt when handling a disturbance will always be a matter of discretion, exercised as each circumstance warrants. That this may result in inconsistencies as to when contempt is invoked in some courts as compared with others is a necessary result of the flexibility that is required.

6.29 In our view an "interference with the administration of justice" is the appropriate component of this aspect of the conduct element.

6.30 Some consultee views suggest that an "interference with the administration of justice" test is too broad and should be narrowed to capture only interferences that prejudice a fair hearing or outcome. We take account of these when we look below at whether "non-trivial" is the right threshold.

Actual interference and risk of interference

Consultation

6.31 In the consultation paper we considered it plain that where there was an actual interference with the administration of justice then this should be sufficient to meet this aspect of the conduct threshold.[23]

6.32 Regarding the risk of interference, we said in the consultation paper that it should be sufficient that the conduct creates a risk of interference and that "it should not be necessary to prove that their conduct actually so interfered".[24] We recognised that although it is possible to argue that contempt liability should only be imposed in the event that conduct actually interferes with the administration of justice, that would "set too high a threshold for establishing general contempt and may impose too onerous a burden on the party bringing proceedings".[25]

6.33 We said that although it could be argued that allowing contempt to bite where there is only a risk of interference might set the bar too low,[26] where the risk of interference is sufficiently high then that risk should be sufficient to establish contempt.[27]

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23 CP 262, para 3.17.

24 Above, para 3.19.

25 Above, para 3.20.

26 Above, para 3.21.

27 Above. On the degree of risk, see para 6.40 below.

6.34 Regarding actual interference, consultation responses suggested that consultees, like us, saw this as uncontentious: no consultee argued that an actual interference should not be sufficient.

6.35 With respect to a risk of interference, there was very strong support for the provisional proposal. Most consultees simply said that a risk of interference should be included within the conduct element. Among them were the AGO, the CPS, the Family Division of the High Court and the CBA, who said the proposal would be "in keeping with the common law". Some consultees expressly said it would be inappropriate for only actual interferences to meet the conduct threshold. The Justices' Legal Advisers and Court Officers' Service (JLACOS) said conduct should fall within scope when it creates a risk of interference, and not only when attempts are effective:

> Threats, attempts to burst into private parts of courthouses and attack judges or justices etc, and many others we could have listed, are a grave affront to justice, despite the failure of their object. They ought to be deterred and punished if they occur. Unpunished, they present a picture to the public of courts which are not in control. Also the deterrent effect of contempt is considerably reduced if a contemnor can weigh punishment in the balance against the satisfaction of committing the contempt, safe in the knowledge that if they fail, there will be no punishment at all… Punishment should not depend on accidents of fate, the stout-heartedness of the person threatened, or the skill, courage or celerity of court staff in deflecting a threat. If a person intentionally behaves in a way which creates a risk, they should be punished, whether or not they succeed.

6.36 Two consultees (Social Housing Law Association and COMBAR) supported our provisional proposal to include a "risk" in the conduct threshold on the basis that the risk is "substantial", which we address below.

6.37 Four consultees raised doubts about including risk. While outliers among the views on these issues, we note the two from professional associations (the Law Society and the Criminal Law Solicitors' Association (CLSA)). They argued that it would be difficult to advise on, prosecute or defend a "risk". The CLSA did not expand on why, but the Law Society said it would be too subjective as a standard.

Discussion

6.38 We note the wide support for both actual and risked interference. The reasons expressed by JLACOS are important, and our recommendation for contempt by disrupting proceedings as a discrete form of liability also reflects these points. We were unpersuaded by the views that advising on, prosecuting or defending a risk presents too subjective a standard or cannot be practically prosecuted or defended. We note that there are criminal offences with risk elements. For instance, the conduct element of the offence of intentionally or recklessly causing a public nuisance may be established by proof that the defendant's act or omission "creates a risk of, or causes, serious harm to the public or a section of the public".[28] To establish gross negligence manslaughter requires proof that it was reasonably foreseeable that the defendant's breach of a duty of care to the victim gave rise to a serious and obvious risk of

[28] Police, Crime, Sentencing and Courts Act 2022, s78(1)(b).

death.[29] The definition of terrorism, on which several offences rest, is that action will fall within the definition if it "creates a serious risk to the health or safety of the public or a section of the public".[30] We disagree that an assessment of risk comes down to mere subjectivity; applying the test would involve an informed, reasoned assessment of the potential consequences of a defendant's conduct.

6.39 We conclude that both actual interference and risk of interference should be included in the conduct element.

Substantial risk of interference

6.40 We discuss in chapter 4 whether a "substantial" risk of interference is the appropriate degree of risk in the threshold for contempt by publication when proceedings are active. We conclude that it is and make a recommendation to that effect.[31] We take account there of the strong case for consistency between the degree of risk in the conduct thresholds for general contempt and contempt by publication when proceedings are active. The analysis in chapter 4 applies equally here: in the general contempt conduct threshold the degree of risk should be "substantial", with no further meaning added, but should nevertheless be interpreted by courts as in line with the interpretations of substantial that indicate "weight" rather than merely "not remote".[32]

Non-trivial interference

6.41 We provisionally proposed that the actual or risked interference with the administration of justice must be "non-trivial".[33] We said:

> the requisite gravity of the consequence in question must reflect the fact that general contempt is concerned with serious behaviour, which we provisionally consider to be conveyed by a test that excludes from liability any trivial interferences.[34]

6.42 We noted that at common law, courts have not always been clear about the gravity of interference that is required,[35] though in the context of criminal contempt it has been said that the conduct needs to cause or risk a "serious" interference.[36] We concluded that it seems that at common law, a person will not be liable for contempt where the conduct constitutes or risks merely a trivial interference with the administration of justice.[37] We also considered the strict liability rule, which provides for liability where a publication risks "seriously" impeding or prejudicing the course of justice in proceedings.[38] However, we said that "the case law provides little clarity on the

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29 *R v Rudling* [2016] EWCA Crim 741 at [18]-[19]; *R v Rose* [2017] EWCA Crim 1168, [2018] QB 328 at [77].

30 Terrorism Act 2000, s 1(2)(d).

31 See paras 4.53-4.57 and 4.70 above.

32 See paras 4.56-4.57 above.

33 CP 262, paras 3.17 and 3.22.

34 Above, para 3.13.

35 See, for example, *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [25], where the court simply refers to the "real risk"; *Attorney General v English* [1983] 1 AC 116 at [142].

36 See *Director of the Serious Fraud Office v B* [2014] UKSC 23, [2014] AC 1246 at [39].

37 CP 262, para 3.14.

38 Above, para 3.15.

meaning of 'serious' and, in any event, since our provisionally proposed form of general contempt liability is not strict liability, there may not be a similar need for the interference to be proven to be serious".[39]

Consultation

6.43 This was the most contentious of our provisional proposals on the conduct element of general contempt.

Support for the "non-trivial" threshold

6.44 There was some support for the non-trivial threshold. Several consultees said the reason they agreed with our provisional proposal was simply because they were satisfied that non-trivial interferences should be caught by contempt liability. Adam Gungah (a magistrate) said that "the temporary disruption to court proceedings by an unacceptable conduct clearly does 'interfere' with the administration of justice". Some COMBAR contributors thought it would be useful to prevent weaponisation of contempt, but (as explained below) others from COMBAR thought the bar should be higher.

6.45 The CPS agreed with the provisional proposal. It said that "where Convention rights are engaged, a question may arise as to whether contempt proceedings are a proportionate response to non-trivial interference with the administration of justice" but agreed that contempt proceedings were proportionate for "deliberate non-trivial interference".

6.46 Professor Helen Fenwick added a helpful gloss, stating that there is no need to define what is meant by "non-trivial" interference. She also appeared to agree with our reasoning in the consultation paper that the test does not create a problem for freedom of expression protection where the fault element is intention:

> The term "non-trivial" appears at first glance to need defining, but on further reflection, it is adequately clear; it does *not* appear to be intended to be similar in scope to "serious prejudice or impediment" in s2(2) [of the Contempt of Court Act 1981], although it might appear possibly to be closer to serious impediment. But clearly it denotes a lower threshold in terms of the conduct element which is justified due to the need to prove intent, which rescues this form of contempt from effecting too great an incursion into media freedom in relation to open justice. In terms of a non-trivial interference with specific proceedings, the time of the interference could be significant in terms of deciding whether the interference was trivial or otherwise....

6.47 Many more comments tended to express reservations or disagreement. They coalesced around two main arguments: that the term lacks certainty and clarity, and that it sets the bar too low.

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[39] CP 262, para 3.15.

Uncertainty

6.48 Several consultees expressed concerns about certainty and clarity.[40] Professor Stephen Bailey said that although he supported our provisional proposal, he had "doubts about the expression 'non-trivial'". He pointed out that only one statutory provision uses this language (the Online Safety Act 2023, section 179) and there is thus no case law on its interpretation.[41] The Law Society had concerns about how "non-trivial" would be applied in practice in different contexts. It said it might be difficult to prove a "non-trivial" interference unless an adjournment or re-trial is ordered, and even then, it would depend on the context: whereas a five-minute adjournment in the County Court would not likely meet the non-trivial threshold, in the Supreme Court it might. The CBA had similar concerns about how the words "non-trivial" would be interpreted. It gave the example of wolf-whistling at a juror and noted that, although that has been found to be a contempt,[42] such conduct may be too trivial to meet the "non-trivial" threshold we provisionally proposed. However, it accepted that "equally, there needs to be a level of seriousness specified so that truly trivial behaviour does not give rise to a finding of contempt".

6.49 COMBAR concluded that non-trivial "has been described as having a similar meaning to substantial or even as being a synonym for substantial".[43] Some of COMBAR's contributors said that the conduct threshold we provisionally proposed is useful because it makes it "clear that trivial matters should not form part of contempt proceedings", which they note "may help reduce the threat of inappropriate 'weaponisation'". Others from COMBAR said that "given the stated aims of the consultation to reduce weaponisation of contempt and reduce the burden of satellite litigation, some [of COMBAR's contributors] felt that use of the term 'substantial' was more appropriate". However, they recognised that if we accept that "non-trivial" is to be interpreted as "substantial", this would create "awkwardness" in the test ("substantial risk of substantial interference"), which would need clarification.

The threshold should be higher than "non-trivial"

6.50 The main theme that emerged in critical comments was that the threshold should be higher than "non-trivial", with the most frequent suggestion being that it should be "serious".[44]

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40 The CBA; the Law Society of England and Wales; Professor Stephen Bailey; Transparency Project; Dr Dimitris Xenos.

41 This offence was enacted following a Law Commission recommendation: Modernising Communications Offences (2021) Law Com No 399, recommendation 3, para 3.71.

42 *R v Powell* (1994) 98 Criminal Appeal Reports 224.

43 The response cites, for example *Pipe v Coventry University Higher Education Corporation* [2024] EWCA Civ 191 at [44]; *Sea Shepherd (UK) v Fish & Fish* [2015] UKSC 10, [2015] AC 1229 at [57] (Lord Neuberger): "the assistance provided by the defendant must be substantial, in the sense of not being de minimis or trivial".

44 Garden Court Chambers, Civil Liberties Team; academics from the School of Journalism and the Centre for Freedom of the Media at the University of Sheffield (University of Sheffield CFOM); GNM; Dr Richard Jones; the Media Lawyers Association (MLA); Professor Bailey.

6.51 Dr Dimitris Xenos said that the "non-trivial" threshold would be disproportionately low and infringe the right to freedom of expression protected by article 10 of the European Convention on Human Rights (ECHR):

> the proportionality examination [under human rights review] mainly requires that the state show, first, "a pressing social need" for any restriction of freedom of speech and, then, balance this need against the public interest involved in the speech concerned.

On his analysis, "the suggested 'non-trivial' harm is the lowest threshold of liability that can exist and, as such, it clearly does not conform with 'the pressing social need' standard of human rights law".

6.52 The Media Lawyers Association (MLA) made the following point in a different context, but it is relevant here:

> the principle of proportionality requires that any definition of the conduct element must be narrowly tailored to the conduct it seeks to deter and must go no further than is necessary to achieve that objective. … [The proposed test] sets the scope of the conduct element too widely and is too imprecise to be necessary and proportionate under article 10.

6.53 Citing the decision of the Supreme Court in *Serious Fraud Office v O'Brien*, the MLA and the Bar Council both said that the current law already requires an interference to be "serious".[45] The Bar Council stated that "given the available sanctions for contempt, the dilution of the conduct element in the way proposed would require a proper justification". The preference for the term "serious" was especially emphasised in the context of the need to protect freedom of expression. Garden Court Chambers, Civil Liberties Team said that given general contempt implicates freedom of expression, it is "essential to impose a high bar for liability in order to avoid any 'chilling effect' in relation to freedom of speech". GNM was concerned with the scope of general contempt, saying that "the proposals made by the Law Commission in relation to general contempt are overly wide", "greatly expand the ambit of the current law" and "will have a chilling effect on freedom of expression". Among GNM's arguments was that although "in reality, common law contempt has seldom been invoked against the media … this may change, particularly in circumstances where … the law is codified".

6.54 Professor Bailey argued the threshold should be "serious" but also looked at "significant" as a term. He said that "as a matter of ordinary language, it is difficult to see that anything 'non-trivial' is 'serious'", and that gravity increases from: "non-trivial",

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[45] They cited *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23; [2014] AC 1246 at [39] (Lord Toulson JSC): "A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of a trial, threatening witnesses or publishing material likely to prejudice a fair trial". The MLA also cited *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 at [22]-[27]. Further, the MLA disputed our characterisation of *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Criminal Appeal Reports 15 at [24] (CP 262, para 3.14, fn 13) observing the reference to the "real and specific risk of serious interference with the proper administration of justice".

"significant", and finally "serious". He concluded that "it does not seem attractive to sanction 'almost-but-not-quite-trivial interferences'".

Discussion

6.55 The points made in consultation are wide-ranging and it will be helpful to address two of them briefly.

6.56 There are good reasons not to choose "substantial" as the threshold, especially as the degree of risk and the degree of harm are qualitatively different. As the Bar Council point out, using the same word would cause confusion.

6.57 While we can see the logic in Professor Bailey's argument that there is a spectrum that runs from non-trivial through significant and up to serious, we do not think that the use of a mid-point term would be helpful. There does not inherently or necessarily seem to be clear water between "non-trivial" and "significant", especially as it would be applied in factual circumstances where the distinction would have no effect and the terms would simply be equated. Although it might be argued that, even if there is no clear water between the terms, the term that suggests an apparently lower threshold may risk a chilling effect. As we explain below, in our view that risk is mitigated by the fault threshold that requires proof of specific intent.[46]

6.58 Given that, there is a choice to be made between "non-trivial" and "serious". Our view is that "non-trivial" is the appropriate standard and we reach that conclusion for the following reasons.

6.59 First, compliance with article 10 cannot be seen solely in terms of this component of the conduct element. It must be seen alongside other components (including the "substantial risk" component) and, importantly, alongside the fault element. As the CPS noted, where proof of intention is required – and we recommend below it should be – then the compliance concerns diminish. To foreshadow the discussion of fault below, we agree with GNM that while common law contempt has not been used against the media frequently, codification may make it more likely to be used. Importantly, although such proceedings against the media have been unusual, the possibility of contempt proceedings carries a chilling effect, the scope of which will vary with (for instance) how certain the law is, the level of punishment for a breach of the law, the costs of defending proceedings, and how risk-averse a publisher is. However, there is a protection against that risk of a chilling effect and for freedom of expression in the recommendation below that, to establish fault in general contempt, there must be proof of intention to interfere with the administration of justice.[47] Were this not so, we would see the case for a threshold of "serious" as compelling.

6.60 Secondly, we have considered the question of alignment with the threshold for the degree of interference we recommend for contempt by publication when proceedings are active, which (adopted from the current law under the Contempt of Court Act 1981 (CCA 1981)) is "seriously impede or prejudice". The conduct threshold for that form of liability is high but the fault threshold is low because the defendant's fair trial rights are at stake. In general contempt, as we explain below, we recommend that intention

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46 See further paras 6.137-6.138 below.

47 Above.

should be the threshold for fault. Were the conduct thresholds to be aligned for the two forms of contempt then we see some significant risks. One is that a threshold of "serious interference" would not be the same as "seriously impeded or prejudiced".[48] Adopting thresholds that are almost the same, but not quite, carries a risk of litigation and uncertainty. That would not be resolved by using exactly the same terminology because the latter is applied with reference to specific proceedings. However, even if that point were put to one side there is another, more significant risk. The risk would be that an interpretation of the threshold in general contempt would affect the interpretation of the threshold in contempt by publication when proceedings are active, with the result that the latter threshold is lowered or diluted. There would rightly be concerns about a chilling effect, especially given the lower fault threshold in that form of contempt. That would be an unacceptable risk.

6.61 Thirdly, we do not agree that a recommendation of "non-trivial" would necessarily be changing the law as it stands, nor that it would simply and always mean "anything except the trivial", especially as what is "non-trivial" will depend on context. We note the comments of COMBAR in this regard that it can operate to mean "substantial". We also note that in the Court of Appeal it has been said (not in the contempt context, but where the meaning of "non-trivial" was the subject of the Court's attention) that "the meaning of 'non-trivial' is not confined to that which is only just not trivial. … It can also mean 'significant'".[49] The comments in *O'Brien* (that criminal contempt requires serious interference) were made in obiter. The Supreme Court was not scrutinising the threshold or making a decision about it, nor (for example) explaining the boundaries of civil or criminal contempt. Importantly, the Court did not explain what "serious" means in the context of contempt.

Omissions as conduct

6.62 In our provisional proposals for contempt by breach of order, and in our recommendations for that form of contempt, a deliberate act or omission would satisfy the conduct element.[50] We did not address in the consultation paper whether an omission would suffice for conduct in general contempt.

6.63 GNM said "it would be helpful if the law could make clear … [that] 'conduct' means some positive action on the part of the person accused". It gave as an example the desire for reassurance that there are no obligations on journalists to inform the authorities of potential contempts by third parties.

6.64 Regarding the current law, the authors of *Arlidge, Eady & Smith* take the view that it is:

> difficult to conceive of circumstances in which a criminal contempt could be committed, by way of interference with the administration of justice, by omission

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48 CCA 1981, s 2(2).

49 *Baker Tilly UK Audit LLP v Financial Reporting Council* [2017] EWCA Civ 406 at [36] (Arden LJ).

50 See paras 3.70-3.73 above; CP 262, para 2.47.

only. Normally, one would expect to find some positive act giving rise to the relevant risk or interference.[51]

6.65 We agree, and it seems plain that the position would and should be the same for general contempt.

Recommendation on conduct

6.66 Given our conclusions on the components above, we make the following recommendation regarding conduct.

Recommendation 25.

6.67 We recommend that the conduct element of general contempt should be satisfied where a person's conduct interferes with the administration of justice in a non-trivial way or creates a substantial risk of a non-trivial interference with the administration of justice.

FAULT

6.68 One overriding question falls for consideration in this part of the chapter: what degree of fault should be required to establish general contempt?

6.69 In the consultation paper we stated the overall effect of our provisional proposals on the fault element for general contempt:

> The effect of our provisional proposals regarding fault is that the scope of liability for contempt would continue to require proof of intention to interfere with the administration of justice. However, we also look at whether proof of recklessness should suffice where general contempt is committed by conduct other than publication.[52]

6.70 We sought views on these issues using four consultation questions.[53]

6.71 These set out a suite of possible options, and as comments in consultation responses on individual questions often raised issues regarding related questions, we begin by setting out the position from the consultation paper across all of these.

The fault options in the consultation paper

The provisional proposal on intention

6.72 In the consultation paper we explained that although we are disposing of the distinction between civil and criminal contempt, "given that contempt liability may give

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51 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) (*Arlidge, Eady & Smith*) para 11-4.

52 CP 262, para 3.66.

53 Above, paras 3.76, 3.114-3.116.

rise to criminal sanctions such as imprisonment, we draw on general criminal law principles in approaching the fault element":[54]

> The criminal law distinguishes between a basic intent, which relates to the act itself, and a specific intent, which relates to the purpose or consequences of that act. Applied to the contempt context, where, for example, a person had glued themselves to a courtroom fixture such as the dock, basic intent would be established by proof the defendant intended to glue themselves to the dock, while specific intent would be established by proof that they intended to interfere with the administration of justice.[55]

6.73 Our view was that more than just basic intent is required because contempt sanctions may be up to two years' imprisonment and because expression and association (which are constrained by contempt) are protected rights under articles 10 and 11 of the ECHR.[56]

6.74 We explained that intention may be either direct or indirect; it will be sufficient to establish intention on either basis:

> A person is taken to have direct intention where they "acted in order to bring about" a particular result. Indirect intention arises where they "did not act in order to bring about that [result], but [they were] aware that it was a virtually certain consequence" of their conduct. In the context of our provisionally proposed form of general contempt, the relevant result is a non-trivial interference with the administration of justice. This test sets a high bar: absent proving direct intention, for a person's foresight of consequences to suffice to establish intention, "the probability of the consequence taken to have been foreseen must be little short of overwhelming".[57]

6.75 Our provisional view was that:

> a defendant who acts with specific intent should be culpable. This intent will be established upon proof that a defendant acted in order to bring about a non-trivial interference with the administration of justice. We note that, as the case law shows, proof the defendant knew that such an interference was a virtually certain consequence of their conduct will be sufficient to infer intention.[58]

6.76 CQ 9 asked:

> We provisionally propose that the fault element of general contempt should be satisfied by intention, which will be established where it is proved that the defendant intended to interfere with the administration of justice in a non-trivial way.

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54 Above, para 3.67.

55 CP 262, para 3.68.

56 Above, para 3.69.

57 Above, para 3.71 (references omitted).

58 Above, para 3.75, with the case law referred to being discussed at paras 3.72-3.74.

Do consultees agree?[59]

Publication: the provisional proposal that only proof of intention should suffice

6.77 In the consultation paper we opened our discussion of recklessness in the following way:

> In some circumstances, a person may not have intended the contempt (in the manner described above) but may still have had a level of awareness that indicates culpability. The concept of recklessness may provide an alternative basis for liability in these circumstances.[60]

6.78 We said, however, that a recklessness threshold was not appropriate where general contempt had been committed by publication; in those circumstances we provisionally proposed that it should be essential to prove intention:

> Although the recklessness test would require an assessment of reasonableness that took account of the right to freedom of expression protected by article 10, there is a clear risk that there would be a chilling effect on publication, to the detriment of public discussion of matters of public interest. Our provisional view is that the better approach is to retain the intention requirement.[61]

6.79 In CQ 11 we asked whether consultees agreed with our provisional proposal on general contempt by publication:

> We provisionally propose that where general contempt is committed by publication, the fault element for general contempt should be satisfied only by intention.[62]

Conduct other than publication: the open question on recklessness

6.80 The open question on recklessness was thus restricted to circumstances where general contempt was committed by conduct other than publication. In a lengthy discussion we explained what recklessness was and why we were seeking views about whether it should suffice in these circumstances.

6.81 We explained that in 1988 the Court of Appeal held that intention was always required to establish fault in contempt, but we noted that the test for recklessness was that laid down in *Caldwell*:

> where the awareness of the risk was to be judged by objective standards: if in the circumstances an "ordinary prudent individual" would have been aware of "the possibility of [the relevant] kind of harmful consequence". Thus, when the Court of Appeal rejected the proposition that recklessness should be sufficient to establish fault, it was rejecting an objective test.[63]

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59 Above, para 3.76.

60 CP 262, para 3.77.

61 Above, para 3.108.

62 Above, para 3.114.

63 Above, para 3.79 (references omitted), citing *R v Caldwell* [1982] AC 341 at 354.

6.82 We explained that the position changed in *R v G*, which now governs recklessness not on an objective standard (as *Caldwell* did) but on a subjective standard. Under this test a person will be reckless:

> with respect to –
>
> (i) a circumstance when he is aware of a risk that it exists or will exist;
>
> (ii) a result when he is aware of a risk that it will occur;
>
> and it is in the circumstances known to him, unreasonable to take the risk.[64]

6.83 Given the move to a subjective test, our view was that we should look again at whether recklessness should suffice for fault in contempt, stating:

> We welcome consultees' views as to whether a person who engages in the requisite conduct while aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice may be sufficiently culpable and, where it was unreasonable to take the risk (discussed below) should be subject to liability for general contempt.[65]

6.84 We were clear that this would require a subjective awareness of the risk.[66] We said of the reasonableness of taking the risk:

> Having proved that the defendant was aware of the risk, it would then need to be proved that, in the circumstances as they were known to the defendant, it was unreasonable to take that risk.
>
> An assessment of whether it was reasonable to take a risk will at times engage issues of rights. This will be particularly relevant where the conduct involves expression, which is protected under article 10 of the ECHR. It may also be relevant where the conduct involves association with others, such as protest, as freedom of association is protected by article 11. These, however, must be balanced against the right to a fair trial, which will be compromised should there be an interference with the administration of justice.[67]

6.85 We noted that articles 10 and 11 are qualified rights, quoting article 11(2):

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others.[68]

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64 CP 262, para 3.80 (references omitted) citing *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41] (Lord Bingham).

65 CP 262, para 3.87.

66 Above, para 3.94.

67 Above, para 3.98-3.99.

68 Above, para 3.103.

6.86 We explained that an assessment of the reasonableness of taking the risk would require the court to ensure that "any limits placed on the defendant's rights to expression or assembly are proportionate to the legitimate aims that are being protected", which is a fact-specific exercise.[69]

6.87 Given the provisional proposal in CQ 11 regarding publication, CQ 12 was limited to conduct other than publication:

> We invite consultees' views on whether, where general contempt is committed by conduct other than publication, the fault element for general contempt should be satisfied:
>
> (1) only by intention, or
>
> (2) either by intention or recklessness.[70]

6.88 In CQ 13 we presented a provisional proposal that, if recklessness were to be sufficient for fault, the test should be that in *R v G*:

> If recklessness is to be an alternative fault element where contempt is committed by conduct other than publication, we provisionally propose that recklessness should be established by proving that:
>
> (1) the defendant was aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice; and
>
> (2) in the circumstances as the defendant knew them, it was unreasonable to take the risk.
>
> Do consultees agree?[71]

Consultation

6.89 The responses across the four consultation questions were extremely mixed.

6.90 In CQ 9 (on intention), for example, there were 48 responses. Of these, 26 agreed with our provisional proposal, 11 disagreed, and 11 responded "other". The comments suggest there may be different ways to interpret the responses. For instance, it is difficult to say how many of the responses were agreeing (or not) that intention should suffice, or agreeing (or not) with what we provisionally proposed must be proved for intention.

6.91 In CQ 11 (on requiring intention for general contempt by publication), of the 38 consultees that responded to this question, 24 agreed, 7 disagreed, and 7 were categorised as "other".

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69 Above, para 3.105 (references omitted).

70 CP 262, para 3.115.

71 Above, para 3.116.

6.92 In CQ 12 (on whether recklessness should suffice for conduct other than publication) there were 39 responses. Option 1 (only intention should suffice) was chosen by 15 consultees, and option 2 (intention or recklessness) was chosen by 24.

6.93 In CQ 13 (on whether the *R v G* test should apply if recklessness were to be sufficient) there were 39 responses, of which 21 agreed, 5 disagreed, and 13 were "other".

6.94 Although there is no single or, mostly, even a predominant view that can be discerned from the responses, the comments that were offered across the different questions provided clear insight into the substance of the views and concerns held by consultees.

Intention

6.95 In chapter 5 we explain there was no doubt that that proof of intention to interfere with the administration of justice (that is, specific intent) should be sufficient to establish fault and we set out consultees' views on the more contentious matter of whether *only* intention should be sufficient.[72] We note in that chapter that where freedom of expression was engaged then there were strong views that only proof of specific intention should suffice.[73] We cite many responses that argued that there should be a lower fault threshold where proceedings have been disrupted. Persuaded by consultees, we recommend in chapter 5 that contempt by disrupting proceedings should be a form of liability.[74]

6.96 Against that background we consider now whether anything less than proof of specific intent should be sufficient to establish general contempt.

Recklessness

6.97 With respect to the recklessness test that was the subject of the provisional proposal in CQ 13, 21 of the 39 consultees who responded agreed that if recklessness were to be sufficient then the *R v G* test should be used.[75] However, we also heard concerns about it. COMBAR for example said:

> As to the operation of the recklessness test itself, we note that the *R v G* test is intended to be adapted to marry up with the suggestion at question 6 that the respondent's conduct must have created a substantial risk of interfering with the administration of justice in a non-trivial way. The *R v G* test for recklessness is usually based on (a) a respondent being aware of a risk that exists or will exist and (b) it being unreasonable in the circumstances known to him to take that risk. The Law Commission suggests adapting part (a) of this test to accommodate the requirement set out above that the respondent must have created a substantial risk.
>
> It is hard to envisage a situation where a respondent is aware that his conduct has created a substantial risk of interfering with the administration of justice, and it was

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72 See paras 5.10-5.25 above.

73 See para 5.12 above.

74 See para 5.48 above.

75 These included the CBA; Housing Law Practitioners' Association (HLPA); JLACOS.

nonetheless reasonable for him to take the risk. Part (a) of the test, as adapted, therefore risks usurping part (b).

There was also concern that the test for recklessness in *R v G* is already apt to be misunderstood ….

Some Contributors therefore point out that broadening contempt out to include recklessness risks stretching contempt too far into the realms of "risk".

The "publication / other than publication" distinction

6.98 Most responses offered no comment on this distinction. We might infer from the responses to CQ 11 that many consultees thought publication was worthy of strong protection on freedom of expression grounds, but at least some of those consultees who agreed did so on the basis that specific intent should be required for any form of general contempt.[76] In addition, the comments showed the focus of many consultees was on contempt in the face of the court rather than publication contempt and so the split was likely of less concern to them.

6.99 Of those who did turn their attention to the distinction, none told us that it was a good idea and all criticised it.

6.100 The CPS, taking in CQ 12 the view that only intention should be sufficient said:

> We would encourage the distinction between types of contempt to be as clear and meaningful as possible. We do not think there needs to be two types of general contempt. First, we consider the elements should be the same: only intention should suffice for this serious form of contempt (or criminal offence). Second, because we do not consider that publications should be put in a different category to other types of intentional interference with the administration of justice. We think the distinction is of doubtful use, both because some publication contempts do not engage free speech, and because some non-publication contempts may engage other rights. For instance, use of social media to harass witnesses or intimidate victims entitled to anonymity is a publication contempt unlikely to amount to free speech. By contrast, non-publication forms of contempt (or a like criminal offence) might engage other rights such as freedom of assembly and association or freedom of thought, conscience and religion. Third, Convention rights are protected by the obligations on public authorities without needing to create a different category of general contempt because of a possibility that freedom of expression is engaged (in our view, a number of publication general contempts would not).

6.101 GNM said:

> The Law Commission has potentially drawn a distinction between the fault element required for (i) general contempt by publication; and (ii) general contempt by conduct other than publication, appearing to form the view that freedom of expression can be protected by applying a higher threshold to the former alone.

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[76] See for example the comments of the AGO at para 5.13 above.

> The Law Commission state that section 2(1) of the Contempt of Court Act 1981 provides an "appropriate definition of publication", namely "'publication' includes any speech, writing, programme included in a programme service, or other communication in whatever form, which is addressed to the public at large or any section of the public". This suggests that steps leading up to publication would not amount to publication and it is only the act of actually publishing that prompts the difference between the two forms of contempt.
>
> This fails to take into account that before publication journalists may take steps which could fall within the definition of general contempt by conduct other than publication. The Consultation does not appear to fully take this on board, although it may be illustrated by the fact that a number of the cases cited for general contempt in the consultation paper actually involve media organisations.

6.102 Greg Callus said:

> It makes no sense whatsoever for there to be a split in "General Contempt" based on whether or not the contempt is committed by "publication", where "publication" means that only intent and not recklessness is sufficient, whilst simultaneously having a strict liability framework for publication contempt where proceedings are active.
>
> Article 10 ECHR has a role to play, but it attaches to every form of expression (including publication at common law) not just to "publication" in the meaning of s.2(1) and s.19 [of the CCA 1981]. Article 10 isn't only engaged when the publication is to the public at large: it is engaged by all publication (private messages, slogans on Tshirts, outbursts when the Court is sitting in private as well as in public).
>
> Having a different intent element because article 10 is potentially engaged is unworkable: it is almost always engaged, but in cases of criminal (non-strict liability) contempt, the interference is almost always necessary and proportionate. A contemnor who wishes to argue that by allowing subjective recklessness the committal for contempt would breach article 10 rights is welcome to make that argument in the particular case, but I find it hard to conceive of a situation where that argument would succeed. …
>
> The better solution is to have a unitary mens rea for criminal/general contempt (excluding the strict liability regime under the 1981 Act) which is either limited to (a) specific intent; or (b) specific intent or subjective recklessness.

6.103 Garden Court Chambers, Civil Liberties Team noted that article 10 and 11 rights may arise in conduct other than publication. It is likely they had protest in mind, which was the focus of their response, but the point is a general one:

> It is our view that the fault element for general contempt should be satisfied only by intention and not by recklessness. This is necessary in order to protect the article 10/11 ECHR rights of potential defendants (which may arise in contempt other than by publication).

6.104 The Bar Council said:

We would observe that the introduction of different tests for *mens rea* relating to "general contempt by publication" and "general contempt other than by publication" risks undermining the clarity which the Law Commission seeks to introduce to this area. That is so not least because what constitutes publication is not without ambiguity (for example it is generally understood to bear a different meaning at common law than it does in the context of the strict liability form of contempt).

Discussion

6.105 From the wide-ranging views of consultees two points have been central in shaping our recommendations.

6.106 The first we deal with in chapter 5, which is that courts must be able to deal with disruptive conduct, and the contempt liability framework should ensure that this can be done.

6.107 The second is that our provisionally proposed distinction between general contempt by publication and general contempt by conduct other than publication with different fault thresholds is problematic. We are persuaded by consultees' criticisms. Although publication is an important part of freedom of expression, it is not the only way that the right is engaged. As consultees have pointed out, it is clearly engaged by conduct other than publication including, for example, journalistic activity and protest. The distinction would also give rise to uncertainty and legal challenges as to whether conduct constitutes publication. This does not aid our goal of simplification. We are persuaded that to maintain the distinction would be neither appropriate nor practical. Accordingly, our recommendations for general contempt will not employ that distinction.

6.108 Recklessness was the lower threshold on which we consulted. The support for this was significant, with 24 of 39 consultees in favour of intention or recklessness, as against 15 who preferred intention only. However, in responses and in consultation meetings the support for recklessness was neither universal nor unqualified. Some consultees wanted assurance that a recklessness threshold would be subjective, and others saw the potential for confusion and unreasonable expansion. But most marked was the support for the view that the fault threshold in general contempt should be lower than recklessness; it should in effect be the standard that was laid down in *Jordan*,[77] requiring only basic intent and not requiring any proof that the defendant intended to interfere with the administration of justice. The driving motivation behind that view was that this is necessary if the courts are to be able to deal with disruptive conduct.

6.109 Having taken account of the disruptive conduct concerns in chapter 5, in our view neither a basic intent threshold nor a recklessness threshold is suitable for general contempt because they do not provide sufficient protection for freedom of expression. They go beyond what is necessary and proportionate. Instead, we have concluded that specific intent should be the fault threshold in general contempt. We think that, given our recommendation on contempt by disrupting proceedings, and further

[77] *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30.

criminal offences (that we recommend below), general contempt should require proof of intention to interfere with the administration of justice.

6.110 A requirement for specific intent provides a crucial protection for freedom of expression and for freedom of association. That protection is important given the range of conduct that engages these rights, the public interest in protecting those rights, and compliance with their protection under human rights laws. There was significant support from consultees for intention as the threshold, including because – given the conduct threshold we have recommended – it is what would render contempt laws a necessary and proportionate measure to protect the public interest in the administration of justice. This alone would be sufficient for us to reach a conclusion that intention is an appropriate threshold for general contempt and that the threshold should be no lower.

6.111 Nevertheless, we have considered consultees' arguments that the fact contempt may result in imprisonment does not justify a specific intent threshold because there are criminal offences with greater sanctions that require proof only of basic intent. In our view these objections do not take account of two significant differences between criminal offences and contempt. First, a person charged with a criminal offence has the full protection of the criminal law, including in relation to procedure and sentencing. Secondly, criminal offences can only be dealt with in criminal courts, whereas contempt laws empower non-criminal courts to commit a defendant to prison. While we will look at procedure and sentencing in part two of our report, because our recommended liability framework does not create a criminal offence of contempt,[78] and even though our provisional proposals seek to enhance protections for contempt defendants, both those differences will persist in some form.

6.112 In sum, our view is that specific intent is the appropriate threshold for general contempt. It provides appropriate protection for freedom of expression; the limits it imposes are necessary and proportionate.

6.113 The relationship between the fault and conduct thresholds is important because only when read together do they describe the scope of what falls within general contempt. Our recommendation for an intention threshold for fault sits alongside our recommendation for a conduct threshold of "non-trivial" interference. We reiterate a point made above: were the fault threshold to be lower than specific intent then there would be a compelling case for a conduct threshold of "serious", rather than "non-trivial" interference.[79]

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78 See paras 2.48-2.74 above.

79 See para 6.59 above.

Recommendation on fault

Recommendation 26.

6.114 We recommend that the fault element of general contempt should be satisfied by intention, which will be established where it is proved that the defendant intended to interfere with the administration of justice in a non-trivial way.

BEFORE PROCEEDINGS COMMENCE AND AFTER PROCEEDINGS HAVE CONCLUDED

6.115 In chapter 3, we explain that contempt by breach of order or undertaking applies here there has been an order made by the court or an undertaking given. A contempt may still be committed while an order is in force even if the proceedings in which the order was secured or undertaking given have concluded. In chapter 4, we explain that contempt by publication when proceedings are active will only apply after proceedings become active, and will not apply when they are no longer active, and we made recommendations about what the active period should be. In chapter 5, we recommend that contempt by disrupting proceedings should require the defendant to have been aware that legal proceedings were in existence at the time of their conduct, thus necessarily confining the points in time within which that form of contempt can apply.

6.116 Here, we look at when general contempt should apply. It will be self-evident that it should apply once proceedings have been commenced, but whether it should apply before proceedings have commenced or after proceedings have concluded are contentious matters.

Before proceedings commence

Consultation

6.117 In the consultation paper we considered whether general contempt should apply before proceedings commence. We focussed on the position of the media when reporting occurred before criminal proceedings were active (and thus before there could be liability under the CCA 1981 "strict liability" rule).[80] We said that it is "well established that the law of contempt will apply when proceedings have not yet commenced, but when they are 'imminent'", and that, following the expansion of the law in *Attorney General v News Group Newspapers*,[81] it will apply "also prior to that point, when proceedings are not yet imminent".[82]

6.118 We noted that "the meaning of 'imminent' has long been the subject of controversy"[83] and that, because it is imprecise, it might be unclear what period of time the word

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80 CP 262, paras 3.31-3.54.

81 *Attorney General v News Group Newspapers* [1989] QB 110 at 133; see also *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1207 (Bingham LJ).

82 CP 262, para 3.31.

83 Above, para 3.36.

"imminent" covers.[84] We noted what was said in *News Group Newspapers*, that "where a prosecution is virtually certain to be commenced and particularly where it is to be commenced in the near future, it is proper to describe such proceedings as imminent".[85] However, in some situations, it might not be so obvious. We recognised that the uncertainty as to the reach and scope of the word might have a chilling effect on freedom of expression since a journalist cannot know when contempt applies.[86] We noted the criticism levelled in *Arlidge, Eady & Smith* that, especially in the context of investigative journalism, "exposure to liability for contempt when proceedings 'may never materialise' is not easy to reconcile with the protection of freedom of expression provided by article 10 of the ECHR".[87] We noted particular concerns of journalists about the law of contempt applying to criminal investigations before criminal proceedings are active and recognised that this may result in journalists "self-censoring".[88] We also referred to some judicial criticism of the law of contempt applying before proceedings are commenced.[89]

6.119 We said that "the concerns about uncertainty and reach should be seen in light of the requirement that there must also be an intention to interfere with the administration of justice"[90] (though we noted that were the fault threshold to be lower than intention then the concerns about a chilling effect would be greater).[91] We said that there are currently criminal offences which seek to address threats to the administration of justice before proceedings are active, for example, the offence of intimidating witnesses[92] or the common law offence of perverting the course of justice, which applies from the point where an allegation is made that may result in an investigation.[93]

6.120 We took the provisional view that, despite the concerns raised, the requirement to prove intention to interfere with the administration of justice went a long way to diminish any chilling effect, even while accepting that it "does not fully address the problems of uncertainty and reach of the law where proceedings have not yet commenced and, especially, where they are not yet even imminent".[94] Our provisional proposal was stated in CQ 7:

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84 This concern was noted by the Phillimore Committee. Phillimore Report, para 117.

85 *Attorney General v News Group Newspapers* [1989] QB 110 at 135.

86 CP 262, para 3.36.

87 Above, para 3.37, referring to what is argued in *Arlidge, Eady & Smith* (2019) para 5-76.

88 CP 262, paras 3.41-3.44.

89 Above, para 3.38. *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1229-1230 (Hodgson J), see also at 1225 (Hodgson J). The criticism was that *News Group Newspapers* was wrong to extend contempt law beyond imminent proceedings.

90 CP 262, para 3.39.

91 Above, paras 3.39-3.40.

92 Criminal Justice and Public Order Act 1994 (CJPOA 1994), s 51(1); CP 262, paras 3.46-3.47.

93 CP 262, para 3.48.

94 Above, para 3.53.

We provisionally propose that the law of contempt should continue to apply before proceedings have commenced, including when proceedings are imminent and also before proceedings are imminent.

Do consultees agree?[95]

6.121 Forty consultees responded to this CQ. Of those, 30 agreed, five disagreed, and seven gave an answer categorised as "other". There were four key themes in the responses.

6.122 First, it was clear that agreement with the proposal was frequently prompted by the provisionally proposed fault threshold – intention to interfere with the administration of justice.[96] A fault threshold lower than intention would not have attracted the same support.

6.123 Secondly, even among those who disagreed with the proposal, there was a view that the law could justifiably and proportionately apply prior to proceedings commencing, but not before proceedings are pending or imminent. GNM said:

> [The proposal is] overly wide and vague and would have a chilling effect on journalism and article 10 rights. We do not consider there to be any specific need for general contempt affecting publications to apply for such a wide timeframe and would suggest that any liability should begin when the relevant proceedings are "pending or imminent".
>
> [The proposal] means that general contempt could apply to any cases where a media organisation investigates potential crimes, even where the police is not involved and the prospect of proceedings is remote. There is a danger such investigations could be interpreted as interfering with the administration of justice in a non-trivial way or result in a substantial risk of such a non-trivial interference. There is also a risk that intention may be inferred, particularly if the reporting exposed wrongdoing that the journalists considered warranted a police investigation/prosecution. The work undertaken by journalists investigating stories that may uncover potential crimes is in the public interest. Investigative journalists should be able to do their work and be given credit for this work without encountering the prospect of severe legal sanctions, including possible imprisonment and substantial fines.

6.124 Thirdly, and this would be particularly relevant if the law were only to apply from the time proceedings are imminent, there was dissatisfaction with the lack of clarity on the meaning of "imminent". That dissatisfaction came from consultees who agreed, disagreed and who answered "other".[97] There were some attempts to give it a clear meaning, even while allowing "imminent" to include a period some time before proceedings have commenced. Academics from the School of Journalism and the

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95 Above, para 3.54, CQ 7.

96 For example: Professor Helen Fenwick; Professor Bailey; Criminal Bar Association (CBA); the General Council of the Bar of England and Wales (the Bar Council); Gavin Sutter; Greg Callus (responding "other").

97 For example: the MLA; Impress; PA Media; GNM; University of Sheffield CFOM; Paul Foster; Dr Jones; the Bar Council; Professor Fenwick.

Centre for Freedom of the Media at the University of Sheffield (University of Sheffield CFOM) proposed that proceedings should be considered "imminent" when "it is obvious to, or can reasonably be expected by [a prospective publisher] that proceedings will become 'active' within 28 days".[98]

6.125 Fourthly, it was pointed out that in civil proceedings where a contempt application has been made on the ground that there has been a false statement made to the court, the law applies before proceedings have commenced. In this regard the CBA drew attention to the Court of Appeal's application of *Attorney General v News Group Newspapers* in *Jet2 Holidays v Hughes*.[99]

Discussion

6.126 We have reached the conclusion that general contempt should apply before proceedings have commenced, including before they are imminent. There have been two aspects of the law that have driven our consideration of consultees' responses and this conclusion. The first is whether our conclusion that general contempt should apply before proceedings have commenced restricts freedom of expression disproportionately and unnecessarily and, especially, whether it will have an adverse effect on investigative journalism. On this issue we have been especially mindful of the issues discussed in the consultation paper and the responses from consultees on those points. The second relates to the administration of justice in civil proceedings.

6.127 As we explain above, our recommendations do not include the two strands of general contempt (one by publication, one by conduct other than publication) that we provisionally proposed.[100] Instead, we recommend one form of general contempt with the same conduct and fault elements regardless of what type of conduct is in issue. This means that were general contempt only to apply when proceedings have commenced or when they are imminent, then that would be the position for all general contempt. It is neither viable nor wise to make one set of rules for some types of conduct – such as publication – and a different set of rules for others.

Publication and investigative journalism

6.128 It may be observed that the question of whether general contempt should apply before proceedings have commenced should be viewed against the background of our recommendation in chapter 4 that for the purposes of contempt by publication when proceedings are active, proceedings should not be deemed "active" until the point of

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98 A detailed elaboration was provided, including provision for notification by the AG or investigating authorities that would trigger a 28-day period in different circumstances, as well as defences.

99 *Jet2 Holidays v Hughes* [2019] EWCA Civ 1858, [2020] 1 WLR 844 at [31]-[33], citing *Attorney General v News Group Newspapers* [1989] QB 11. This point was made by the CBA but was raised by Forum of Insurance Lawyers (FOIL) in a different context.

100 See paras 6.98-6.104, 6.107 above.

charge.[101] Thus, general contempt will be the relevant law at all points, including in the period between arrest and charge.[102]

6.129 We agree with the responses from media and other consultees that, as we stated in the consultation paper, the absence of a specific point in time from which the law applies is troubling. It is certainly not the ideal. However, we do not agree that it renders the law unworkable or that it makes the law so uncertain that it falls foul of article 10. This is because there must be proof of intention to interfere with the administration of justice; that is the safeguard that protects freedom of expression.

6.130 When the administration of justice is engaged, there will be constraints on freedom of expression. In *Attorney General v Times Newspapers*, Lord Diplock provided a statement of what the administration of justice demands:

> The due administration of justice requires: first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedures adopted in courts of law; and thirdly that, once the dispute had been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law.[103]

6.131 We agree with this statement of what the administration of justice requires. These requirements are not time-bound and it will be a question of fact as to whether the administration of justice is engaged in any given circumstances.

6.132 In the criminal context it is accepted that it can be engaged in the investigatory stage. In *Attorney General v MGN Ltd & News Group Newspapers* the Divisional Court accepted that the "fade factor" may alleviate the risk of prejudice to a jury when material is published long in advance of a trial.[104] However, at an earlier stage it is possible to affect the administration of justice. Here, it was the vilification of the suspect that carried the risk of interference with the administration of justice:[105]

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101 See para 4.285 above.

102 It should be noted that once proceedings are active, although contempt by publication when proceedings are active would be the most common basis of liability where there is a prejudicial publication, general contempt would continue to be applicable.

103 *Attorney General v Times Newspapers* [1974] AC 273 at 309.

104 *Attorney General v MGN Ltd & News Group Newspapers* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [34]. The Court describes the fade factor at [21]: "what people read in their newspapers or watch on their television screens months before trial fades in the memory, and for that reason [as well as juries doing their duties responsibly], the risk of conscious or even unconscious prejudice against the defendant will have dissipated when the trial takes place".

105 The question was whether the test under section 2(2) of the CCA 1981 has been met, which was whether the publication created a substantial risk of serious impediment or prejudice to the course of justice in the particular proceedings, as the suspect had been arrested. However, the general point remains here: the risk is not limited to a risk of prejudicing a jury.

> At the simplest level publication of such material may deter or discourage witnesses from coming forward and providing information helpful to the suspect, which may, (depending on the circumstances) help immediately to clear him of suspicion or enable his defence to be fully developed at trial. This may arise, for example, because witnesses may be reluctant to be associated with or perceived to be a supporter of the suspect, or, again, because they may begin to doubt whether information apparently favourable to the suspect could possibly be correct. Adverse publicity may impede the course of justice in a variety of different ways, but in the context we are now considering, it is not an answer that on the evidence actually available, the combination of the directions of the judge and the integrity of the jury would ensure a fair trial. The problem is that the evidence at trial may be incomplete just because its existence may never be known, or indeed may only come to light after conviction.[106]

6.133 To what extent is there a legitimate media concern that investigative journalism will be adversely affected? First, the conduct threshold would need to be met. This is not certain. For example, were there to be a risk that a witness or potential witness may reconsider their evidence and willingness to engage with a police investigation, that risk may be mitigated if the wrongs uncovered by the media are remedied by the police or other agencies. Secondly, were the conduct threshold met, then are the media consultees correct that intention may be proved without too much difficulty and is not the safeguard we think it to be?

6.134 We explain above that specific intention may be proved directly or indirectly.[107] Direct intention may be proved by a range of admissible evidence. Where it is proved that the defendant could foresee the consequences (that is, an interference with the administration of justice or a risk of such an interference) were virtually certain then indirect intention may be inferred. A media organisation would almost certainly be aware of the range of possible risks, but, for several reasons, this does not mean that intention to interfere with the administration of justice will be proved.

6.135 First, even where a person knows a consequence is certain to follow, it does not mean that indirect intention will be established. As we explained in our 2021 report on Modernising Communications Offences, even where a defendant had that knowledge it does not follow that there must be a finding they intended that consequence.[108]

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106 *Attorney General v MGN Ltd & News Group Newspapers* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [31]; see also at [30] citing *Re Lonrho Plc* [1990] 2 AC 154 at 208 (Lord Bridge) on civil proceedings: "The question whether the course of justice in particular proceedings would be impeded or prejudiced by publication … 'must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court. Before proceedings have come to trial and before the facts have been found, it is easy to see how critical public discussion of the issues and criticism of the conduct of the parties, particularly if a party is held up to public obloquy, may impede or prejudice the course of the proceedings by influencing the conduct of witnesses or parties in relation to the proceedings'".

107 See para 6.74 above.

108 Modernising Communications Offences (2021) Law Com No 399, paras 2.189-2.195.

6.136 Secondly, evidence of foresight less than virtual certainty will be relevant to establishing direct intention, but is not sufficient on its own.[109]

6.137 Thirdly, an awareness of risks will not be the only evidence that is taken into account. Where there has been thorough, measured, investigative journalism and reporting then the process of that investigative work will provide evidence of other factors that indicate there was not an intention to interfere with the administration of justice. There may be evidence that a journalist made efforts to mitigate or avoid the risks of interference with the administration of justice. By contrast, an inference of intention will be more easily drawn where a person has published without any care or caution. It is important to note that where a publication or other journalistic activity occurs in the course of responsible journalism then the European Court of Human Rights (ECtHR) case law shows that the requirement to prove intention will be all the stronger as a safeguard. In *Axel Springer v Germany* the Court noted that under article 10, "freedom of expression carries with it 'duties and responsibilities', which also apply to the media even with respect to matters of serious public concern" and these will "assume significance when there is a question of … infringing the "rights of others".[110] However, when exercised responsibly by the media, freedom of expression rights will attract strong protection:

> The Court has repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[111]

6.138 In this light, we are content that the risk of investigative journalism being affected by the provisional proposal is low and that the requirement to prove intention is a suitable safeguard, as numerous consultees agreed.

6.139 There are other circumstances in which general contempt may involve publication and be engaged before proceedings have commenced. We were told in consultation that where family proceedings or Court of Protection proceedings have not yet commenced, family members may post material online to try to expose conduct by one of the prospective parties. In these circumstances, if the intention is to affect the course of litigation, then in our view this should fall within the scope of general contempt.

Civil proceedings, pre-action protocols and false statements

6.140 In some types of civil proceedings there will be a pre-action protocol (PAP) that explains "the conduct and set out the steps the court would normally expect parties to

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109 See M Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (2025) para 17B-41.

110 *Axel Springer AG v Germany* (39954/08) [2012] EMLR 15 (7 February 2012) at [82].

111 *Axel Springer AG v Germany* (39954/08) [2012] EMLR 15 (7 February 2012) at [79].

take before commencing proceedings".[112] There are currently 14 different types of proceedings with specific PAPs and, where there is no specific PAP applicable, a Practice Direction sets out the expectations. These expectations are that the parties will have "exchanged sufficient information" to:

(a) understand each other's position;

(b) make decisions about how to proceed;

(c) try to settle the issues without proceedings;

(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;

(e) support the efficient management of those proceedings; and

(f) reduce the costs of resolving the dispute.[113]

6.141 Protocols "are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules".[114] The Practice Direction on Pre-Action Protocols and Conduct states:

> A person who knowingly makes a false statement in a pre-action protocol letter or other document prepared in anticipation of legal proceedings may be subject to proceedings for contempt of court.[115]

6.142 Making a false statement in proceedings has long been recognised as conduct that (if accompanied by proof of the requisite fault element) may constitute contempt of court. We look at this conduct below as an instance of general contempt but, at this point in our discussion it is an important consideration in whether general contempt should apply before proceedings are active, including before proceedings are imminent. The decision in *Jet2 Holidays v Hughes* explains clearly why the law of contempt should apply in those circumstances, and why there should be no specified limit on how far back it may apply before proceedings are commenced.

6.143 The relevant rule considered in *Jet2 Holidays v Hughes* read:

> Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.[116]

6.144 The question for determination was whether a contempt application could be made where false statements were made in documents prepared to comply with a PAP but

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112 Practice Direction – Pre-Action Conduct and Protocols (updated 6 April 2022), para 1.

113 Above, para 3.

114 Practice Direction – Pre-Action Conduct and Protocols (updated 6 April 2022), para 1.

115 Above, para 2.

116 *Jet2 Holidays v Hughes* [2019] EWCA Civ 1858, [2020] 1 WLR 844 at [17], citing then CPR r 32.14(1).

where proceedings were ultimately never issued. The Court of Appeal (Civil Division) said that they could:

> A dishonest witness statement served in purported compliance with a PAP is capable of interfering with the due administration of justice for the purposes of engaging the jurisdiction to commit for contempt because PAPs are now an integral and highly important part of litigation architecture.[117]

6.145 It recommended that the rules should be changed to take account of PAPs, and they were.[118] The relevant rule now reads:

> Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, *prepared in anticipation of* or during proceedings and verified by a statement of truth, without an honest belief in its truth.[119]

6.146 Significantly, materials "prepared in anticipation of" proceedings are not limited to those required by a PAP but include preparation of witness statements "as part of compliance with a PAP, even though that is not strictly required by the PAP".[120]

6.147 We did not consider these issues in the consultation paper, but the CBA has rightly drawn attention to *Jet2 Holidays v Hughes* as a decision relevant to the scope of the application of general contempt. The reasoning in the decision presents a compelling case as to why, in civil proceedings, it is essential that general contempt is not time-bound. The more distant from the commencement of proceedings, the less likely it is that a statement will create the requisite risk of interference with the administration of justice. However, it should be left to the courts to decide in any particular case if the administration of justice is engaged and if material in any given circumstance reaches the threshold.

Conclusion

6.148 Our conclusion is that the position in civil proceedings shows a compelling case as to why general contempt should apply before proceedings have commenced and before they are imminent. The concerns that arise in the publication context are not so great that they outweigh that case, particularly as the requirement to prove intention is a significant safeguard for publishers.

6.149 There remains a question of whether it would be feasible and wise to recommend that general contempt applies before proceedings are imminent only where PAPs are engaged, and that where publication and investigative journalism are involved, it should not apply before proceedings are imminent. In our view this is neither practical nor necessary. It is not practical because, as we explained above, boundaries cannot

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117 Above at [37], see also at [3].

118 Above at [50].

119 CPR, r 32.14, as amended by the *Civil Procedure (Amendment No 3) Rules 2020, s 8*, emphasis added.

120 *Jet2 Holidays v Hughes* [2019] EWCA Civ 1858, [2020] 1 WLR 844 at [44]. An error in compliance will not prevent liability arising; it will be sufficient if statements are made "in purported compliance" with a PAP: at [44].

easily or logically be drawn around the category of cases involving publication.[121] It is not necessary because proof of intention provides an adequate safeguard for freedom of expression.

6.150 In the event that the fault threshold for general contempt were to be any lower than intention then those concerns would arise far more acutely and would require some time-bound limits for general contempt. Given our recommendations, it is unnecessary for us to explore what those limits should be. However, were time-bound limits to be implemented then, for the reasons in the preceding paragraph, they should apply across all of general contempt and not only to publication cases or cases that engage freedom of expression.[122]

Recommendation 27.

6.151 We recommend that general contempt should apply before proceedings have commenced, including when proceedings are imminent and also before proceedings are imminent.

After proceedings have concluded

Consultation

6.152 In the consultation paper we considered whether general contempt should apply after proceedings have concluded. We examined the authorities. In *Attorney General v Times Newspapers*, Lord Simon said that "once the proceedings are concluded, … the pan holding the administration of justice is not entirely cleared".[123] He went on to say that, because future juries will be empanelled and future witnesses will be expected to give evidence, it is important that jurors and witnesses in previous cases "must not be threatened" and "must not be victimised".[124] The case law, in our view, suggested that the rationale for contempt liability "lies in the effect that the conduct would have on unspecified future proceedings".[125] Accordingly, our provisional view was that under the current law it is "doubtful that contempt can be committed after the disposal of a matter, or at least not on the basis that there is an actual or risked interference with the concluded proceeding".[126]

6.153 Though there is some uncertainty as to whether the victimisation of participants in concluded proceedings may give rise to contempt liability, it is clear that criminal

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121 See para 6.107 above.

122 Time-bound limits would also be potentially complex and differentiated as they would need to be limited to when proceedings are imminent in a criminal context, but extend further back where PAPs are engaged.

123 CP 262, para 3.57; *Attorney General v Times Newspapers* [1974] AC 273 at 320 (Lord Simon).

124 *Attorney General v Times Newspapers* [1974] AC 273, 320 (Lord Simon).

125 CP 262, para 3.56-3.58; see also *Attorney General v Butterworth* [1963] 1 QB 696, 728 (Pearson LJ); *Moore v Clerk of Assize, Bristol* [1971] 1 WLR 1669.

126 CP 262, para 3.55.

liability may indeed arise. As we explained in the consultation paper, offences have been introduced since those judgments.

(1) Section 51(2) of the Criminal Justice and Public Order Act 1994 (CJPOA 1994), provides for an offence of harming or threatening to harm a person who assisted in the investigation of an offence or who acted as a juror or witness in proceedings for an offence.[127] This offence applies to conduct committed from the commencement of proceedings until a year after the trial or appeal has concluded.[128] The maximum sentence where a person is convicted on indictment is five years' imprisonment and/or a fine; and the maximum sentence on summary conviction is six months' imprisonment and/or a fine.[129]

(2) Section 40 of the Criminal Justice and Police Act 2001 (CJPA 2001) provides for an offence of harming or threatening to harm a person who was a witness in proceedings – other than proceedings for an offence – in the Court of Appeal, the High Court, the Crown Court, County Court or magistrates' courts.[130] This offence applies to conduct committed from the commencement of proceedings until a year after those proceedings or an appeal have concluded.[131] The maximum sentence where a person is convicted on indictment is five years' imprisonment and/or a fine; and the maximum sentence on summary conviction is six months' imprisonment and/or a fine.[132]

6.154 We considered the existing criminal offences to be "both appropriate and adequate to punish the actual or threatened harm to a participant in concluded proceedings and to deter the risk of such harm and interference with the administration of justice that may occur in future".[133] We provisionally concluded that "if contempt is deployed after particular proceedings have concluded then it will inevitably be concerned with the risk of interference with future proceedings".[134]

6.155 Therefore, in CQ 8 we said:

> Our provisional view is that where potentially contemptuous conduct occurs following the conclusion of particular proceedings, then any application of the law of contempt will inevitably be concerned with the risk of interference with future proceedings.

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127 The actual or threatened harm "may be financial as well as physical (whether to the person or a person's property)": CJPOA 1994, s 51(4).

128 CJPOA 1994, s 51(9).

129 Above, s 51(6).

130 CJPA 2001, ss 40(1)-(2), 42(1)(a). It is immaterial for the purposes of this offence "whether the harm that is done or threatened is physical or financial or is harm to a person or to his property": s 40(4)(c).

131 CJPA 2001, s 40(6). Section 39 of the Act creates witness intimidation offences that apply after proceedings commence and require proof of intention "to cause the course of justice to be obstructed, perverted or interfered with", thus appearing not to be directed at conduct after proceedings have concluded.

132 CJPA 2001, s 40(5).

133 CP 262, para 3.63.

134 Above, para 3.63.

Do consultees agree?[135]

6.156 The majority of consultees who responded to CQ 8 agreed with our provisional view.[136] Comments provided in support of this position tended to echo our conclusions and provisional proposal in the consultation paper.[137] The CLSA agreed with our provisional view that the existing criminal offences are sufficient to punish and deter interference with participants once proceedings have concluded. However, some consultees argued there was a gap in the law, especially if contempt were not to apply.[138]

6.157 JLACOS pointed out that "witnesses in the Family Court, tribunals and Coroners' Courts are not protected". It said that "witnesses in family proceedings would have been protected initially", under section 40 of the CJPA 2001 "but the Act has not been updated to take account of care proceedings moving from magistrates' and County Courts to the Family Court in 2014". With respect to the judiciary, JLACOS said:

> This is a particular issue for lay justices and lay members of tribunals, who, like jurors, are more likely to live in the communities where the matters arose and more likely to encounter people dissatisfied with their decision. A threat to one, particularly when it is clearly a threat with impunity, is likely to impact others.

We were also told by Mary Prior KC, a former chair of the CBA, of an instance after criminal proceedings had concluded. A barrister, having acted for a defendant charged with a serious offence, was threatened by the complainant and a friend. We were told that the barrister suffered "quite severe psychological harm and has given up defending [cases involving that offence]".

Discussion

6.158 Our question in the consultation paper was whether it is inevitable that a contempt application where proceedings have concluded would be based on interference or a risk of interference with future proceedings, rather than the concluded proceedings. The aim of that question was to inform our decisions about what the law should be. Specifically, should general contempt apply after proceedings have concluded?

6.159 The consultation responses raise two issues of significance.

6.160 First, we are persuaded that there is a gap in the criminal law. We agree with consultees' concern that the existing criminal offences in section 51(2) of the CJPOA 1994 and section 40 of the CJPA 2001 are cast too narrowly. Neither offence captures actual or threatened harm to judges or legal representatives (or court staff). We consider this to be unsatisfactory; there does not appear to be a principled reason for excluding them from the protection offered by these criminal offences. Additionally, the protection of witnesses in non-criminal proceedings under section 40 of the CJPA

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135 Above, para 3.64.

136 Of the 39 responses to CQ 8, 21 consultees agreed, 9 consultees disagreed, and 9 consultees gave an answer categorised as "other".

137 Including the AGO; the CBA; the Bar Council; GNM; Impress; Gavin Sutter.

138 Including an anonymous consultee; JLACOS.

2001 does not apply to family, coronial or tribunal proceedings. If family proceedings have been excluded inadvertently (as JLACOS suggest), that should be remedied.[139] It is not clear why proceedings in the coroners' courts or tribunals are not protected. Further, as with section 51(2) of the CJPOA 1994, the offence in section 40 of the CJPA 2001 does not apply to judges, legal representatives or court staff. Section 40 does not apply to jurors but we expect that is because juries are not used in the types of proceedings to which this offence applies. In the event that the scope of section 40 of the CJPA 2001 were expanded to coroners' courts proceedings, which may involve juries in some cases, then we consider it necessary for jurors to be protected.

6.161 We recognise that other criminal offences may apply in circumstances not covered by section 51(2) of the CJPOA 1994 or section 40 of the CJPA 2001. For example, section 181 of the Online Safety Act 2023 (OSA 2023) criminalises sending threats of death or serious harm, including rape, punishable by up to five years' imprisonment. Under section 4A of the Public Order Act 1986 (POA 1986) it is an offence:

> if, with intent to cause a person harassment, alarm or distress, [a person]
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting
>
> thereby causing that or another person harassment, alarm or distress.[140]

6.162 Section 4 of the POA 1986 makes it an offence to use "threatening, abusive or insulting words or behaviour" towards a person, or to distribute or display "threatening, abusive or insulting" material if that is done with intent to cause the person to believe that immediate unlawful violence will be used against them or to provoke such violence, or the person is likely to believe such violence will be used or provoked.[141] The utility of these offences is somewhat limited, however. This is because section 181 of the OSA 2023 does not apply to in-person threats, and the POA 1986 provisions (which do indeed apply in person) are summary-only offences with a maximum penalty of six months' imprisonment and/or a fine.[142] These problems thus undermine the position we took in the consultation paper that it is the criminal law that provides protection after proceedings have concluded and our view is that there is a strong case for reform of the provisions in the CJPOA 1994 and CJPA 2001 so that the gaps are filled.

6.163 Secondly, were those gaps filled, would it be necessary for general contempt law to apply after proceedings have concluded? In our view it would be necessary, but for reasons unrelated to the matters discussed above.

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139 Matrimonial and Family Proceedings Act 1984, s 31A as amended by the Crime and Courts Act 2013, s 17(3).

140 POA 1986, s 4A(1).

141 Above, s 4(1).

142 Above, ss 4(4), 4A(5).

6.164 As we have explained, general contempt is concerned with behaviour that interferes, or risks interfering, with the administration of justice. In most circumstances it will not be practically possible to interfere with the administration of justice in proceedings that have concluded; there will be no proceedings with which to interfere. Therefore, it is unlikely that the conduct threshold will be satisfied. This is not to say, however, that it will never be satisfied.

6.165 One instance where the threshold could be met is where a court order remains in force after proceedings have concluded. A person who is bound by the order may be liable for contempt by breach of order. However, a person not bound by the order but who subverts its purpose or encourages a party to breach it may have engaged in conduct that interferes with the administration of justice or creates a risk of such interference in that case, even though proceedings have concluded.[143] This falls within the province of general contempt and may arise in any type of proceedings, including family proceedings and Court of Protection proceedings.

6.166 A second instance may arise in private law family matters, where parties reach an agreement about child access, property or money during the course of proceedings. Some agreements are turned into consent orders, but others are not. We have been told that these matters may reignite, especially as children get older and needs change. A breach of an agreement that has not been transformed into a consent order would not be a breach of a court order and nor would it be a breach of an undertaking. However, it could potentially constitute general contempt. Similarly, where a third party has subverted the purpose of the agreement or encouraged a person not to comply with the agreement then it would fall within general contempt in the same way that subverting or encouraging falls within general contempt where there is a court order or undertaking.

6.167 Consequently, we recommend that liability for general contempt should not be closed off at the point proceedings have concluded.

6.168 Our recommendations are thus directed to two ends.

6.169 Given that in most cases the conduct threshold for general contempt will not be satisfied where conduct is committed after proceedings have finished, we consider it necessary for the criminal law to fill any potential gaps in protection after that point. To achieve this, we recommend that Government consider reviewing the criminal offences with a view to ensuring that:

(1) the offence in section 40 of the CJPA 2001 applies to proceedings in family courts, coroners' courts and tribunals;

(2) the offence in section 40 of the CJPA 2001 applies to relevant conduct committed against judges, legal representatives, court staff and jurors (in addition to those already protected); and

[143] See Appendix 1 paras 1.30-1.36.

(3) the offence in section 51(2) of the CJPOA 1994 applies to relevant conduct committed against judges, legal representatives and court staff (in addition to those already protected).

6.170 Given that conduct may interfere with the administration of justice or create a risk of such an interference even after proceedings have concluded, general contempt should continue to apply after proceedings have concluded.

Recommendation 28.

6.171 We recommend that general contempt should continue to apply after proceedings have concluded.

Recommendation 29.

6.172 We recommend that Government consider reviewing and amending:

(1) the offence in section 40 of the Criminal Justice and Police Act 2001 so that it applies to proceedings in the Family Court, coroners' courts and tribunals; and

(2) the offences in section 40 of the Criminal Justice and Police Act 2001 and section 51(2) of the Criminal Justice and Public Order Act 1994 so that they apply to relevant conduct committed against judges, legal representatives, court staff and jurors (in addition to those already protected).

THE CONDUCT ELEMENT: A NON-EXHAUSTIVE STATUTORY LIST OR GUIDANCE

6.173 Proof of general contempt is not reliant on proof of any specific type or category of conduct. In this respect it differs from contempt by breach of order (for which there must be a breach of an order or undertaking by the defendant), contempt by publication when proceedings are active (for which there must be a publication by the defendant), and contempt by disrupting proceedings (for which there must be abusive, threatening or disorderly behaviour). There is no constraint on what kind of conduct may give rise to liability under general contempt.[144] It will, nevertheless, be helpful to examine some of the conduct that may more commonly fall within this form of liability. Though we do not consider the fault element in this discussion, it should be noted that proof of fault – that is, proof of an intention to interfere with the administration of justice – will always be required to establish general contempt.

Consultation

6.174 In the consultation paper we considered whether it would be helpful if any statutory provision setting out what constitutes general contempt were accompanied by a non-

[144] The conduct cannot, however, be an omission; it must be an act: see paras 6.62-6.64 above.

exhaustive list of examples of conduct that is capable of constituting general contempt.

6.175 We acknowledged that even though a list would be explicitly non-exhaustive, it could have unintended consequences, "focusing the application of the law of contempt on a narrow set of circumstances listed explicitly in statute" and giving "a misleading impression that the list, even if not exhaustive, identifies the only types of conduct that are of concern to the courts".[145] Our provisional view was that the risk of those consequences was "outweighed by the greater clarity and certainty that a non-exhaustive list of examples would bring to the law of contempt":[146]

> This would not only benefit judges and legal professionals tasked with interpreting and applying the law, but also those … using and engaging with the justice system. The instances in a non-exhaustive list may be helpful when government or the courts provide public-facing material, as they do in many areas.[147]

6.176 We presented our provisional proposal in CQ 16:

> We provisionally propose that any statutory provision setting out what constitutes general contempt should be accompanied by a non-exhaustive list of examples of conduct that is capable of constituting general contempt.
>
> Do consultees agree?[148]

6.177 There were 43 consultees that responses to this question, of whom 37 agreed.[149] Of the remaining 6, 2 disagreed and 4 gave answers categorised as "other".

6.178 Generally, consultees who agreed said a non-exhaustive list would make it clearer to litigants, practitioners and judges whether particular conduct might constitute contempt. It was seen as something that would foster a better understanding of the law, with transparency, helping litigants understand what they can expect. There were views that it would make the law more accessible to non-lawyers, which is especially important in the context of litigants in person. Some consultees through it would result in more consistency as to how conduct is treated.

6.179 Some consultees expressed caution. Herbert Smith Freehills LLP agreed, on the proviso that it was "made clear that other conduct need not be of the same type or nature as the examples in the list in order for it to be recognised as constituting contempt". The CBA emphasised the need to be clear that the list did not take account

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145 CP 262, para 3.176.

146 Above.

147 CP 262, para 3.176.

148 Above, para 3.178.

149 These included: the AGO: Adam Gungah (a magistrate); DJ Watkin; First-tier Tribunal (Property Chamber); JLACOS; Social Housing Law Association; Chancery Bar Association; Court of Protection Bar Association (CPBA); the Crown Prosecution Service (CPS); the Criminal Law Solicitors' Association (CLSA); the Bar Council; COMBAR; HLPA; the CBA; the Civil Justice Council (CJC); the MLA.

of the fault element, suggesting it should be identified as "conduct that is capable of interfering with the administration of justice in a non-trivial way".

6.180 Greg Callus disagreed with the provisional proposal, arguing that it would be "legislating by example", which was unsatisfactory. The Law Society's position was that:

> a non-exhaustive list could be helpful for litigants in person but it should be produced as guidance rather than as a statutory provision. It should also be clearly displayed in the court room.

Discussion

6.181 The consultation responses show a strong desire for clarity in the law, and indicate that it would be very helpful to have a non-exhaustive list of the types of conduct that could potentially satisfy the conduct element for general contempt. We agree.

6.182 We also agree that the way any list is expressed is important. It must not suggest that doing an act will of itself constitute contempt; proof of fault is also required. We would add that a list must not suggest that any act within the list will inevitably satisfy the conduct element; the contempt conduct threshold must always be met. Unless conduct has interfered with the administration of justice in a non-trivial way or has created a substantial risk of a non-trivial interference with the administration of justice then it will not meet the general contempt threshold.

6.183 We have concluded that a non-exhaustive list should not be included in primary legislation. Our provisional proposal was that a non-exhaustive list should accompany a statutory definition, but we did not express a view as to whether this should be in primary legislation or should be provided in some other way. Ultimately, there is both a desire and need for clear and practical guidance that aids all users of the justice system. We are persuaded by the responses that argued against its inclusion in primary legislation; we recognise that a statute may not be the best way to provide that guidance. Amendment can be difficult as it requires parliamentary time, a non-statutory approach may be easier to keep up to date with amendments or additions as the law develops, and a non-statutory approach may focus more directly on the practical needs of those for whom contempt may be particularly relevant. Further, there would be a risk that a statutory non-exhaustive list of behaviours amounting to general contempt could be construed in a way that requires any conduct not on the list to be analogous to that which is on the list. General contempt is a residual category and the risk of narrow interpretation is undesirable.

6.184 We have, however, also concluded that guidance about general contempt should be issued and we make a recommendation to this effect. We do not describe this as a non-exhaustive list (wanting to be sure to avoid the risks outlined in the preceding paragraph) but it is important that there is clear and accessible material that enables professional and lay users of the courts to understand what types of conduct could create a non-trivial interference with the administration of justice, or create a substantial risk of such an interference. It might be anticipated that Government would agree with the senior judiciary who would produce and issue such guidance.

6.185 It is for the producer of the guidance to decide what it should contain. However, in addition to the discussion in this and other chapters, including about the relationship between the different forms of liability, we include an Appendix to the report that we hope will assist anyone wishing to understand the scope and application of general contempt, including those who produce the guidance.[150] The Appendix looks at examples of conduct that were provisionally proposed for inclusion in a non-exhaustive list where those do not otherwise appear in the report, providing consultee views and our conclusions about what may or may not merit inclusion in guidance. We provide the Appendix particularly to ensure that the views of consultees are set out.

Recommendation 30.

6.186 We recommend that Government arrange for clear and accessible guidance about general contempt to be issued for professional and lay users of the courts.

EFFECTS: CLARIFICATION AND REFORM

6.187 We conclude this chapter by looking at three aspects of the existing law where our recommendations regarding fault and conduct in general contempt give rise to a need for clarification or will have particular effects with the result that reform is warranted. These are:

(1) the making of false statements;

(2) statutory contempts in the County Court and magistrates' courts; and

(3) photography, recording and live-streaming.

False statements

6.188 We consider the making of false statements above, where we look at the application of general contempt before proceedings commence. We now look at a different aspect of false statements: the application of the general contempt fault element in this context. We do so to explain that contempt liability will be established in this category of conduct in a way that is consistent with the existing law and may be applied practically.

6.189 In the consultation paper, we explained the fault requirements under the current law when there is an allegation that a person has committed contempt by making a false statement in, or in anticipation of, proceedings:[151]

> The current law imposes contempt liability on a person who "makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its

[150] See Appendix 1.

[151] CP 262, para 3.163.

truth".[152] Here, it is necessary to prove that the defendant "knew that what he was saying was false and that his false statement was likely to interfere with the course of justice".[153] It will not be sufficient that the statement was made recklessly.[154] Rather, it will require proof that "the alleged contemnor made a statement to the court knowing it to be untrue and knowing that it would be relied upon by the court".[155]

6.190 Our recommendation on general contempt also rejects recklessness as the basis on which liability may be established,[156] and so is consistent with the existing law on false statements. We note that in a tort action for deceit, if a false statement is made recklessly (not caring if a statement was true) then that will be sufficient to establish the fault element.[157] An aggrieved person – such as an insurer against whom a false claim has been lodged – may commence an action for deceit to seek damages, and that will be the fault threshold, but contempt is different. The sanctions for contempt may include committal to prison, and recklessness will not suffice.

6.191 Our recommendation on fault in general contempt is framed in terms that are different to those used in the false statement contempt case law. Where the false statement contempt cases refer to the defendant's knowledge, our recommendation is that fault for general contempt is to be established by proof of an intention to interfere with the administration of justice. We explain here how the approaches are consistent and our analysis of the position when a false statement falls for consideration as an instance of general contempt.

6.192 The requirement in general contempt to prove intention to interfere with the administration of justice is consistent with the approach of the Court of Appeal (Civil Division) in *Norman v Adler*, which we cited in the consultation paper in the extract

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152 Above, footnote 175: CPR, rr 32.14 and 31.23. A person who provides false evidence to the court may also be liable for contempt (see, for example, *Apted v Apted and Bliss* [1930] P 246), but nowadays such conduct would likely be dealt with as an offence of perjury under the Perjury Act 1911: *Arlidge, Eady & Smith* (2019) para 10-164.

153 CP 262, para 3.163, footnote 176: *KJM Superbikes v Hinton* [2008] EWCA Civ 1280, [2009] 1 WLR 2406 at [12] (Moore-Bick LJ), citing *Malgar Ltd v RE Leach (Engineering)* [2000] FSR 393. See also *Neil v Henderson* [2018] EWHC 90 (Ch) at [82]; *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [37]-[39] (Thirlwall LJ), [101] (Bean LJ).

154 CP 262, para 3.163, footnote 177: This view had been expressed in *Berry Piling Systems Ltd v Sheer Projects Ltd* [2013] EWHC 347 (TCC), [2013] BLR 232 at [28] that it would be sufficient if a statement were made recklessly in the sense that it says "something which… [the defendant] consciously has no idea whether it is right or wrong". This was rejected by the Court of Appeal (Civil Division) in *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232.

155 CP 262, para 3.163, footnote 178: *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [39] (Thirlwall LJ).

156 See paras 6.108-6.114 above.

157 *Derry v Peek* [1889] UKHL 1, [1889] 14 AC 337 at 374 (Lord Herschell); *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2013] EWCA Civ 413 at [77].

above.[158] It is also consistent with the approach of the Divisional Court in a case decided since the consultation paper was published, *R (Ayinde) v Haringey LBC*.[159]

6.193 In *Norman v Adler*, the Court of Appeal (Civil Division) equated proof of intent to interfere with the administration of justice with proof of knowledge that the statement is false or proof of a lack of honest belief that the statement is true. The Court noted that:

> The purpose of contempt proceedings is not to punish incompetence or errors of judgment. Where such conduct is obvious on the face of the papers and explains the failure to put matters before the court that should have been produced, a judge is entitled to and should take it into account when assessing whether there is a strong case of contempt. … The purpose of proceedings is to protect the public interest by punishing those who dishonestly mislead the court.[160]

6.194 There was a strong emphasis on the need to prove dishonesty:

> It is not sufficient to say that the contemnor did not care whether what he said was true or not. It must … be proved to the requisite standard that he knew that he did not know whether what he said was true or not.[161]

6.195 Where the person making the statement has not been sufficiently curious or cautious about whether the content of a statement is true then the court may take that into account.[162] A court may conclude that "an omission is so glaring as to raise an irresistible inference of intent to mislead the court".[163] Put differently, this would be an omission that would support an inference the defendant did not honestly believe the statement was true.[164]

6.196 In *Ayinde*, the Divisional Court (in a judgment delivered by the President of the King's Bench Division, Dame Victoria Sharp) said:

> Placing false material before the court with the intention that the court treats it as genuine may, depending on the person's state of knowledge, amount to a contempt. … As to the requisite state of knowledge, mere negligence as to the falsity of the material is insufficient. There must be knowledge that it is false, or a lack of an honest belief that it is true.[165]

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158 *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232.

159 *R (Ayinde) v Haringey LBC* [2025] EWHC 1383 (Admin).

160 *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [96]-[97] (Thirlwall LJ); see also at [102] (Bean LJ).

161 Above at [61] (Thirlwall LJ).

162 Above at [96]-[97] (Thirlwall LJ).

163 Above at [70], [97]-[98] (Thirlwall LJ), [102] (Bean LJ).

164 Not every failure will support this inference: "To show that not all reasonable enquiries have been made may be enough to justify a supplementary order designed to reinforce the original obligations. It does not by itself justify a finding of criminal contempt, based on dishonesty": Above at [60] (Thirlwall LJ).

165 *R (Ayinde) v Haringey LBC* [2025] EWHC 1383 (Admin) at [26], citing *JSC BTA Bank v Ereschchenko* [2013] EWCA Civ 829 at [42] (Lloyd LJ), *Newson-Smith v Al Zawawi* [2017] EWHC 1876 (QB) at [12] (Whipple J), *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [61] (Thirlwall LJ).

6.197 The decisions in *Norman v Adler* and *Ayinde* leave us in no doubt that proof of intention to interfere with the administration of justice will be satisfied by proof that the defendant knew a statement was false or did not honestly believe the statement was true. We think it is best left to the courts to develop the law as to when a belief is not honestly held.

6.198 The effect is that the making of a false statement would constitute contempt where the defendant:

(1) makes a false statement to the court in or in anticipation of legal proceedings (satisfying the conduct element of general contempt, which is that the conduct is (or creates a substantial risk of) a non-trivial interference with the administration of justice); and

(2) knows the statement is false or does not honestly believe that it is true (satisfying the fault element of general contempt, which is an intention to interfere with the administration of justice).

Statutory contempts in the County Court and magistrates' courts

6.199 In the consultation paper, we considered some aspects of the statutory powers that have been granted to the County Court and to magistrates' courts to enable them to deal with some matters as contempt, namely:

(1) disruptive behaviour;

(2) insults; and

(3) (in the County Court only) assault of a County Court officer who is executing their duties.

6.200 We address the first of these in chapter 5, recommending the repeal of the statutory provisions because they would be unnecessary, given our recommendation for a category of contempt by disrupting proceedings. We now turn to the remaining two matters. They were considered in the consultation paper as part of our analysis of what conduct should be included on a non-exhaustive list of conduct that would fall within general contempt. Although we do not recommend such a statutory list, the responses from consultees have been helpful and we draw on them here.

Insults

6.201 Section 118(1)(a) of the County Courts Act 1984 empowers the court to commit to prison for a month a person who "wilfully insults a judge of the County Court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from court". Section 12(1)(a) of the CCA 1981 is to a similar effect, enabling committal of a person who "wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the

court, during his or their sitting or attendance in court or in going to or returning from the court".[166]

6.202 In the consultation paper we took the view that:

> ordinarily it will be unlikely that insults will meet the general contempt threshold. This is because, without more, an insult will not tend to carry a substantial risk of a non-trivial interference with the administration of justice, nor actually interfere with the administration of justice in a non-trivial way, and so tends not to rise to the appropriate level of seriousness to warrant the imposition of liability for contempt.[167]

6.203 This is not to say that an insult could never meet the general contempt conduct threshold.[168] It may do, but the question will be whether that insult interferes with or creates a substantial risk of interference with the administration of justice. We said the threshold is most likely to be met where the insult in some way disrupts proceedings, or carries a risk of disrupting proceedings (but, always, the threshold question is not one of disruption but one of interference with the administration of justice or a substantial risk of such an interference).[169]

6.204 Our provisional view was that the courts should only be able to deal with insults as contempt if the elements of contempt are established. This, we said, does not deny the courts the power to control their proceedings effectively or to deal with matters as contempt:

> Where there is a wilful insult then a pause for consideration and, if appropriate, an initial enquiry may be needed to ascertain whether the elements of contempt are met, and where a person persists with wilful insults then it will be likely that subsequent conduct will disrupt proceedings in a way that constitutes a non-trivial interference with the administration of justice. However, insults should not automatically constitute contempt; a finding of contempt should not be available unless a wilful insult meets the general contempt threshold.[170]

6.205 We acknowledged that the differences in the way that insults are treated "creates a risk of inconsistently exposing people to liability or affording unequal protection based on arbitrary definitions and distinctions, and may thus result in gaps in the law".[171]

6.206 During consultation we heard many concerns about courts' ability to deal with disruptive conduct. Our recommendation for a category of contempt by disrupting proceedings addresses those concerns and also ensures consistency across the courts, rather than providing powers only to the County and magistrates' courts.

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166 Both statutes provide the same powers: the judge (or magistrate, as relevant) may order detention until the rising of the court or order committal to prison or a fine of up to £2,500.

167 CP 262, para 3.128.

168 CP 262, para 3.128.

169 Above, para 3.132.

170 Above.

171 Above, para 3.10.

6.207 We received fewer comments directly on the issue of insults. The Association of HM District Judges said that the practice in many cases is to overlook insults (meaning, as we read it, insults directed at the judge), and this was consistent with what we heard throughout consultation. There were views that insults may reach the threshold of interference, or even of serious interference, especially if they are part of broader conduct.[172] It was pointed out that there may be a difference in an insult directed to a juror and an insult directed to a judge; where the latter may not reach the contempt threshold, but an insult directed at a juror returning to deliver a verdict may do as an interference with the administration of justice.[173] The Association of HM District Judges thought that a formal warning system may be useful when faced with insulting conduct.[174] The CBA was "not sure that all insults are contempt on the basis of immediate disruption to proceedings" but may have other effects that constitute an interference with the administration of justice. They cite as an example *Re Johnson*, where following threats and abuse a lawyer could not subsequently attend case conferences.[175]

6.208 In our view, it is clear that insults can result in disruption to proceedings, and are capable of constituting or creating a substantial risk of a non-trivial interference with the administration of justice. It will always be a question of fact as to whether this has happened in any given circumstances. The fact that judges can and do overlook insults, and have done for many years,[176] suggests that on many occasions insults alone do not reach the conduct threshold for general contempt.

6.209 The statutory provisions on insult, in our view, are unnecessary and unjustifiable. Were sections 12(1(a) of the CCA 1981 and 118(1)(a) of the County Courts Act 1984 left in place then magistrates' courts and the County Court would be able to punish insults even where they did not reach the contempt conduct threshold. There would be the potential for confusion as to whether conduct was punishable as a contempt of court under the contempt liability framework, or as an insult under the statute. Were the provisions to remain in place then these courts would have powers that are not available to superior courts.[177]

6.210 In the consultation paper we recognised that the powers in the statutes may be valuable as they "assist the County Court and magistrates' courts in managing proceedings so that they are fair, efficient and effective".[178] Our conclusion, however, is that those powers should be secured through coherent, effective and fair contempt

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172 For example: University of Sheffield CFOM; the CBA.

173 The CBA; *R v Powell* (1994) 98 Criminal Appeal Reports 224 at 228.

174 This position was taken on CQ 67 in regard to procedure but it is also relevant here.

175 *Re Johnson* (1887) 20 QBD 68.

176 In *R v Powell* (1994) 98 Criminal Appeal Reports 224 at 228 it was said that insults directed at judges "do occur from time to time even in the Court of Appeal Civil Division. or particularly in that Court when disappointed litigants express briefly but forcibly their view of the decision which has just been reached. They are usually of very short duration and almost invariably overlooked. Judges are not so conscious of their own dignity or so afraid of losing it that they have to take action in all such cases.

177 We note also our provisional proposal that the County Court should have the powers of a superior court for the purpose of sanctions, which would accentuate the disparity: CP 262, paras 10.163-10.167.

178 CP 262, para 3.131.

of court laws and procedures, rather than through exceptional statutory powers. The category of contempt by disrupting proceedings will enable all courts to deal with disruptive conduct through the law of contempt. Where there is no disruption, no non-trivial interference with the administration of justice, and no substantial risk of such an interference is created, then the conduct should not fall to be dealt with as contempt.

6.211 Given these conclusions, we recommend repeal of section 12(1)(a) of the CCA 1981 and section 118(1)(a) of the County Courts Act 1984.[179]

Recommendation 31.

6.212 We recommend that section 12(1)(a) of the Contempt of Court Act 1981 and section 118(1)(a) of the County Courts Act 1984 should be repealed.

Assault of a County Court officer

6.213 Section 14 of the County Courts Act 1984 reads:

> 14 Penalty for assaulting officers
>
> (1) If any person assaults an officer of the County Court while in the execution of his duty, he shall be liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 3 months or to a fine of an amount not exceeding level 5 on the standard scale, or both; or
>
> (b) on an order made by the court in that behalf, to be committed for a specified period not exceeding 3 months to prison or to such a fine as aforesaid, or to be so committed and to such a fine,
>
> and an officer of the court may take the offender into custody, with or without warrant, and bring him before the court.
>
> (2) The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.

6.214 Section 14(1)(a) is an offence. Section 14(1)(b) enables the court to treat the conduct as a contempt, imposing a penalty of up to 3 months' imprisonment and/or a level 5 fine.

6.215 In the consultation paper we considered this provision as part of a discussion of whether physical assaults, non-physical assaults and threats:

> are sufficiently akin in their seriousness and the risk they will interfere with the administration of justice such that they should be grouped together *if inferior courts*

[179] See also paras 5.49-5.52 below regarding recommendations on other provisions in sections 12 and 118.

have specific powers, rather than excluding non-physical assaults and threats from specific powers.[180]

6.216 Consultees saw threats as conduct that can and should be seen as constituting contempt. 27 of the 33 consultees who responded to CQ 15 supported the provisional proposal. The Family Division of the High Court said that "threats and intimidation of judges, parties, and local authority employees are sadly not uncommon. We strongly agree with the proposal at Q15". The Chartered Institute of Legal Executives (CILEX) saw:

> a substantial difference between a threat or a non-physical assault, and the assault of a court officer. However, for the purposes of contempt of court, they both amount to an individual seeking to prevent justice and should therefore be punished.[181]

6.217 We are in no doubt that threats may satisfy the conduct element of general contempt, but the prior question remains whether inferior courts should have specific powers to deal with assaults. If they should not, then the question of whether to include threats in those provisions does not arise.

6.218 We have concluded that the powers under section 14(1) are unnecessary.

6.219 Section 14(1)(b) empowers the County Court to punish conduct that falls within the scope of general contempt. We recognise that the provision also sets out sanctions and powers to take a person into custody, which are matters we will address in part two of our report.[182] However, with respect to the power to deal with assaults, section 14(1)(b) is not needed. The better position is that the County Court is empowered to deal with such conduct using contempt powers.

6.220 Section 14(1)(a) creates an offence. We do not read this as creating an offence that can be prosecuted in the County Court but as creating a criminal offence that would be investigated and prosecuted in a magistrates' court in the usual way. There is nothing in the County Courts Act 1984 or any other statute that we are aware of that gives the court the power to hear criminal proceedings. However, the conduct criminalised by section 14 is already criminal conduct and may be referred for prosecution; there are already assault offences that provide for penalties greater than those under section 14(1)(a).[183] Repeal of the provision would not leave a gap in the law.

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180 CP 262, para 3.142 (emphasis added).

181 The Chartered Institute of Legal Executives (CILEX) went on to argue that sentencing may reflect the difference they saw.

182 In the consultation paper we provisionally proposed that the County Court should have the same sanctions powers as a superior court of record (CP 262, paras 10.163-10.167) and discussed immediate temporary detention powers (CP 262, paras 8.146-8.157).

183 See paras 2.69-2.70 above. Common assault is triable summarily and punishable by up to six months' imprisonment and/or a level 5 fine: Criminal Justice Act 1988, s 39. There are also specific criminal offences for assaulting, resisting or obstructing a court security officer, with assault punishable on summary conviction by up to six months' imprisonment or an unlimited fine, and obstructing or resisting punishable by a fine of up to £1,000: Courts Act 2003, s 57.

6.221 We therefore make a recommendation regarding repeal of these provisions.[184]

Recommendation 32.

6.222 We recommend that:

(1) section 14(1)(b) of the County Courts Act 1984 should be repealed; and

(2) the Government consider repeal of section 14(1)(a) of the County Courts Act 1984.

Photography, audio recording, video recording and streaming

6.223 There are a number of laws that regulate and prohibit conduct that depicts or records in some way what happens in courtrooms. In the consultation paper, we addressed the prohibition on photography,[185] but other matters arose in consultation responses. We address them here together with a view to achieving consistency and coherence in the law, as well as taking account of the public interest in the administration of justice and the public interest in open justice. We present our recommendations together at the end of this discussion with a view to that goal of coherence.

Contempt

6.224 It is uncontroversial that photography, video recording, audio recording and similar activities are conduct that (when done without authorisation) could meet the general contempt conduct threshold. That is, these activities may constitute or create a substantial risk of a non-trivial interference with the administration of justice. It will always be a question of fact as to whether the threshold is met but the unauthorised taking of photographs or the audio or video recording or live-streaming of proceedings could be viewed as an interference with the court's control of its proceedings, that power being integral to the protection of the rights of parties and the resolution of disputes. It may disclose or risk disclosure of information that is in some way protected, for example by revealing the identity of a witness who has anonymity or disclosing material that may identify that person.

6.225 Whether the contempt threshold is met will always depend on the circumstances, but these activities, when unauthorised, are clearly very likely to reach that threshold.

6.226 Section 9 of the CCA 1981 makes it a contempt to bring into a court an audio recording device with the intention of using it, or to use it, or to publish the recording, unless one has permission of the court.[186] In our view, this provision is unnecessary. The relevant conduct falls within the scope of general contempt and should be dealt

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184 The recommendation regarding s 14(1)(b) is a recommendation for repeal and the recommendation regarding s 14(1)(a) is framed as a recommendation to government to consider repeal. We distinguish these as the latter is a criminal offence where the case for repeal is not dependent on the provision's overlap with contempt.

185 CP 262, from para 3.90.

186 CCA 1981, 9(1).

with as general contempt, rather than as a separate, overlapping statutory contempt.[187] The exception where there is leave of the court would be unnecessary in general contempt as the fact of permission would indicate clearly that it does not constitute or create a substantial risk of a non-trivial interference with the administration of justice.[188] In the event that a device is brought into a court, or used, or even that material on it is published, and the conduct threshold is not met, then it should not be captured as a contempt. Accordingly, we recommend the repeal of section 9.

6.227 We will return below to one further aspect of audio recording.

Criminal offences

6.228 The prohibition on photography is found in section 41 of the Criminal Justice Act 1925. It has been held that "the section should be applied in a way which takes into account the modern developments in photography" and so it also covers video recording.[189] Section 41(1) reads:

> (1) No person shall—
>
> (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court [or in the building or in the precincts of the building in which the court is held][190] any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or
>
> (b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof ….

6.229 In contrast to general contempt, which will require proof of fault in the form of an intention to interfere with the administration of justice, section 41 does not require any proof of fault.

6.230 In chapter 5 we discuss the fault element for general contempt. Our view is that the criminal offence is an important tool for the courts because it enables action to be taken when intention to interfere with the administration of justice cannot be proved. We explain that in rare cases it may not be able to be proved because a person does not understand that the conduct is prohibited, though a warning in those instances would leave little doubt that, for any repeat of the conduct, intention could be proved.[191] The particular value of the section 41 prohibition is that it addresses acts that may be committed and may interfere with the administration of justice before any warning can be given. For example, a photograph may be taken on a mobile phone

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187 Where there is a publication then, if the elements of contempt by publication when proceedings are active are satisfied, it may be more appropriate to deal with it as that form of contempt.

188 It would also appear very unlikely that the fault threshold would be met.

189 *R v Loveridge* [2011] EWCA Crim 973 at [25].

190 Criminal Justice Act 1925, s 41(2(c).

191 See para 5.37 above.

and published instantly. Even with our recommendation for a category of contempt by disrupting proceedings, the section is still valuable because it enables immediate action to be taken by the court, including referral for prosecution.

6.231 In the consultation paper we said:

> We note that the maximum penalty for a breach of section 41 is a £1,000 fine. The penalty is substantially less than the maximum two year sentence that the superior courts may impose for contempt, and the offence is one of strict liability. As the effect of our provisional proposals regarding fault is that taking photographs would not constitute contempt in circumstances where [intention could not be proved], the result would be that the courts have fewer powers in relation to taking photographs in court. It is outside our Terms of Reference to make provisional proposals or, ultimately in the final report, recommendations about the criminal offence. However, we are able to take consultees' views on whether the government might in due course consider a review of section 41.[192]

6.232 In CQ 10 we provisionally proposed that if taking photographs in court were not to constitute contempt unless intention could be proved then the government should consider reviewing section 41.

6.233 We received 34 responses to this question. There were 21 consultees who agreed with the provisional proposal.[193] Six disagreed.[194] Seven responses were categorised as "other".[195] The comments varied widely, and were often linked to views on other issues or matters (such as audio recording) that were raised separately. Some were directed in effect at what should be the elements of general contempt, which we have already addressed. But others went directly to issues that we are addressing here. Three themes emerged that were especially relevant.

6.234 First, there were views that the section works effectively and there was no need for a review.[196]

6.235 Secondly, there were views that the section needed modernising so that it was not limited to photography but also captured audio recording, broadcasting or live-streaming.[197]

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192 CP 262, para 3.96, references omitted. With respect to our Terms of Reference, we distinguish section 41 from other statutory provisions (where we directly recommend repeal or amendment) because section 41 is solely concerned with a criminal offence and can apply to conduct that does not reach the contempt conduct threshold.

193 These included: JLACOS; Social Housing Law Association; the CPS; the Bar Council; HLPA; the CJC; Professor Bailey; Dr Jones, University of Sheffield CFOM; and GNM.

194 These included: Greg Callus; CPBA; the CLSA; the CBA.

195 These included: Paul Foster; David Toomer; Chartered Institute of Journalists.

196 For example: Paul Foster; the CBA; CPBA; the CLSA; Greg Callus.

197 For example: the Bar Council; the CPS; JLACOS; University of Sheffield CFOM; Gavin Sutter; the CJC; Greg Callus.

6.236 Thirdly, there were views that there needed to be more latitude, including provision for authorised activities, especially where conduct was in the course of responsible journalism.[198]

6.237 In our view there is merit in all of these positions.

Section 41: modernisation

6.238 The case against review was put frankly by the CBA: section 41 is "simple, easy to understand and as far as we are aware, work[s] in practice". The CLSA said the mere fact that the sanction for the section 41 offence is less severe than for contempt does not mean that section 41 needs to be altered or reviewed. Greg Callus said that it does not necessarily follow that a difference in penalty means a review of section 41 is required:

> For those with the requisite intent, criminal contempt applies. For those without the requisite intent, there is a strict liability summary offence with a lower penalty which does a good job of generally preventing photographs being taken in court. There are good reasons to consider s.41 should be reformed to permit broadcasting of proceedings, but not for any of the reasons to do with reform of contempt of court.

6.239 In light of the responses that we have received overall, we are persuaded that the section functions well. We are also persuaded that the difference in penalty between contempt and the criminal offence does not give rise to the need for a review, especially as the offence is one of strict liability. However, we think that a review would be appropriate so that the criminal offences are modernised. It is especially appropriate that there are criminal offences for conduct that, like photography, may result in an interference with the administration of justice before a warning can be given.

Coherence

6.240 Consultation responses have in different ways drawn attention to the lack of coherence in and between the ways that the conduct in issue is dealt with in contempt and criminal offences. We provide the following examples without the nuance and detail of the specific laws but our aim is to highlight the lack of consistency and coherence.

(1) Section 41 of the Criminal Justice Act 1925 criminalises photography, though does not make provision for photography with permission;

(2) Section 9 of the CCA 1981 makes it a contempt to record audio of proceedings, except with leave of the court, but it does not make it a criminal offence; and

(3) Section 85B of the Courts Act 2003 makes it a criminal offence to record or transmit remote proceedings (making no reference to this conduct where proceedings are not remote), but provides for general or specific authorisation via leave of the court in which the proceedings are being conducted or via leave

[198] For example: Charles Thomson; Dr Jones; Transform Justice; GNM.

of the Lord Chancellor. Section 85B(9) makes "conduct that amounts to the offence" a contempt of court.

6.241 In our view, just as we have concluded that section 9 of the CCA 1981 should be repealed as it is unnecessary, so should section 85B(9) of the Courts Act 2003 be repealed on the same grounds. The conduct it deals with may constitute general contempt and, like the conduct in section 9, should be dealt with as general contempt.

6.242 With respect to the criminal offences, in our view, they should not only be modern but they should also be consistent. At present, it is a criminal offence to make an audio recording or transmission of remote proceedings, but it is not a criminal offence where proceedings are in person. This is unsatisfactory.

6.243 Our recommendations here are directed towards modernisation and consistency.

Sketching

6.244 Section 41 includes sketches by artists in its scope. We did not receive any comments on this aspect of the section and make no recommendation with regard to review, Nevertheless, we observe that where a review is directed to modernisation then it may also be logical to address sketching.

Recommendation 33.

6.245 We recommend that the Government consider reviewing section 41 of the Criminal Justice Act 1925 and section 85B of the Courts Act 2003 with a view to ensuring:

(1) that the criminal offence in section 41 is modernised, so it applies to photography, video recording, and transmission or live-streaming of audio or video;

(2) that the criminal offences in section 41 and section 85B are coherent and consistent, with a particular attention to consistency in application to in-court and remote proceedings.

Recommendation 34.

6.246 We recommend that section 9 of the Contempt of Court Act 1981 should be repealed.

Recommendation 35.

6.247 We recommend that section 85B(9) of the Courts Act 2003 should be repealed.

Audio recording and permission

6.248 We received views that the law should permit journalists to make audio recordings of proceedings for the purpose of reporting, without first obtaining the permission of the court. GNM said:

> Technology has rapidly advanced since these laws were introduced. … Accredited media should be able to record sound from court hearings for the purpose of notetaking only without seeking the permission of the court. Sound recording technology can be used unobtrusively and recordings would be useful for journalists to assist the accuracy of their court reports.

GNM said that this is all the more necessary given the delays and significant costs associated with obtaining transcripts.[199]

6.249 The MLA took a similar position:

> Allowing journalists to record audio in court for note-taking purposes would assist in the accuracy of court reporting and encourage more court reporting as it would be an easier exercise to undertake. Reporters believe that news coverage would be more accurate and comprehensive, and thus public understanding improved, if the media were permitted to make recordings for non-publication purposes. There could of course be exceptions where there is good reason, for example the oral evidence of particular witnesses. The view amongst reporters is that it is very difficult to take fully accurate, comprehensive shorthand or handwritten notes, especially where proceedings involve complex legal or factual matters. … In view of the fact that live text based reporting and remote observation is now permitted in certain cases the MLA consider that the use of audio recorders and audio recordings should be permitted on a case-by-case basis to individuals (such as accredited media and legal bloggers) who have first identified themselves to the court. …
>
> Audio recording for the purposes of note-taking [should be permitted] (with a corresponding prohibition on publication to the public at large or to a section of the public) with a possible pilot scheme to consider the practicalities.

6.250 We find these arguments very persuasive. In our view there is a strong case to allow audio recording of proceedings for the purposes of responsible journalism without permission of the court being sought on every occasion.

6.251 We first ask whether such a recording would reach the conduct threshold under our recommended form of liability for general contempt. We are not convinced that it would. Where an accredited journalist makes a recording in good faith for the purposes of responsible journalism, does so unobtrusively, and stores the recording securely and for a limited time after which it is securely deleted, then it is not immediately apparent that conduct would constitute or create a substantial risk of

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[199] GNM gave this example: "the MP David Davis was reportedly quoted £100,000 for a transcript of the Lucy Letby trial at Manchester Crown Court" (see: Law Society Gazette, *MP quoted £100,000 for Letby court transcript* (20 September 2024)).

interference with the administration of justice.[200] It is also unlikely that the intention threshold would be met. However, we recognise that does not give media organisations or journalists the certainty they need.

6.252 It is not only journalists who may have good reason to want to record proceedings. We also heard from an individual consultee, Tracey Edwards, who said that audio recordings of any public hearing should be permitted and there should be no requirement to obtain permission. She said this is important for ensuring transparency of the judicial process and promoting fairness:

> Allowing recordings of court proceedings can enhance transparency and accessibility. It can also address the issue of discrimination against litigants in person (LiP) who are unlikely to be able to afford the high costs of official transcripts and … which … can take months to obtain, whereas a recording is immediately available. Awaiting … a transcript may impede further proceedings for LiPs.
>
> Allowing personal recordings would also level the playing field, ensuring that all parties have access to an accurate record of proceedings. This is particularly important for those who represent themselves and may already face disadvantages compared to those with legal representation.

6.253 We are not persuaded that an exemption from liability should be any broader than audio recording by accredited journalists for the purpose of responsible journalism. We appreciate the difficulties that litigants in person face, and that others (such as researchers) may wish to record proceedings, but can only do so by securing leave on a case-by-case basis. We see a strong case for establishing an authorisation system under which journalists or others with good reason for recording material (such as researchers) might seek wider permission to make audio recordings of proceedings. A system may vary from court to court: it may be that in some courts an application process will still be required, but in others a form of blanket authorisation may be available. This could result in, for instance, an authorisation to record proceedings in particular courts (for example, family courts or County Courts), or for particular periods (for example, a period of months or years), or for particular types of proceedings (for example, criminal proceedings generally, or some types of criminal proceedings).

6.254 The development of an authorisation system would, we think, most appropriately begin with the procedure rule committees, which have formed a cross-jurisdictional working group that is considering the development of contempt procedure rules.[201] We recommend that the procedure rule committees consider the development of an authorisation process to enable the responsible and secure audio recording of proceedings without individuals needing to apply for leave on a case-by-case basis. We recognise that any system may not apply uniformly.

6.255 Any system would need safeguards. For example, there would need to be consideration of how those in court would know if someone is recording. A victim

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200 This is a very specific circumstance. We are not suggesting that audio recording should be omitted from a non-exhaustive list of conduct that may constitute contempt.

201 This was one of the provisional proposals in our consultation paper, CP 262, paras 8.94, 8.97. Progress is recorded in the minutes published by rule committees; see for example, *Family Procedure Rule Committee, April 2025, Minutes*, 4.1.

and/or their family sitting in the gallery may not wish to be recorded, and it might reasonably be expected would certainly not wish to be recorded without their knowledge. The lack of separate seating for victims and their families is likely to make this a particular consideration. A defendant's family may be in the same position. These and other challenges, such as whether recording of some types of evidence should not be permitted, would be matters for the rule committees to consider.

6.256 Finally, we see a need for alignment of the criminal law and contempt law with respect to audio recordings. Our recommendation regarding the review of section 41 includes consideration of the transmission or live-streaming of audio, but we do not recommend that audio recording should be a criminal offence. It is not an offence under the current law and we think that should remain the case; it is proportionate that this conduct falls only within the realm of contempt.

6.257 In the event that audio recording were to be included in the criminal offence then an anomaly would arise. If we are correct that a recording made in good faith for the purposes of responsible journalism would not reach the contempt threshold, but would fall foul of a strict liability criminal offence, then this would undermine the coherence of the ways that the contempt and criminal regimes fit together. A permission-based exemption under the criminal law may provide one resolution, but the better position is that audio recording is not criminalised.

Recommendation 36.

6.258 We recommend that the procedure rule committees consider the development of an authorisation process to enable the responsible and secure audio recording of proceedings by accredited journalists.

Chapter 7: Section 12 of the Administration of Justice Act 1960

INTRODUCTION

7.1 We turn now to an issue we did not consider in our consultation paper, namely section 12 of the Administration of Justice Act 1960.

7.2 Section 12(1) of the Administration of Justice Act 1960 (variously "section 12" and the "AJA 1960") provides that publishing information relating to proceedings before a court sitting in private will not *of itself* be a contempt of court, save in the context of certain statutorily prescribed proceedings as specified in paragraphs (a)-(e) (for example, certain proceedings relating to minors, mental health, secret discoveries or inventions, and national security).

7.3 The Act was passed to clarify this aspect of the otherwise chaotic common law of contempt, rather than to create any new head of liability.

7.4 Notably, section 12 does not provide a defence for other forms of contempt. If a person publishes information relating to proceedings before a court sitting in private, and in so doing creates a substantial risk that the course of justice in those proceedings will be seriously impeded or prejudiced, that person could be liable for strict liability contempt under the Contempt of Court Act 1981. All section 12 does is limit or provide for liability for the mere publication of information related to proceedings in private (so that it will not *without more* constitute contempt).

7.5 Where contempt liability does apply under section 12, that is therefore a discrete form of contempt – what for ease of reference we will call "section 12 contempt".

Section 12 and the scope of this project

7.6 The view we adopted prior to the publication of the consultation paper was that this was not an issue for the Law Commission. In short, we had to consider whether this was a question about liability for contempt *per se* (which would be within scope of our review) or whether it was, in substance, really a question about the substantive law relating to reporting restrictions (which would not be). On its face, of course, the question is clearly about liability for contempt of court, but the considerations that inform section 12 (that is, which proceedings are specified in section 12) are almost entirely those of transparency and the proper limits of open justice. There is a considerable body of case law – both before and after the passing of the AJA 1960 – on the "curtain of privacy". Our provisional view was that we could no more comment on the scope of the curtain of privacy than we could determine (through the lens of contempt) whether a court should make a reporting restriction order (RRO). Contempt is the tool by which that privacy is enforced, but we took the view that the question of whether it should be enforced at all is not a matter for a project on contempt of court.

7.7 However, we have now concluded that section 12 is in scope, albeit in a slightly narrower way than some consultees may have argued. We find that continued liability

under section 12 would not readily be justifiable in light of our proposed liability framework. We maintain our view that, if section 12 liability were to continue in some form, the considerations that would be needed to inform that liability extend well beyond the scope of a project on contempt of court. For example, the question of how long privacy should extend in certain family court matters is not one for a project on the framework of contempt liability. Nevertheless, it is within scope of our project to say that contempt liability in the statutory form that section 12 adopts ought not to exist as a discrete head of liability.

7.8 As we note below, the matters currently within scope of section 12 are better dealt with as RROs on a case-by-case basis. Otherwise, we risk liability for breaches of different types of reporting restrictions being assessed differently depending on whether the breach is of an RRO properly so-called or of a section 12 provision. Further, courts consider making RROs on a case-by-case basis (rather than having them applied automatically) which means that they benefit from a bespoke proportionality and European Convention on Human Rights (ECHR) analysis.

Section 97 of the Children Act 1989 ("section 97")

7.9 As will be seen, some stakeholders mention section 97 in the same figurative breath as section 12. Section 97 provides that it will be a criminal offence to publish material intended or likely to identify any child involved in proceedings before the High Court or Family Court.

7.10 Our position is that this is outside the scope of our project, for the same reason that, for example, section 1 of the Sexual Offences (Amendment) Act 1992 is out of scope. It is a criminal offence relating to the substance of a reporting restriction.

CONSULTATION RESPONSES

7.11 We did not ask a specific question on this, so there is no quantitative data. However, some respondents mentioned section 12.

7.12 The Family Division of the High Court[1] provided the following comments:

> The proposed general contempt by publication will cause confusion within the family justice system unless the [Law Commission] also addresses the operation of Administration of Justice Act 1960 (AJA 1960) s12 and clarifies whether publication of material likely to identify a child as being involved in proceedings shall be a contempt or offence even if the publication is after the conclusion of proceedings – see Children Act 1989 (CA 1989) s97 and the rule in *Clayton v Clayton*…
>
> After the conclusion of many family proceedings, (i) the court's orders impose continuing requirements on parties during the subject children's minorities, (ii) the subject children may be harmed by publication; and (iii) further applications concerning the same family may well follow.

[1] This response was submitted by the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and from the senior judge of the Court of Protection. See para 1.34 above for further information about the Family Division response.

The use of social media to post information about family cases is common. AJA 1960 s12 has particular relevance to the family justice system in which the vast majority of cases are heard in private.

By operation of s12(1) the publication of information relating to those proceedings (and any Court of Protection hearings in private) will be a contempt of court. This effectively creates strict liability but the scope of "information relating to proceedings" is complex and has been the subject of judgments such as *In the Matter of B (a child)* [2004] EWHC 411 (Fam).

The consultation paper does not address whether section 12(1) AJA 1960 should be repealed or, if not, the interrelationship between that provision and the proposed framework…

Transparency orders in the Court of Protection and family courts vary or disapply AJA 1960 s12(1) but not CA 1989 s97. The use of transparency orders allowing reporting by accredited journalists and legal bloggers of proceedings in the Family Court and Family Division will be rolled out nationally in 2025. In the great majority of family cases s12 will continue to bind parties, witnesses, and non-legal bloggers.

In the Court of Protection, transparency orders, which are effective against all who are aware of their existence, are already made in nearly every case which requires a hearing which are generally heard in public.

The proposed law of contempt by publication requires proof of intention to interfere with the administration of justice whereas s12(1) and s97 create stricter liability. Contravention of s97 is a criminal offence not a contempt of court. The effect of s12(1) continues beyond the conclusion of proceedings irrespective of whether there are any future related proceedings. Family proceedings often conclude with orders which bind parties for years to come, such as Child Arrangements Orders. Further applications may be made whilst the children remain children. Hence, if all three provisions co-exist there will be even greater confusion than already exists as to what may be published, when, and by whom.

We propose that the opportunity to produce greater clarity around the law of contempt in family proceedings must be taken by recommending:

- The repeal of AJA 1960 s12(1)(a) and (b) upon the introduction of the new framework.

- CA 1989 s97 should remain in force.

7.13 Rights of Women (a charity providing advice to women on the law in England and Wales) noted that they were interveners in *Griffiths v Tickle*. The judgment of Dame Victoria Sharp usefully summarises their submissions:

[Rights of Women] argued that women who have been victims of domestic abuse are entitled to choose between anonymity and publicity. They have a right to freedom of expression and "informational self-determination" or… the right to tell their own stories. It was argued that women who do not seek the support of the Family Court are relatively free to speak out about their experiences. The freedom of

those who are engaged in Family Court disputes is likely to be much more restricted. [Rights of Women] supported the arguments of the applicants and the mother that the public interest in open justice meant there was a pressing need for the Family Court to publish more judgments.[2]

7.14 Sir James Munby (former President of the Family Division of the High Court) provided an extensive analysis of section 12 (which was also published online by the Transparency Project[3]), arguing that there are real contempt liability issues (apart from the prior question about transparency). He noted that:

> The six critical words in section 12 – "information relating to proceedings … in private" – have probably generated as much litigation as any other six words on the statute book.

7.15 There seems to be real complexity relating to the scope of "information relating to proceedings" (that is, what does that entail) and the length of time for which section 12 applies. The nearly seventeen pages of analysis that Sir James provided by way of answering (inconclusively) the second point alone, provides compelling support for the proposition.

7.16 Sir James also cited Sir Andrew McFarlane (current President of the Family Division), who said the following in his report *Confidence and Confidentiality: Transparency in the Family Courts*:

> The 1960 Act was concerned to protect and support the administration of justice. Now, some sixty years after its enactment, I have concluded that s 12 has the contrary effect of undermining confidence in the administration of Family justice to a marked degree. Whether s 12 should be repealed and replaced by a provision that is more fit for purpose is a matter for Parliament and not the Judiciary. I do however support calls for urgent consideration to be given by Government and Parliament to a review of this provision.[4]

7.17 The views of Sir James were cited with approval by the Media Lawyers Association and by the Transparency Project.

SHOULD SECTION 12 CONTEMPT BE A DISCRETE HEAD OF LIABILITY?

7.18 In asking this question, we should be clear that we are not asking about whether publishing material relating to private proceedings should ever attract contempt liability, and neither are we making any statement about the appropriate limits of transparency in the courts.

7.19 Rather, if we assume that the unauthorised publication of private proceedings might appropriately attract contempt liability (and that seems a fair assumption), the question

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2 *Griffiths v Tickle* [2021] EWCA Civ 1882 at [24] (Dame Victoria Sharp PQBD).

3 Transparency Project, *The Pressing Need for Reform of Section 12* (19 October 2024).

4 Sir Andrew McFarlane (President of the Family Division), *Confidence and Confidentiality: Transparency in the Family Courts* (28 October 2021) para 38.

then is whether a form of private proceedings contempt should exist at all given the broader contempt liability framework that we proposed.

7.20 The first thing that is striking about such a form of liability – which is in substance a reporting restriction – is that it would not sit comfortably alongside our framework on liability for breach of RROs. Were we to conclude otherwise, we would be accepting that there should be different rules for statutory reporting restrictions as against ad hoc RROs. For example, we recommend for breach of an RRO that a person needs to have notice of the order (and that it is open to them to show that they did not know about the order). Would there be a commensurate requirement for private proceedings contempt, eg that the person must have known that the proceedings were those to which the statute applied? (In any event, that may not even be strictly commensurate, because knowledge of section 12 is knowledge of the *law*, ignorance of which usually affords no defence).

7.21 For this reason, even – or perhaps particularly – paragraph (e) of section 12(1) is problematic. It provides that it will be a contempt of court to publish information relating to proceedings before a court sitting in private:

> (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

7.22 This means that, potentially, breach of an RRO could create liability under both section 12 and under contempt by breach of order, where the gravamen of each head of liability is identical but the elements required to be proven are different. This would be undesirable and confusing. In contrast, a breach of an order may rightly give rise to liability under both contempt by breach and general contempt. The essence of contempt by breach lies in the act of breaching the order itself, whereas general contempt focuses on the intentional interference with the administration of justice; the gravamen of the contempt in each of those cases is different.

7.23 Further, we justify the form of liability that we have proposed for breach of order on the basis that, in drafting the order, the court will have conducted the necessary proportionality/ECHR assessments, as well as issued an order that is clear (and, to the extent that it is not, would prevent liability arising because the applicant could not prove breach to the criminal standard if the underlying requirement were vague or ambiguous). Section 12 lacks this bespoke approach to reporting restrictions. It may, in certain cases, therefore, be harder to justify a finding of contempt where the underlying restriction is applied automatically. A blanket RRO that exists in perpetuity may be easier to justify in some cases than in others (such as in the context of national security), and that will have bearing on the proportionality of any subsequent contempt proceedings.

7.24 Nevertheless, further consultation will be required in respect of section 12(c), which concerns proceedings relating to national security. We do not recommend repeal of this provision. We have discussed the matter with Lord Justice Singh (the then President of the Investigatory Powers Tribunal) and Sir Brian Leveson (the Investigatory Powers Commissioner). Lord Justice Singh emphasised that public confidence in the Investigatory Powers Tribunal depends on its ability to access all relevant material. To preserve this oversight function, the Tribunal must adhere to

stringent security protocols and maintain a trusted relationship with the UK Intelligence Community. The contempt jurisdiction in section 12 is an essential safeguard in this context, ensuring that sensitive material is not disclosed in a way that could compromise national security or undermine the Tribunal's work. Sir Brian Leveson concurred. We have received no views to the contrary, and the evidence we have received would strongly support retaining section 12(1)(c) as a necessary component of the statutory framework.

7.25 By contrast, the evidence in support of section 12(1)(d) is far less compelling. Our research, supported by discussion with Lord Justice Birss (the then Deputy Head of Civil Justice and now Chancellor of the High Court), suggests that section 12(1)(d) plays no meaningful role in proceedings involving secret processes or similar matters. Unlike section 12(1)(c), which underpins the integrity of national security oversight, section 12(1)(d) does not appear to provide any unique protection beyond what is already achieved through other mechanisms, such as reporting restrictions and contempt by breach of order. Indeed, it is entirely standard practice in litigation in this area for confidentiality clubs to be agreed between the parties or established by the court, that are backed by a sealed court order. While we do not have a sufficient evidence base to recommend immediate repeal, we consider that the Government should review section 12(1)(d) with a view to its possible repeal. This would help simplify the statutory scheme and avoid unnecessary duplication.

7.26 By way of conclusion, our view is that it would be better if section 12 liability did not exist at all in light of our recommended framework, such that any reporting restriction should be made by order. In light of the consultation responses received, we recommend the repeal of paragraphs (a), (b), and (e) of section 12(1). However, the evidence relating to paragraph (c) strongly supports its retention; further detailed consultation would therefore be required, and we make no recommendation at this stage. While there is some evidence in favour of repealing paragraph (d), it is limited, and we therefore recommend only that the Government consider its repeal.

Recommendation 37.

7.27 We recommend repeal of the exceptions to the general rule in section 12(1) of the Administration of Justice Act 1960 found in paragraphs (a), (b) and (e).

Recommendation 38.

7.28 We recommend that Government consider repeal of section 12(1)(d) of the Administration of Justice Act 1960.

Chapter 8: The role of the Attorney General

INTRODUCTION

8.1 The Attorney General (AG) is both a government minister and the senior of the two Law Officers, occupying the role of principal legal advisor to the government. The AG has a constitutional role as "guardian of the public interest",[1] and a part of that role involves protecting the public interest in the administration of justice. The AG is supported in the exercise of the contempt function by the Attorney General's Office (AGO) and the Solicitor General (SG). Together, the AG and SG are known as the Law Officers. However, since any powers of the AG may be exercised by the SG,[2] throughout this chapter we refer only to the AG.

8.2 In fulfilling the public interest role, the AG undertakes work and makes decisions that can be collectively described as the AG's "contempt function".[3] The AG can institute proceedings for common law contempt or, under the Contempt of Court Act 1981 (CCA 1981), for strict liability contempt. When aware of a potential contempt, the AG may also decline to bring such proceedings. The AG may become aware of an issue in any number of ways, including by receiving a request or referral from a court or any person or organisation, requesting them to consider bringing contempt proceedings. Under the CCA 1981, proceedings for strict liability contempt can only be instituted by or with the consent of the AG, so the AG may also either grant or refuse consent to another person seeking to bring such proceedings.[4] We refer to decisions made in the exercise of the contempt function as "contempt decisions".

8.3 In this chapter we consider the role of the AG in the context of liability for contempt.

8.4 First, we look at whether the AG should retain the contempt function. We consider the views we have heard from consultees as to why the AG should or should not retain the function and also approach the matter from first principles. We acknowledge the arguments that the AG should not retain the contempt function because, being a government minister and legal advisor to the government, they have conflicts of interest which might affect or be perceived to have an effect on their decision-making. However, given countervailing factors and ways to mitigate the conflicts of interest, we recommend that the AG should retain the contempt function. For the avoidance of doubt, we also recommend that for all four forms of liability in our framework, proceedings may be commenced by a court acting on its own motion or by the AG.

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1 See Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), para 7.1, citing *Constitutional Role of the Attorney General,* Fifth report of the Constitutional Affairs Committee (2006-07) HC 306.

2 Law Officers Act 1997, ss 1(1)-(2).

3 We described the public interest function of the Attorney General (AG) in relation to contempt in the consultation paper, CP 262, paras 7.5-7.11.

4 CCA 1981, s 7.

8.5 Second, we look at the current requirement for the AG's consent to bring proceedings for strict liability contempt. We recommend that the requirement for the AG's consent should be retained for contempt by publication when proceedings are active.

8.6 Finally, we look at whether the AG's contempt decisions should be capable of judicial review. We conclude that the possibility of judicial oversight of AG contempt decisions should address the conflicts of interest concerns and ensure accountability in decision-making. Accordingly, we recommend that these decisions should be open to judicial review.

8.7 The discussion of the AG's role in contempt of court in in this chapter is limited to issues that are particularly relevant to the liability framework. In part two of the report, we will consider further issues regarding the AG's role.[5] They relate to the procedure and transparency of decision-making by the AG and the AGO, and were explored in chapter 7 of the consultation paper. They are: whether the AGO should publish a statement of practice to enhance consistency and predictability of AG decision-making; the powers of the AG to obtain information for decision-making; and whether the AG should publish data relating to the exercise of their contempt function.[6]

THE PUBLIC INTEREST FUNCTION IN CONTEMPT

8.8 The role of the AG in contempt has attracted criticism because the AG is a parliamentarian. In the consultation paper, we acknowledged that some think it is inappropriate for the AG to be the public interest gatekeeper for contempt proceedings.[7] The essence of the concern is that the AG may be perceived to be, or may actually be, biased in their decision-making. The concern is most acute where critics argue that a publication by a parliamentarian reaches the contempt threshold, but the AG does not institute proceedings. However, the concern also arises where the AG chooses not to commence proceedings against media organisations or other publishers who share or support the AG's political views or party, or chooses to commence proceedings against those whose views are not shared by the AG or their party. As a result, critics argue, there is a risk that the public interest in the administration of justice is not adequately protected.

Reform options

8.9 In the consultation paper, we considered the concerns about the political nature of the AG and whether the contempt function should be removed. We considered four possible options:

(1) remove the AG's contempt function and do not pass it to another body;

(2) pass the AG's contempt function to the Director of Public Prosecutions (DPP);

(3) pass the AG's contempt function to a new body; or

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5 At paras 1.25-1.27 above, we explain the two parts of our report and the coverage of each.

6 CP 262, paras 7.1-7.190.

7 Above, para 7.17-7.28.

(4) leave the contempt function with the AG.[8]

8.10 We said that if the contempt function were removed from the AG and not passed to another body, it would fall to another party to the affected proceedings or to courts (acting on their own motion) to bring contempt proceedings in the public interest.[9] However, we acknowledged that the AG "as guardian of the public interest, is in a better position to reach a decision on whether contempt proceedings are warranted in the public interest"[10] than a judge, who would be acting as "victim, prosecutor and judge".[11] Furthermore, a judge can only bring contempt proceedings where they have been made aware of a publication and, given publications may occur before a judge has been assigned to a particular case, this would present difficulties.[12]

8.11 As for the second option, we said that the Crown Prosecution Service (CPS) (headed by the Director of Public Prosecutions (DPP)) is a non-political body at arm's length from government, which makes it appealingly impartial, and the DPP has experience in making decisions in the public interest.[13] However, we said that shifting the responsibility to the CPS would not be appropriate. Our provisional view was that "there are overriding conceptual and practical reasons why it would be inappropriate to pass the AG's contempt function to the DPP".[14] The reasons we gave were: contempt is not a criminal offence; the AGO has the relevant expertise; moving the function to the CPS would have significant resource implications;[15] and public confidence might be impacted if the CPS were to seek to imprison a person for non-criminal conduct.[16]

8.12 We were not persuaded by the possibility of passing the AG's contempt functions to a new body. We briefly considered the creation of a new post of "Director of Civil Proceedings", as proposed in 1990 by former Lord Chief Justice, Lord Woolf of Barnes, so that decisions could be made in the public interest by a non-political, arm's length body.[17] However, we expressed concern that establishing a new body would have significant (possibly disproportionate) resource and oversight requirements,[18] and acknowledged that, in any event, such a proposition would fall outside our Terms of Reference.[19]

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8 CP 262, para 7.29.

9 Above, para 7.31.

10 Above, para 7.35.

11 Above, paras 7.32 and 7.35.

12 Above, para 7.34.

13 Above, paras 7.36-7.38.

14 Above, para 7.41.

15 Above, para 7.39.

16 Above, para 7.41.

17 Above, para 7.43, citing Sir Harry Woolf (later Lord Woolf of Barnes) in Sir Harry Woolf, *Protection of the Public: A New Challenge* (1990) p 109.

18 CP 262, para 7.45-7.46.

19 Above, para 7.44.

8.13 On the basis that we saw no suitable alternatives and we considered the AG to be well suited to the constitutional function of bringing contempt proceedings in the public interest, we provisionally proposed that the AG should retain the contempt function.[20] We said the conflicts of interest concerns could be remedied in other ways (including through the possibility of judicial review). We consider those other options later in this chapter.[21]

Consultation

8.14 The majority of consultees who responded on the issue agreed that the AG should retain the contempt function.[22] However, those who disagreed were united in their concern as to the political character of the AG. In the following paragraphs, we outline reasons why consultees said the contempt function should be removed. This is followed by consultees' views on whether an alternative body would be more appropriate. Finally, we set out the arguments made by those who said the AG should retain the role.

The political character of the Attorney General

8.15 By far the most common reason given by consultees who said the contempt role should be removed from the AG is that their political character opens up the possibility of bias or perception of bias, rendering them unsuitable for the role.[23]

8.16 Professor Helen Fenwick, Dr John McGarry and academics from the University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media (University of Sheffield CFOM) argued that even if there was no actual bias, apparent bias (also called perceived bias) is sufficient to warrant the removal of the role from the AG. Professor Fenwick said that removing the function from the AG may be necessary for "the perception of preserving impartial justice, avoiding actual or perceived conflicts of interest, and ensuring that there is no bias in relation to contempt actions", notwithstanding that the AG might be more amenable to protecting freedom of expression than a court might be. According to Dr McGarry:

> it is not only that the AG should act independently in fact; it is that he should be seen to be acting independently and in many cases it would be too easy to make the case that the appearance of independence is missing.

8.17 Dr McGarry said that cases where the potential defendant is a member of either House of Parliament "epitomises the problematic nature of his power"; concerns also arise in situations involving the media and politicians or political activists outside of Parliament. He cited the proceedings brought against Stephen Yaxley-Lennon (also

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20 CP 262, para 7.48, CQ 50.

21 See below, paras 8.75-8.123.

22 27 out of 43 agreed, 11 disagreed, and 5 gave an answer categorised as "other".

23 Consultees who expressed this view included: Sam Hussaini; the joint response from the Association of Police Communicators (APComm) and the National Police Chiefs' Council (NPCC); the joint response from the National Police Chiefs' Council (NPCC), College of Policing (CofP) and Counter Terrorism Policing (CTP); Dr Clive Dolphin; Dr John McGarry; Professor Helen Fenwick; Garden Court Chambers, Civil Liberties Team; University of Sheffield CFOM; Sunny Gill.

known as Tommy Robinson),[24] and said that even if the decision to bring those proceedings was not politically motivated, the fact that they were brought by the government "as personified in the AG … provide[s] unnecessary grist to the mill of those who would seek to question the legitimacy of a decision to bring proceedings for contempt". Garden Court Chambers, Civil Liberties Team said that concerns about the AG's role are acute in cases involving "demonstrators opposed to Government action", such as the proceedings brought against Trudi Warner,[25] and the recent cases brought by National Highways Limited.[26] Policing stakeholders said "there may be bias where there is political alignment between the government of the day and some media outlets".[27]

8.18 Dr McGarry and University of Sheffield CFOM told us explicitly that these concerns undermine "faith in the office"[28] and "confidence in the impartiality of the process".[29]

Alternatives to the Attorney General

8.19 Those who said the AG should not retain the contempt function expressed different views about which body should carry out the contempt function.

8.20 Consultees did not exhibit strong support for the establishment of a new body to bring proceedings, nor was there support for the public interest contempt function passing to the courts. However, there was some preference for the role to be moved to the DPP and the CPS.[30] Sam Hussaini, a barrister, argued that the DPP, unlike the AG, is a "non-political role" so "would not be vulnerable to conflict of interest, or the appearance of it, as the AG is". He submitted that the DPP and CPS already carry out similar functions in determining whether to bring prosecutions for criminal offences and where the public interest lies. Accordingly, he could see "no reason why the DPP and CPS could not be equally competent as the AG and AGO in carrying out the contempt role". He said that it does not matter that the DPP would be taking decisions on cases that are not criminal offences and that there is no evidence that "public confidence will be diminished if a prosecuting authority is seeking to imprison people for non-criminal conduct". Sam Hussaini and Dr McGarry were both unpersuaded by resource concerns, arguing that funding and staffing could be diverted from the AGO and the CPS could acquire the relevant specialisation.

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24 See for example *Attorney General v Yaxley-Lennon* [2019] EWHC 1791, [2020] Criminal Law Review 534; and also *Solicitor General v Yaxley-Lennon* [2024] EWHC 2732 (KB) in which Yaxley-Lennon was found in contempt of court and given a custodial sanction for breaching an injunction made by Nicklin J, which required him not to publish libelous allegations against a particular individual.

25 *Solicitor General v Warner* [2024] EWHC 918 (KB), [2024] 2 Criminal Appeal Reports 19.

26 Garden Court Chambers, Civil Liberties Team said these "have essentially been brought by a state entity (National Highways Ltd is wholly owned by the state)".

27 The APComm and NPCC; the NPCC, CofP and CTP.

28 University of Sheffield CFOM.

29 Dr McGarry.

30 Dr Dolphin; Sam Hussaini; Dr McGarry; the APComm and NPCC; the NPCC, CofP and CTP; University of Sheffield CFOM.

8.21 Some hybrid options were presented to us. Notwithstanding that Dr McGarry favoured moving the role to the DPP, he said one option could be for the AG to:

> remain constitutionally responsible to Parliament and the public for the exercise of the contempt function … and could exercise a backstop role whereby the power to initiate contempt will usually be taken by the DPP (or other arm's length official) but …the AG may step in to halt or initiate proceedings himself and … he would be accountable to Parliament for such actions.

8.22 Policing stakeholders suggested that decisions on whether to bring proceedings for publication contempt should be taken jointly by the DPP, IPSO (the independent regulator for the UK print and digital news industry) and Ofcom (the broadcast industry regulator).[31] The joint response from the Association of Police Communicators (APComm) and the National Police Chiefs' Council (NPCC) said the involvement of the DPP would "ensure impartiality and integrity".[32]

8.23 However, we heard from some of those who thought the AG should retain the contempt function[33] that there are no suitable alternatives. The General Council of the Bar of England and Wales (the Bar Council) found "real difficulty" with the idea of any alternative:

> We are not attracted by the idea of an independent, stand-alone, body charged with taking such decisions: in a time of scarce resources and multiple costs pressures on a justice system that is broken or near broken in many respects, we do not think that the inevitable additional costs of such a body could easily be justified. We also think there are dangers in having a body that is set up only to take such decisions, as the taking of such decisions can only benefit from experience of applying the public interest test in a wide variety of different contexts.
>
> Nor are we attracted by the idea of transferring the power to bring such proceedings to the DPP. As the paper points out, contempt of the kind at issue is not a criminal offence, so that the obvious experience and remit of the DPP in relation to criminal prosecutions is not immediately relevant. More fundamentally, we see the risk of a real conflict of interest, and certainly a perceived risk of conflict, between the DPP's interest and function as a prosecutor in criminal proceedings and the decision as to whether it is in the public interest to (for example) bring proceedings for contempt in relation to a publication: in particular, there is a risk that such decisions could be influenced, or be perceived to be influenced, by tactical considerations in relation to the criminal proceedings. We do not think that that issue can be resolved by "Chinese walls", not least because many such decisions, such as a decision to proceed against a major public figure or major media outlet, would be bound to be taken by the DPP personally.
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> … the decision is not an appropriate judicial function. … We agree with the consultation paper that it would not be appropriate or practical to confer that power

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31 The APComm and NPCC; the NPCC, CofP and CTP.

32 The APComm and NPCC, citing, IPSO, The Editors' Code of Practice - IPSO.

33 The Court of Protection Practitioners Association (CoPPA); the General Council of the Bar of England and Wales (the Bar Council).

on the trial judge (because there may at that point be no trial judge, and if there is, the trial judge is not well-placed to weigh, or be seen to be able fairly to weigh, the wider public interest beyond the effect of a possible contempt on the trial at issue).

Similar lines of argument were presented by the Court of Protection Practitioners Association (CoPPA).

8.24 The CPS, though of the view that ultimately this was a matter for the AG to decide, told us it is appropriate for the AG to retain the function.[34] The CPS emphasised that "a key consideration" in where the responsibility for bringing contempt proceedings should lie "is whether or not this is to be a criminal offence". Despite arguing that general contempt should be a criminal offence, and elsewhere in this report we recommend it should not be,[35] the CPS conceded that "it is inappropriate for the DPP to take on the 'prosecution' of non-criminal offences".

Why the Attorney General should retain the public interest function

8.25 We were told by several consultees, including the AGO, that the AG is well equipped to weigh the relevant considerations and determine whether the public interest requires contempt proceedings to be brought.[36] The Bar Council said "the wide-ranging and multi-faceted nature of the public interest discretion" should be exercised by "someone who is equipped to make both the legal and wider public interest judgments required" and "the AG, given his wide-ranging role as defender of the public interest, is the natural person to exercise that function". The Media Lawyers Association (MLA) and Guardian News and Media Limited (GNM) said the AG is the appropriate public officer to represent the public interest in the administration of justice.

8.26 We were also told by several consultees with media interests and expertise that the effective protection of free speech requires the AG to retain the contempt function. We heard that the AG plays an important role in limiting the effects of contempt laws on journalists and other publishers, because proceedings for contempt by publication when proceedings are active can only be instituted by or with their consent.[37] The AG also engages in dialogue before bringing proceedings and asks publishers whether there are reasons why proceedings should not be brought. According to the MLA:

> [The AG's function] is an important safeguard to (i) prevent vexatious litigation; (ii) ensure there is a "strong prima facie case"; (iii) ensure it is in the public interest to bring proceedings and that the media are not exposed to costly litigation, which would have a chilling effect on journalism; and (iv) maintain consistency in the administration of the law.

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34 The CPS's comments were given in the context of general contempt, which they submitted should be a criminal offence. The CPS said it "express[ed] no view" about the role of the AG in relation to contempt by breach of order or undertaking or contempt by publication when proceedings are active.

35 Paras 2.48-2.74 above.

36 The Bar Council; the Attorney General's Office (AGO); Guardian News and Media Limited (GNM); the Media Lawyers Association (MLA).

37 The MLA; GNM; Professor Jacob Rowbottom.

8.27 Others agreed. Professor Jacob Rowbottom said that, despite the "potential conflicts of interest", the "Attorney General's policy in relation to contempt has been a key factor in restraining the impact of the law on free speech (as not every arguable contempt is pursued)". GNM was of the view that so important is the protection afforded by the AG, that "consent should be required for all contempt cases involving article 10 rights" (such as publications which would fall within liability for general contempt or breaches of reporting restrictions).

8.28 Additionally, we heard from some that the political character of the AG is unproblematic.[38] On the contrary, they suggested that a beneficial feature of the AG holding the contempt function is that they are accountable to Parliament, which places a check on their power.[39] Although the Bar Council accepted that "it is at least possible" for an individual AG to "fall below, or widely to be seen to have fallen below, the standard of independence and impartiality that is expected… there remains a strong political understanding that the AG should take such decisions independently and impartially". Furthermore, the Bar Council said that if the AG's contempt decisions were to be subject to judicial review, then that would provide a further check on any "temptation or pressure" to act inappropriately.

Discussion

8.29 We recommend that the AG should retain the contempt function.

8.30 Although the majority of consultees who responded on the issue said the AG should retain the function, that is not determinative. We have been alive to the concerns about the political character of the role and the potential for apparent bias to affect the way the contempt function and process are seen. However, the following three points, which emerged from consultees' responses in favour of the AG retaining the contempt function, are particularly persuasive:

(1) There is no suitable alternative to the AG. There would be a risk of a real or perceived conflict of interest between the DPP's role in weighing the public interest in bringing criminal proceedings and determining whether it is in the public interest to institute contempt proceedings. Perhaps most importantly, the CPS is of the view that unless contempt is a criminal offence, the function should not lie with the DPP. Establishing a new body is neither viable nor appealing. Any new body would lack the expertise that has been developed over time by the AG and AGO, and the resource requirements associated with establishing a new body are disproportionate to any benefits to be gained. Removing without rehoming the contempt function currently exercised by the AG is neither wise nor practical: it would leave the decision to bring contempt proceedings in the hands of the courts only, and as outlined above, consultees have raised concerns that in some circumstances it would not be appropriate for courts to make decisions on whether to bring proceedings in the public interest.

(2) The AG is well-suited to exercising the public interest function. The AG and AGO have experience making decisions in the public interest and in the context

[38] GNM; Professor Stephen Bailey.

[39] GNM.

of contempt, and have developed expertise in assessing whether it is in the public interest to bring proceedings for contempt by publication when proceedings are active.

(3) In the context of contempt by publication when proceedings are active (which requires the consent of the AG, discussed below),[40] the AG provides an important protection for freedom of expression, limiting the extent to which contempt proceedings can be instituted against publishers. Arguably, this protection has more to do with whether the consent requirement is retained than whether the AG retains the contempt function in general. However, as we conclude above, there is no other body suited to exercising the contempt function, and therefore, none suited to exercising the consent requirement.

8.31 In the consultation paper, we said that another reason the AG should retain the role is because to remove it would amount to major constitutional reform.[41] Following responses from Dr McGarry, Sam Hussaini and University of Sheffield CFOM, we accept that constitutional change can, and should, take place if it is warranted.[42] The contempt function of the AG is not beyond the scope of review and reform for constitutional reasons. Nevertheless, for the reasons set out above, we do not think the contempt function should be removed.

8.32 Despite our recommendation, we acknowledge the force of feeling among some consultees that the conflicts of interest associated with the AG's role in contempt are a serious concern. Of course, if the AG is to retain the function as we recommend, these concerns will remain. We are of the view that some reform is needed to mitigate these risks and concerns so that both freedom of expression and the administration of justice are appropriately protected. In the following parts of this chapter, we consider the consent requirement and whether it should be modified. We also consider whether contempt decisions made by the AG should be open to judicial review, and we recommend that they should be. We think that this sufficiently addresses the conflicts of interest concerns.

Recommendation 39.

8.33 We recommend that the Attorney General should retain the contempt function.

Bringing contempt proceedings

8.34 Unless proceedings are initiated on a court's own motion, the applicant in contempt proceedings will often be the AG or a person or body seeking to enforce a court order.

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40 Paras 8.40-8.72 below.

41 CP 262, para 7.47.

42 Dr McGarry noted that the Constitutional Reform Act 2005 precipitated significant constitutional reforms to the role of the Lord Chancellor and to the structure of the Judiciary (among other things), and is evidence of a "decoupling of law and politics". Additionally, as argued by University of Sheffield CFOM, the 2007-2008 Government consultation on the role of the Law Officers considered reforms to the role of the AG in distinct areas (legal advice, prosecutions, and criminal justice policy). See House of Lords Select Committee on the Constitution, *Reform of the Office of Attorney General* (7th Report of Session 2007-2008).

There are other circumstances where a person or body other than the AG may wish to bring contempt proceedings, including, for example, where someone has made a false statement in proceedings or in anticipation of proceedings, or is not a party to a court order but has sought to subvert an order made by a court.[43]

8.35 It is well established that a court that has contempt protection and contempt powers may institute contempt proceedings on its own motion.[44] In part two of the report we will discuss which courts have protection, and which courts have what powers. However, for completeness and for the avoidance of doubt, we include in our recommendations in this chapter that a court that has jurisdiction to deal with contempt may commence proceedings on its own motion for any of the four forms of contempt in our new liability framework.[45]

8.36 The AG may institute proceedings for strict liability contempt under the CCA 1981. The AG can bring proceedings for contempt under the common law to protect the public interest in the administration of justice.[46] Our recommended form of general contempt would mirror much of the common law in this respect, with the AG able to bring proceedings for general contempt. This reflects the practice developed in the latter half of the 20th century, whereby individuals and courts could refer matters to the AG, who would then decide whether to bring proceedings. The AG may bring proceedings even where the order is between parties:

> It is quite clear … that the law officers have locus to apply for committal of an alleged contemnor even if the contempt is civil and involves the breach of an order obtained… by a private individual in the course of proceedings between private individuals. The law officers act to safeguard the public interest and the administration of justice.[47]

Again, in our new liability framework this would still be the position; the AG would be able to bring proceedings for contempt by breach of court orders or undertakings.

8.37 For the avoidance of doubt, we recommend that the AG should be able to commence proceedings for all four forms of contempt in our new liability framework.[48]

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43 See paras 6.142-6.147 and 6.188-6.198 above, and Appendix 1 paras 1.30-1.36.

44 Senior courts have an inherent jurisdiction to institute contempt proceedings on their own motion. Where other courts, tribunals and bodies are protected by the law of contempt and have the power to deal with it, they may also initiate proceedings on their own motion: see chapter 6 of CP 262. See also, for example, Civil Procedure Rules (CPR), r 81.6(1): "If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings".

45 In part two of the report, we will consider the procedural requirements when a court acts on its own motion.

46 See, for example, *Solicitor General v Yaxley-Lennon* [2024] EWHC 2732 (KB) at [31], citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 293 (Lord Reid).

47 *Solicitor General v Jones* [2013] EWHC 2579 (Fam), [2014] 1 Family Law Reports 852 at [14].

48 These recommendations are distinct from any matters relating to permission requirements. Permission will be discussed in part two of the report.

8.38 In part two of the report, where we will look at permission filters and standing to bring proceedings, we will consider the position where a person other than the AG wishes to institute contempt proceedings.

Recommendation 40.

8.39 We recommend that the Attorney General or a court (having the power to deal with contempt) on its own motion may bring proceedings for contempt of court based on any of the four forms of liability: contempt by breach of court order or undertaking; contempt by publication when proceedings are active; contempt by disrupting proceedings; or general contempt.

THE CONSENT REQUIREMENT

8.40 Section 7 of the CCA 1981 provides that, unless a court institutes contempt proceedings on its own motion, proceedings for strict liability contempt by publication can only be instituted by or with the consent of the AG.[49] Therefore, section 7 has the effect of placing the AG in a gatekeeper role. This, we have heard, exacerbates concerns about possible conflicts of interest on the part of the AG.

8.41 What follows is a discussion of whether the consent requirement should be retained, removed or modified in the parallel form of contempt in our new liability framework, contempt by publication when proceedings are active. We consider two circumstances in particular in which the consent requirement might warrant modification, namely (i) where the potential applicant is a party to the active proceedings, and (ii) where the alleged contemnor is a politician.

8.42 We recommend that the consent requirement should be retained in all circumstances.

The consent requirement generally

Consultation

8.43 In the consultation paper, we acknowledged that concerns about possible conflicts of interest on the part of the AG are exacerbated by the section 7 consent requirement.[50] We said that one reform could be to remove or modify the consent requirement in section 7.[51] We said that removing it might have a chilling effect on freedom of expression because the requirement for the consent of the AG limits the number of cases that may otherwise be pursued against the media.[52] However, we presented two options which could limit the exclusivity of the AG's power:

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49 CCA 1981, s 7.

50 CP 262, para 7.57.

51 Above, paras 7.49-7.51.

52 Above, para 7.57.

(1) a parallel approach, whereby an applicant could either obtain consent from the AG or permission from the court;[53]

(2) a sequential approach, whereby an applicant must first seek consent of the AG and if consent is refused, then may seek permission from the court.[54]

8.44 We explored the advantages and disadvantages of both options. Both, we accepted, would have resource implications for the Judiciary, requiring courts to consider applications where currently they do not.[55] The parallel approach might cause confusion for litigants as to which route to choose.[56] Though the sequential route might be procedurally clearer for litigants, matters would take longer to resolve, and it would effectively provide a right to appeal against the AG's refusal to give consent.[57]

8.45 In response to the question of whether the consent requirement should be retained or modified, there were similar levels of support for retaining the current approach and for adopting the sequential approach.[58]

8.46 The parallel approach received little support.[59] Those in favour said it was the best option for addressing the conflicts of interest concerns because the risk of bias on the part of the AG is removed where applicants have the option not to involve the AG.[60] However, as other responses indicate and as we discuss at paragraphs 8.75 to 8.123 below, those concerns may be better addressed in other ways.

8.47 With respect to the sequential route, we heard that being able to obtain permission from the court where the AG refuses consent provides a "useful safeguard"[61] or "backup" in the context of conflicts of interest on the part of the AG;[62] that the flexibility of the approach is useful;[63] and requiring applicants first to approach the AG "reduces the impact on judicial resources".[64]

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53 CP 262, para 7.58.

54 Above.

55 Above, para 7.59.

56 Above.

57 Above.

58 Of the 31 who answered this question, 13 consultees favoured retaining the current approach and 12 favoured the sequential approach.

59 Of the 31 who answered this question, only 6 favoured the parallel approach.

60 The Criminal Law Solicitors' Association (CLSA); Hacked Off; Sam Hussaini.

61 Dr Richard Jones; the MLA.

62 Dr Dolphin. Others who made similar comments include: Professor Fenwick; the MLA; University of Sheffield CFOM; the Chartered Institute of Legal Executives (CILEX); Dr Jones.

63 The Law Society of England and Wales (the Law Society); the Criminal Bar Association; Professor Peter Hungerford-Welch.

64 Court of Protection Bar Association (CPBA).

8.48 Those in favour of retaining the current approach, whereby proceedings for contempt by publication should only be brought by or with the consent of the AG, gave three main reasons:

(1) First, this approach provides certainty. We heard that it would be detrimental to certainty and consistency in process and outcome if the consent of the AG could be overridden or bypassed by seeking permission from the court.[65]

(2) Second, and a view expressed by the AGO and several media consultees, the AG consent requirement provides an important safeguard for freedom of expression by limiting the number of cases instituted against publishers.[66] Both the Bar Council and the MLA stressed that if proceedings could be instituted in cases where the AG does not bring them, it could have a chilling effect on fair media reporting of active proceedings in the public interest.[67] The AGO said the consent requirement ensures that "public discussion and appropriate speech are not unnecessarily or disproportionately restricted where proceedings are active". We also heard that the consent requirement helpfully filters out frivolous or vexatious applications.[68] The Bar Council said that under the parallel and sequential approaches, such applications for permission would proceed to court where they would put pressure on judicial and other public resources.[69]

(3) Third, it would be inappropriate for a court to replace the AG's power to determine whether it is in the public interest to bring proceedings.[70] We heard that to leave it with the courts would introduce inconsistencies in decision-making.[71] Others emphasised concerns about the overlapping roles that a judge would have to play.[72] According to the Justices' Legal Advisers and Court Officers' Service (JLACOS):

> Contempt by conduct, where the court is both the prosecutor and the tribunal, is complicated enough, without extending the problem to the High Court. Proceedings with a clear applicant independent from the court are always easier to manage.

Similarly, Professor Stephen Bailey said that, unlike in other cases where permission is required (for example applications for judicial review or appeals), "getting the permission of a judge for what is in substance, although not

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65 An anonymous consultee; and the Family Division of the High Court. The response of the Family Division of the High Court was submitted by the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and from the senior judge of the Court of Protection. See para 1.34 above for further information about the Family Division response.

66 The AGO; GNM; Professor Rowbottom; the MLA.

67 Professor Rowbottom; the Bar Council; the MLA.

68 The Bar Council; Professor Rowbottom; GNM; the MLA.

69 The Bar Council.

70 The Bar Council; GNM.

71 GNM.

72 Professor Bailey; the Justices' Legal Advisers and Court Officers' Service (JLACOS); Chartered Institute of Journalists (CIoJ).

technically, a criminal prosecution in the sensitive area of strict liability contempt seems wrong in principle".

Discussion

8.49 We recommend that the current approach should be retained. That is, the consent of the AG should be required to bring proceedings for contempt by publication when proceedings are active.

8.50 Although support for the sequential approach was similar to that for retaining the current approach, we are not persuaded that it is appropriate for courts to be asked to grant permission where the AG has determined that it is not in the public interest to bring contempt proceedings. Courts would likely be very reluctant to interfere with an assessment by the AG as to where the public interest lies. We are also concerned that a sequential approach would result in the application of two different standards to the same case. In any event, the main reason given for favouring the sequential approach was that the opportunity to obtain permission from the court where the AG refuses to grant consent safeguards against potential conflicts of interest on the part of the AG. However, we recommend a different way that those concerns may be remedied.

8.51 There are additional problems with both the parallel and sequential approaches. Allowing applicants to approach courts for permission to bring contempt proceedings against any possibly contemptuous publication would place pressures on scarce judicial resources. Furthermore, judges exercising permission in the context of contempt would be responsible for bringing proceedings as well as acting as the gatekeeper and judge. Not only would this be inappropriate, it could also compromise a defendant's right to a fair and impartial hearing, which is protected by article 6 of the European Convention on Human Rights.

8.52 Ultimately, we are persuaded that the consent requirement should be retained for contempt by publication when proceedings are active because it is necessary to limit the impact of contempt laws on freedom of expression. This was something we recognised in the consultation paper, and we remain convinced of the need to strike a balance between protecting the administration of justice and free speech. Modifying the consent requirement such that applicants could bypass the AG and seek permission directly from the court (under the parallel approach) or ask the court to overrule a refusal by the AG to bring proceedings (as would be possible under the sequential approach) would have a chilling effect on freedom of expression.

8.53 The requirement for the AG's consent raises the further question of who, other than the AG or the court, might seek to bring contempt proceedings. As indicated at paragraph 8.38 above, we will consider that in part two of the report.

Recommendation 41.

8.54 We recommend that proceedings for contempt by publication when proceedings are active may be brought only with the consent of the Attorney General.

Exceptions or modifications to the consent requirement in limited circumstances

Consultation

8.55 In addition to asking open questions on whether the consent requirement should be retained or modified, we also acknowledged two circumstances in which the consent requirement could operate differently:

(1) We acknowledged that the parallel or sequential route might operate slightly differently if the potential applicant is a party to the active proceedings where the alleged contempt has occurred,[73] and we asked consultees about this.[74]

(2) We acknowledged that the possibility of a conflict of interest is "particularly acute" in circumstances where the potential defendant is a parliamentarian, so we asked whether, if the consent requirement is retained generally, there should be a specific exception in such cases.[75] For example, the applicant could be required to obtain permission from the court rather than consent from the AG.[76] We said there would need to be sufficient certainty as to which circumstances would not require the AG's consent and that it could prove difficult to carve out a category of persons who would be exempt. We suggested that removing the consent requirement in every case involving a political office-holder "could be overinclusive and thus, disproportionate".[77] However, we asked whether the consent requirement should be removed and replaced with a requirement to obtain permission of the court in cases where the potential defendant is a current or former member of either House of Parliament.[78]

Whether the consent requirement should apply to parties to proceedings

8.56 There was little support for the consent requirement to apply differently where the potential applicant is a party to the active proceedings where the alleged contempt occurred.[79] Several consultees expressed the view that there should be no difference.[80] Some consultees said this is because the potential for a conflict of interest does not depend on whether the applicant is a party to proceedings.[81] Others emphasised that it should not be easier for parties to bring applications for contempt. For example, Greg Callus, barrister and editor of the contempt section of the White

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73 CP 262, para 7.60.

74 Above, para 7.62, CQ 51.

75 Above, para 7.64.

76 Above, para 7.66.

77 Above.

78 Above, para 7.68.

79 There were 26 responses to this part of CQ 51: 4 consultees said the position should be different; 17 said the position should not be different; and 5 selected "other". However, responses were overlapping and reflected some confusion, so the quantitative data is not reliable. Instead, we rely on the qualitative responses.

80 CILEX; the Criminal Bar Association; Professor Rowbottom; Sam Hussaini; Sunny Gill; the Family Division of the High Court.

81 Sam Hussaini; Professor Rowbottom.

Book,[82] and Dr Clive Dolphin[83] both pointed out that if parties to active proceedings could bring contempt applications as of right, it would be too easy to institute them, which would have a chilling effect on fair media coverage of the trial.[84] GNM said that parties to proceedings should not be free to apply to the court for permission where it is refused by the AG:

> There is a danger that parties to active proceedings could come to regard contempt applications as a standard preliminary application made as part of the normal process of defending themselves in proceedings and thereby casting doubt upon the possibility of any fair trial. Such applications would both protract criminal proceedings and also potentially result in journalists becoming caught up in meritless claims brought against them for reasons not connected with the administration of justice but rather as a tactical response to criminal or other prosecutions. Even if such applications were ultimately unsuccessful, the process would have a significant chilling effect – both on the particular journalist involved and publishers more widely.

Whether the consent requirement should be modified where the alleged contemnor is a parliamentarian

8.57 As for whether the requirement to obtain the AG's consent should be removed and replaced with a requirement to obtain the permission of the court where the alleged contemnor is a current or former member of either House of Parliament, a majority of consultees who engaged with the issue supported such an approach.[85] The main reason given was that this would address concerns about the AG making politically-biased decisions.[86] Sam Hussaini said if the AG is to retain the consent function, it should at the very least be removed in circumstances involving current or former parliamentarians.

8.58 Some consultees even suggested the category should be cast in broader terms. The Chartered Institute of Legal Executives (CILEX) said that the requirement to obtain the AG's consent should be removed and replaced with a requirement to obtain permission of the court not only where the potential defendant is a current or former member of either House of Parliament, but also where they are "current principal councillors, and members of devolved bodies, such as the Senedd, or the London Assembly". Sam Hussaini said that although including "any political office-holder" would be disproportionate, it would not necessarily be disproportionate for "the mayor of a major city", for example, to be included in the category. He cited Andy Burnham (Mayor of Greater Manchester) or Sadiq Khan (Mayor of London) as examples where "the potential for conflict of interest would be acute if the AG were to have to decide

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82 The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

83 This response was made by Dr Dolphin on behalf of 11 people arrested for Contempt of Court outside Southwark Crown Court and on behalf of Defend Our Juries.

84 Dr Dolphin; Greg Callus.

85 34 consultees responded to this part of CQ 52. 16 said it should be removed and replaced; 9 said it should not; 9 selected "other".

86 Dr McGarry; CILEX; Professor Fenwick; Sam Hussaini.

whether to grant consent for proceedings".[87] He said that although there is a need for certainty, it is not clear why a "more inclusionary category of political office-holder" would lead to uncertainty.

8.59 Some consultees said that non-parties to proceedings might also have an important role to play where the AG declines to bring proceedings against a parliamentarian. For example, Dr Dolphin said that parties do not always have "the capacity, ability or desire to bring actions that may be in the public interest". Professor Fenwick said that where the AG does not bring proceedings against a political ally, "there is a case for allowing a non-party to fill the gap". The suggestion is that in such circumstances, non-parties should be exempt from the requirement to obtain the AG's consent.

8.60 Those who said there should be no exception and that the AG should always be required to grant consent gave varied reasons. Some said there would be practical difficulties in establishing an appropriate statutory exception. For example, the Bar Council said:

> …the attempt to define a class of "politician" cases where the AG's judgment may be regarded as potentially suspect by reference to a criterion such [as] present or past membership of a House of Parliament is doomed to failure, or, at least, to a definition likely to be regarded as either anomalous or over-extensive…
>
> The suggested criterion of membership of either House gives rise to obvious anomalies: it would catch someone who … was an MP, perhaps briefly, but has gone on to a career elsewhere, for example in journalism (examples such as Brian Walden and Matthew Parris come to mind), thereby giving rise to differences in treatment between different journalists that might well not be easy to defend. Further, it would not catch people who on any view are prominent politicians such as Mark Drakeford, Andy Street, Ben Houchen, or (until the July 2024 election) Nigel Farage. Nor would it catch journalists or commentators, or media or campaigning organisations, with strong and influential opinions that may be obviously hostile, or favourable, to the Government of the day, and so potentially give rise to suggestions of partiality on the part of the AG.

8.61 The Bar Council also advised avoiding the "danger of a public perception that special rules were being made to protect politicians but not others". Such a perception, the Bar Council said, "is unlikely to improve already dangerous levels of public mistrust of politicians, and is likely to exacerbate the equally dangerous but widespread feeling that there is one rule for politicians and one rule for everyone else".

8.62 Greg Callus said that "to deem by statute a conflict of interest because the defendant had once been a member of a House of Parliament (maybe decades before the AG was even elected and is unknown to the AG personally) … is not remotely justified".

8.63 Others said that it would be inappropriate for the role of granting consent to sit with judges instead of the AG in circumstances involving politicians. Professor Bailey said that "in the sensitive area of strict liability contempt" it "seems wrong in principle". The Bar Council said that judges are not well placed to decide whether to bring contempt

[87] Sam Hussaini expressly stated that: "I appreciate that they are former MPs, but the acuteness of the conflict I am postulating does not derive from their status as such, but rather from their status as mayors".

proceedings "given the wide-ranging and multi-faceted nature" of the public interest test, and requiring judges to take a permission decision in cases involving only politicians "risk[s] the judge being dragged into political controversy".

8.64 Some media consultees reiterated the argument that the requirement for AG consent should be retained because it provides protection against unlimited encroachments on free speech. GNM recognised the "potential conflict of interest if the Attorney General is asked to reach a decision about a current or former member of either House of Parliament", but accepted that the consent requirement is a "constitutional check on contempt of court by publication decisions". Professor Rowbottom said that "removing the AG's consent requirement or giving the courts a power to grant permission to a wider range of applicants" may have a "chilling effect on the media and other publishers".

8.65 As for whether non-parties should be able to bring proceedings without the AG's consent (in circumstances where the alleged contemnor is a parliamentarian), GNM said this would create a risk that cases will be brought for "improper reasons". The Bar Council similarly said that it would result in "frivolous proceedings", or "proceedings designed to harass or intimidate, or merely to generate publicity or attract crowdfunding" which "are particularly acute in the case of politicians".[88]

8.66 Finally, some consultees said it was not necessary to remove and replace the consent requirement where the alleged contemnor is a politician because the AG has a duty to exercise their contempt function impartially.[89] The AGO said that "the Attorney General makes decisions in the public interest independent of Government and this applies equally to decisions on contempt proceedings".

Discussion

Whether the consent requirement should apply to parties to proceedings

8.67 It does not appear that there is currently any difference in the way that the consent requirement applies to parties to active proceedings. It may be the case that parties are well-placed to alert the court to publications that pose a substantial risk of serious impediment or prejudice, thereby triggering the court to exercise its own contempt powers.

8.68 However, it is clear from the responses we received that there should be no difference between non-parties and parties to active proceedings in terms of the requirement to obtain consent from the AG. We heard that if it is too easy for parties to bring contempt proceedings (for example, if they were to have an automatic entitlement to bring contempt proceedings or are exempt from the requirement to obtain consent from the AG) this form of contempt could become weaponised. GNM is right to caution against creating a situation whereby parties adopt contempt applications as an ordinary part of litigation, or worse, wield contempt as a litigation tactic to cast doubt

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88 The Bar Council cited as an example "of the ease with which wholly misconceived proceedings against a controversial politician can sometimes generate publicity and substantial crowd-funding … the attempt to bring a private prosecution against Boris Johnson for misfeasance in public office arising out of his statements during the Brexit referendum campaign: see *R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin)".

89 The AGO; Greg Callus; GNM; the CloJ.

on the possibility of a fair trial. This would cause untold difficulties for the operation of the justice process. Furthermore, if parties to active proceedings were not restrained in bringing contempt applications, the effect on media freedoms would be disproportionate.

Whether the consent requirement should be modified where the alleged contemnor is a parliamentarian

8.69 Although the majority of those who responded on the issue said that the requirement to obtain the AG's consent to bring proceedings for contempt by publication when proceedings are active should be removed where the alleged contemnor is a former or current parliamentarian, we are persuaded by the reasoning of the minority in this instance.

8.70 Not only will it be difficult to generate a defined category that is not over- or under-inclusive, but there is a more compelling reason to avoid trying to do so, which is the argument presented by the Bar Council that it would be perceived as an attempt to make "special rules" for politicians.

8.71 We conclude that, unless the court institutes proceedings on its own motion, consent of the AG should be required to bring proceedings for contempt by publication when proceedings are active in all circumstances.

8.72 That said, it is clear from what we have been told by consultees that there are serious concerns about actual or apparent bias on the part of the AG, especially where the alleged contemnor is a politician. It is unlikely these concerns can be remedied by the AGO's response, namely that there is no need to remove the consent requirement and create an exception where the alleged contemnor is a politician because the AG "has a duty to exercise their contempt function impartially". Even if the political nature of the AG does not result in actual bias in decision-making, the risk of apparent or perceived bias remains, and we accept that there is a need to address concerns in this respect. We are of the view that these concerns can be addressed by making contempt decisions of the AG susceptible to judicial review (see discussion at paragraphs 8.75-8.123 below). We also think that judicial review would be a more robust and consistent protection against real or apparent bias than attempting to create different consent rules for different categories of alleged contemnors depending on their degree of proximity to the AG.

Whether a consent requirement should apply for general contempt, contempt by breach of court order or undertaking, or contempt by disrupting proceedings

8.73 The discussion above relates solely to whether there should be a consent requirement for contempt by publication when proceedings are active, and we recommend that there should be.[90] It is also necessary to address whether there should be a consent requirement for the other forms of contempt. Our conclusion is that there should not be.

8.74 The primary reason for a consent requirement for contempt by publication when proceedings are active is that the fault threshold is low in circumstances where there

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[90] See para 8.54 above.

is no failure to abide by court-ordered restrictions, and no abusive, threatening or disorderly disruption to proceedings that requires control by the court. In each of those circumstances, freedom of expression is taken account of in other ways, including at the point an order is made and by virtue of the narrower conduct element of contempt by disrupting proceedings. We heard from some media consultees that the AG should be required to give consent for any contempt application that engages article 10, including an application for general contempt. However, the higher fault requirement for general contempt – the requirement to prove an intention to interfere with the administration of justice – provides a protection against disproportionate infringements of freedom of expression. Given these considerations, we also note there would be practical implications were the circumstances requiring AG consent to be expanded. Among them, it would add complexity and cost to bringing proceedings, for little or no added benefit. Were an expanded requirement to apply only where freedom of expression is engaged then this would present the further risk of satellite litigation. For these reasons, we have reached the view that a consent requirement is neither necessary nor appropriate beyond contempt by publication when proceedings are active. When we consider permission filters and standing in part two of the report we will have in mind that the requirement for consent by the AG only applies to contempt by publication when proceedings are active.

JUDICIAL REVIEW OF DECISIONS OF THE ATTORNEY GENERAL

8.75 We recommend that the AG should retain the contempt function. We also recommend that the requirement for the consent of the AG for proceedings for contempt by publication when proceedings are active should be retained. However, as set out above, an overarching concern we addressed in the consultation paper, and of consultees who said we should recommend neither of these things, was that the political character of the AG's position imports a risk of actual or apparent bias in decision making. This concern is exacerbated by the fact that the law does not seem to permit judicial review of the AG's contempt decisions.

8.76 In light of this we consider now whether the AG's contempt decisions should be open to judicial review.

Current law

8.77 A claim for judicial review asks the High Court to review a decision made by a public official or public body. In this way, courts act as a check on the exercise of power by the Executive. Judicial review focusses on "the way in which the decision is taken, rather than on the decision itself", so judicial review provides a route by which decisions may be reviewed, not appealed.[91] The grounds on which an administrative decision may be reviewed and held to be unlawful, as enunciated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service,* are illegality, procedural unfairness and unreasonableness.[92] Lord Diplock expressed the view that "further development on a case by case basis" may result in the establishment of additional grounds, and the principle of proportionality in the context of human rights has

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91 M Elliott and R Thomas, *Public Law* (5th ed 2024) p 517.

92 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 (Lord Diplock).

emerged in public law debates.[93] However, in *R (Gallaher Group Ltd) v Competition and Markets Authority*, the Supreme Court appeared reluctant to expand the grounds beyond Diplock's "tripartite categorisation".[94] Where a claimant succeeds in a judicial review case then a range of remedies is available. Among them, a court may quash the decision, "destroying [its] validity"; make a "declaration as to the lawfulness of [an] action or inaction"; or make an "order which obliges the [decision-maker] to behave in a particular way".[95] A successful judicial review claim does not mean that the decision will change. For example, when a matter is sent back to a decision-maker for reconsideration, this time complying with procedural requirements, it does not mean that there must or will be a different decision. Similarly, a declaration that a decision was unlawful may affect the way a public body makes decisions in future, but without any change to the decision that affected the claimant. That said, although a declaratory order is not the same as a coercive order and therefore will not require the decision-maker to change the decision, as expressed by the Supreme Court in *Craig v HM Advocate*, courts do not expect that an order declaring a decision to be unlawful will be ignored.[96] Judicial review is a mechanism which can be used to hold government to account.[97] Moreover, the possibility of review is seen to encourage and aid good public decision- and policy-making.[98]

8.78 The question of whether decisions made by the AG are currently judicially reviewable is a contentious one. When we published the consultation paper, it appeared to us that under the common law, some types of contempt decisions could already be reviewed by the courts. However, in 2025, the Divisional Court interpreted the law differently in *R (Campbell) v Attorney General*, reaching the conclusion that decisions by the AG are not currently reviewable.[99] We begin by explaining the common law position as it appeared at the time we published our consultation paper and then turn to more recent developments.

8.79 As we explained in the consultation paper, in *Gouriet*, the House of Lords maintained that "the Attorney-General's discretion is absolute and non-reviewable" by the courts[100] because the AG is best suited to making decisions on the public interest which "attract political criticism and controversy", not the courts.[101] This was reiterated

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93 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 (Lord Diplock). See for example, I Hare KC, C Donnelly SC and J Bell, *De Smiths Judicial Review* (9th ed 2023) paras 1-125–1-127.

94 *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96, at [26], [40]-[41] (Lord Carnwath); [50] (Lord Sumption) "In public law, as in most other areas of law, it is important not unnecessarily to multiply categories"; and [52] (Lord Briggs).

95 M Supperstone, J Goudie and P Walker (General Editor H Fenwick), *Judicial Review* (7th ed 2024) para 1.1. More flexible public law remedies have been also developed, including suspended and prospective-only quashing orders.

96 *Craig v HM Advocate* [2022] UKSC 6, [2022] 1 WLR 1270 at [46].

97 M Elliott and R Thomas, *Public Law* (5th ed 2024) p 520.

98 Gov UK, *JOYS: The Judge Over Your Shoulder* (6th ed 2022).

99 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98.

100 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 512 (Lord Edmund-Davies), cited in CP 262, para 7.70.

101 Above at 482 (Lord Wilberforce), cited in CP 262, para 7.70.

in *R v Solicitor General ex parte Taylor*, in which it was also pointed out that "if [Parliament] had intended the Attorney-General's discretion to be reviewable… it would have said so".[102]

8.80 However, despite this position, other cases have held that statutory powers are judicially reviewable. In *R v Panel on Take-overs and Mergers ex parte Datafin Plc*, Lloyd LJ stated that "if the source of power is a statute or subordinate legislation under a statute then clearly the body in question will be subject to judicial review".[103] Similarly, in *Mohit v Director of Public Prosecutions of Mauritius*, the Privy Council said:

> Since the source of the discretionary power [to grant or refuse consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked.[104]

8.81 This would suggest that consent decisions made by the AG under section 7 of the CCA 1981 are already judicially reviewable. In the consultation paper we said that "this is constitutionally acceptable 'because courts are simply enforcing the powers conferred by Parliament'".[105]

8.82 After we published the consultation paper, the Divisional Court addressed the question of justiciability in *R (Campbell) v Attorney General*.[106] The Court drew on a line of older authorities such as *ex parte Newton*,[107] *R v Comptroller General of Patents, Designs and Trade Marks*,[108] and *London County Council v Attorney General*,[109] to conclude that "by the end of the nineteenth century, there was a class of discretionary functions of the Attorney General whose exercise was categorically immune from review".[110] The Court noted that those cases had emphasised the AG's accountability to Parliament, not to the courts.[111] The Court held that the later decisions in *Gouriet*, *R v Attorney General ex parte Edey* and *R v Solicitor General ex parte Taylor*, which dealt with a range of the AG's constitutional and public interest

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102 *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 218-219.

103 *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815 at 847 (Lloyd LJ).

104 *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [14].

105 CP 262, para 7.73, citing M Elliott and R Thomas, *Public Law* (4th ed 2020) p 501.

106 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98.

107 *Ex parte Newton* (1855) 24 LJQB 247, cited in *Campbell v Attorney General* [2025] EWHC 1653 (Admin) at [17].

108 *R v Comptroller General of Patents, Designs and Trade Marks* (1899) 1 QB 909, cited in *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [18].

109 *London County Council v Attorney General* [1902] AC 165, cited in *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin) at [19].

110 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [48].

111 Above at [17], [19]-[20] and [25].

functions, maintained the approach taken in the earlier authorities, consistently concluding that the AG's decisions were not reviewable by the courts.[112]

8.83 Commenting on whether there is a difference between prerogative and statutory powers for the purposes of justiciability, the Divisional Court in *Campbell* said that, following *Council of Civil Service Unions v Minister for the Civil Service*,[113] "the justiciability of a decision taken in the exercise of a public power depends on the nature and subject matter of the power, rather than its source".[114] It said it did "not consider that it would be coherent to hold that the reasoning in *Gouriet* is inapplicable to functions simply because they are conferred by statute".[115] The Divisional Court said:

> Since [*Council of Civil Service Unions v Minister for the Civil Service*], the aptness or otherwise of a particular subject matter for judicial decision has remained a central preoccupation in the case law. The courts have continued to regard certain subject matters as inappropriate for judicial determination for institutional and constitutional reasons, but they have tended to give effect to these conclusions by limiting or modifying the grounds on which the decision can be challenged or by according a broad margin of discretion or ascribing particular weight to the view of the decision-maker, rather than by categorising the decision as non-justiciable simpliciter.[116]

8.84 The Divisional Court accepted that the position in *Gouriet* applies to statutory and non-statutory functions: the unique constitutional nature of the AG means that "there is a category of functions of the Attorney General which are immune from review on any ground".[117] That category, the Court said, includes:

> powers to enforce the law by bringing criminal or civil proceedings in the public interest and powers to authorise or terminate such proceedings by others—ie, powers which make the Attorney General a gatekeeper to the court and therefore (as some of the older authorities suggest) part of the administration of justice.[118]

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112 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [49]-[54]; *Gouriet v Union of Post Office Workers* [1977] QB 729 (CA); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL); *R v Attorney General ex parte Edey* [1992] 2 WLUK 351; *R v Solicitor General ex parte Taylor* [1996] Admin LR 206.

113 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

114 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [43].

115 Above at [53].

116 Above at [44].

117 Above at [54]. It is also the position of the AGO (as expressed in its consultation response) that *Gouriet* and *R v Solicitor General ex parte Taylor* are authorities for the immunity of the AG from judicial review: "Decisions taken by the Law Officers in exercise of their public interest functions, including decisions on whether to institute contempt proceedings, are not amenable to judicial review (following *Gouriet v Union of Post Office Workers* [1977] UKHL 5 and *R v Solicitor General ex parte Taylor* [1996] COD 61). This reflects the unique constitutional role of the Law Officers when taking such decisions".

118 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [55]. We note that in *Campbell* at [19] the Divisional Court cites the decision in *R v Attorney General ex parte Edey* [1992] 2 WLUK 351, where the Court of Appeal (Parker LJ, McGowan LJ and Sir David Croom-Johnson agreeing) held that it was "perfectly plain" since *Gouriet* that "it was not possible for this court to attempt to control the Attorney-General either in giving or refusing a fiat in a relator action. That position must apply equally well

8.85 It added that "whatever might be said about the precise boundary of the non-justiciable category, the function of consenting to proceedings under [a statutory provision] seems to us to fall squarely within it".[119]

8.86 The Divisional Court considered the Supreme Court's decision in *R (Evans) v Attorney General*. The matter was an application for judicial review of a decision by the AG (to issue a certificate under section 53 of the Freedom of Information Act 2000 to prevent the disclosure of certain communications which had been requested by a journalist) and the Supreme Court held the decision was reviewable.[120] The Divisional Court saw this as one that did not fall within the immune category for two reasons. First, the power was not conferred exclusively on the AG but was also conferred on other office-holders in the Executive or devolved administrations and:

> A rule of non-justiciability justified by the unique constitutional position of the Attorney General cannot apply to a function unless it is conferred specifically on the Attorney General and on no other person.[121]

Second, the statutory power involved "overriding the decisions of independent tribunals rather than regulating access to them" and so was "not sufficiently similar to the Attorney General's gatekeeping powers to bring it within the non-justiciable category".[122]

8.87 The conclusion in *Campbell* was that:

> on the present state of the law, there is a category of functions of the Attorney General which are immune from review on any ground. … It is not now open to any court below the Supreme Court to decide otherwise, however anomalous this may seem in the light of the rest of the modern law of judicial review.

8.88 In light of the above, we make two observations.

8.89 First, based on the reasoning and decision in *Campbell*, it is not clear what exactly the position would be were the courts called upon to decide whether the AG's contempt decisions are reviewable. There is much to suggest that the decisions to grant or refuse consent made under section 7 of the CCA 1981 would be immune from review; these are a part of the AG's role as guardian of the public interest in the administration of justice and conferred on the AG alone. There is also much to suggest that decisions to bring or to decline to bring proceedings at common law would fall within the category of immune decisions. Although a court may act of its own motion to institute contempt proceedings, and private parties may also commence proceedings (most notably, a party that has secured a court order may use contempt proceedings to enforce it), these do not immediately seem to parallel AG functions that are shared in the way the functions addressed in *Evans* were shared. However, we reach no

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where the relief sought is not that there should be a fiat given for the relator action but that the Attorney-General himself should take action".

119 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [56].

120 *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

121 *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [55].

122 Above.

conclusion on these questions and, significantly, it is not necessary for us to do so. It appears to us that following *Campbell*, rendering the AG susceptible to judicial review in respect of contempt decisions would be a departure from the conclusion reached by the Divisional Court.

8.90 Secondly, in the face of the current common law position, and (as the Divisional Court notes) the fact that immunity from judicial review is anomalous in the modern law, our attention is directed to the law reform question: should any or all of the AG's contempt decisions be judicially reviewable? Of course, the position set out above is the common law position, and Parliament could decide to depart from that position and render contempt decisions made by the AG reviewable by the courts.

Consultation

8.91 In the consultation paper, we pointed out that recent academic debates have emphasised that "judicial review is necessary to uphold the rule of law" and to "enhance both the perception and reality that the AG's decisions are independent and impartial".[123] We saw considerable force in the argument that the AG's contempt decisions should be reviewable because "susceptibility to judicial review enhances administrative decision-making, ensures good governance by holding the Executive to account, and improves public confidence in Executive power".[124] We also observed that if decisions by the AG cannot be reviewed by the courts, the concerns surrounding their contempt decisions are exacerbated, and that the reviewability of their decisions "is an important constitutional safeguard".[125]

8.92 We did not make provisional proposals for reform, but instead sought consultees' views by asking open questions. We asked whether decisions made by the AG should be judicially reviewable in all circumstances or only in cases where the potential defendant is a member or former member of either House of Parliament.[126] We asked specifically about parliamentarians because we understood that it was in those instances where concerns about the risk of actual or apparent bias on the part of the AG were at their strongest.[127] We also asked who should be able to bring a claim for judicial review.[128]

8.93 A majority of consultees who responded on the issue said that judicial review should be available with respect to consent decisions by the AG concerning publications

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123 CP 262, para 7.62, citing O Mba, "Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law" (2010) 2 *Oxford University Comparative Law Forum*, and I Cram and N Taylor "The Law Commission's Contempt proposals – getting the balance right?" [2013] *Criminal Law Review* 465, 474-475.

124 CP 262, para 7.76, citing M Elliott and R Thomas, *Public Law* (4th ed 2020) pp 492-494 and 599. See also a general discussion of the effectiveness of judicial review from p 602, and in particular, pp 627-628.

125 CP 262, para 7.77.

126 Above, para 7.80, CQ 53.

127 Above, para 7.79.

128 Above, para 7.81, CQ 54.

made by a current or former member of either House of Parliament.[129] This, we heard, is necessary to enhance accountability[130] and ensure that decisions by the AG are not politically motivated.[131] A consultee who did not support judicial review in all circumstances said that in circumstances involving a current or former member of either House of Parliament, judicial review would be an appropriate "safeguard".[132] However, we also heard that judicial review should not be limited only to those circumstances but that any contempt decision by the AG should be judicially reviewable.[133] The Bar Council reiterated the "dangers of creating one rule for politicians and one rule for everyone else". Professor Fenwick pointed out that conflicts of interest which result in decisions being made by the AG that might warrant judicial review were not limited to cases involving politicians, and "could arise in relation to bringing contempt proceedings against a journalist or a donor who was very supportive of the current Government, or against one who very clearly was not".

8.94 Two-thirds of those who responded said the AG should be subject to judicial review in all circumstances.[134] The main reason given was that judicial review provides an important accountability check on the AG's exercise of the contempt function.[135] Commenting on the importance of judicial review, Dr McGarry said:

> It is a fundamental aspect of the rule of law that the Government must act lawfully.[136] A necessary corollary of this requirement is that the courts must be able to rule on the legality of Government acts or decisions. Judicial review is the primary mechanism by which the courts undertake this role.
>
> Consequently, it would be prima facie contrary to the rule of law if areas of Government activity, members of the Government or those exercising governmental power were immune from judicial review. Given this, any such immunity must be justified by reference to principle or by overwhelming practical concerns. There does not seem to be any such principle or practical concern justifying continuing immunity being conferred on the AG's power to initiate contempt proceedings and so this power should be susceptible to oversight by the judicial review procedure.

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129 Of the 23 who responded, 14 said judicial review should be available in these circumstances; 4 said it should not; 5 selected "other". Those who said it should be available include: JLACOS; Sunny Gill; CPBA; DJ Rachel Watkin.

130 DJ Rachel Watkin.

131 Sunny Gill.

132 Dr Jones.

133 Professor Fenwick; Professor Rowbottom; Dr McGarry; the Bar Council.

134 Of the 35 consultees who responded to this question, 24 said decisions by the AG should be judicially reviewable in all circumstances; 7 said they should not; 4 gave a response categorised as "other".

135 Dr Dolphin; DJ Rachel Watkin; Professor Fenwick; the Family Division of the High Court; Dr McGarry.

136 Dr McGarry included a footnote: "There are numerous authorities but the following from David Gauke, the former Lord Chancellor, in evidence to the House of Lords Constitution Committee will suffice: 'the aspect of the rule of law I would highlight is that sense that the law applies equally to everyone, that no one is above the law and, in particular, that the Government must comply with the law', David Gauke, Oral Evidence to the [House of Lords] Constitution Committee, 'The Role of the Lord Chancellor and the Law Officers, [22 June 2022].

8.95 The Family Division of the High Court said:

> The Attorney General's decision to consent or not to bring contempt proceedings should be subject to judicial review. The decision is made by a Minister and should be subject to safeguards to ensure that all decisions have been made procedurally correctly, are lawful and are reasonable. The law (and society) has moved on since the cases cited from the House of Lords. Challenging the Attorney General's decision in relation to whether or not to bring contempt proceedings is really no different from any other administrative law challenge to a Ministerial decision. Judicial review is an important example of the separation of powers in action.

8.96 The Bar Council appeared largely to agree that judicial review should be available in all circumstances, noting that the current position "is somewhat anomalous" given that decisions not to prosecute criminal offences which are made by the DPP (or even by the AG in circumstances where the prosecution decision is reserved) "are in principle subject to judicial review". The Bar Council was pleased that:

> permitting judicial review of such decisions would of course leave intact the AG's role as sole decision-maker and arbiter of the public interest: the court on judicial review would not, and would not be entitled to, substitute its own [view] of the public interest or the evidence for that of the AG.

8.97 The Bar Council noted "the strength of the argument of principle against any non-reviewable Executive power" and said that "permitting judicial review would in effect force the AG to provide reasons for his or her decision, at least in cases where judicial review proceedings were brought, or threatened". However, the Bar Council also recognised that opening AG decisions to judicial review "would at least to some extent increase the risks of tactical or abusive litigation".

8.98 Although we received very few responses saying that the AG should not be subject to judicial review, the main reason given was that this would lead to a large number of (possibly frivolous) applications, which would be expensive and time-consuming.[137] For example, the MLA said:

> The MLA does not see force in the argument that the decision of the Attorney General should be susceptible to judicial review. The MLA envisage that in respect of contempts by publication there will be numerous applications by persons or bodies who have requested that the Attorney General brings proceedings for strict liability contempt and by persons or bodies purporting to act in the public interest, which will be expensive and time-consuming to deal with by the Attorney General, the Administrative Court and the media.

8.99 The AGO also resisted the possibility of judicial review:

> Decisions taken by the Law Officers in exercise of their public interest functions, including decisions on whether to institute contempt proceedings, are not amenable to judicial review. This reflects the unique constitutional role of the Law Officers when taking such decisions. Any change to this position could have significant broader ramifications, which would require full consideration. Subjecting decisions

[137] The MLA; GNM; Dr Jones.

on contempt proceedings to judicial review risks inconsistency with other public interest functions of the Law Officers, or otherwise calling into question their exercise of those functions.

8.100 Finally, we asked in the consultation paper what the test for standing to bring a claim for judicial review should be and we suggested that there might be limits on who can bring judicial review proceedings. The response from consultees was clear: the usual and settled approach to determining standing for judicial review, that is the "sufficient interest test", should apply in circumstances in which judicial review of a decision by the AG is sought.[138] Dr McGarry outlined why the "sufficient interest" test should be retained:

> The courts generally take an expansive approach so that the sufficient interest requirement will not operate to block claimants who are directly affected by a decision or where the decision in question raises an issue of genuine public interest. This … helps to ensure that the courts will not refuse to hear a claim in judicial review – simply because of the status of the claimant – where there is a prima facie case that those exercising governmental power have acted unlawfully.
>
> Restricting the potential claimants who may challenge the lawfulness of the AG's actions to a select few categories runs contrary to the expansionist approach developed by the courts. It might also mean that potentially unlawful decisions by the AG may go unchecked which would be contrary to the rule of law and undermine the effectiveness of the courts' role in providing oversight of Executive actions and decisions …
>
> Having said that, the courts have proved themselves willing to block busybodies, troublemakers, cranks or those motivated by malice or ill-will.
>
> Thus, the sufficient interest requirement provides adequate protection against the AG having to defend himself against vexatious claims or where there is a suspicion that claimants are attempting to relitigate a case by another avenue. And it will do this while also facilitating the rule of law to be upheld so that the AG is legally accountable for their decisions.
>
> The courts have developed a rich and sophisticated case law to determine the issue of standing in different types of claims for judicial review. Further, the courts are willing to protect those exercising governmental power from busybody litigants with unarguable cases. Given this, it does not seem necessary to superimpose on the rules of sufficient interest and permission further limits to restrict who might be able to challenge the lawfulness of the AG's decisions.[139]

8.101 We heard some arguments that there should be limits on those who can bring a claim for judicial review. For example, CILEX and JLACOS said that it should not be possible to establish standing on the basis of the public interest (which the courts

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[138] Professor Bailey; the Bar Council; the Criminal Bar Association; Dr McGarry; the Law Society; Professor Hungerford-Welch; CILEX; Professor Rowbottom; the Family Division of the High Court.

[139] Footnotes are omitted.

have allowed),[140] because it results in "activism through judicial review, which is sometimes principled and high minded, and sometimes vindictive or meddlesome"[141] and because people "become involved in complex and protracted cases which they are [not] legally equipped to be involved in".[142] GNM said standing should be limited to parties to the active proceedings or a person or body who was refused consent to bring proceedings to "provide a proportionate mechanism" for review without opening the possibility of judicial review too broadly. This, GNM said, would "risk encouraging vexatious litigation, a chilling effect on the media and an unduly burdensome case load for the Administrative Court".

Discussion

8.102 We consider that there are strong reasons why the AG's contempt decisions should be judicially reviewable.

8.103 Many consultees said that refusals by the AG to bring or consent to proceedings for contempt by publication when proceedings are active should be judicially reviewable. This view was strongest where the alleged contemnor was a current or former member of either House of Parliament. However, concerns about the lack of judicial oversight of the AG are not limited to those circumstances. Dr McGarry argued that:

> decisions of the AG should be reviewable in all circumstances and not simply where there is an actual or perceived conflict of interest because the potential defendant is a current or former parliamentarian… the AG's power to initiate contempt proceedings – like any areas of Government activity – may be exercised unlawfully but in ways which do not amount to a conflict of interest. It therefore seems inappropriate to restrict judicial oversight of the AG's role to a limited number of cases.

We agree. If they are to be reviewable, decisions should be reviewable regardless of who the alleged contemnor is.

8.104 Consultees from a range of areas of expertise (legal, judicial and academic) put forward persuasive reasons including the need for accountability and transparency in decision-making. The proposition that the AG is, or should be, immune from review by the courts was seen as outdated and certainly did not find purchase with consultees. We agree with the Divisional Court in *Campbell* that immunity from judicial review is now anomalous. The observation by Nicol J in *R (Halpin) v Attorney General* (cited in *Campbell*) is persuasive:

> If, hypothetically, there were substantial grounds for considering that the Attorney had acted unlawfully in refusing his consent, it would be an unattractive position, to

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140 See, for example, *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [62]-[63] (Lord Hope).

141 JLACOS.

142 CILEX.

> put it neutrally, if that illegality was beyond the power of the courts to judicially review.[143]

8.105 It has also been argued in the literature since *Campbell* that immunity of the AG from judicial review is anomalous in light of the modern law.[144] Dane Luo challenges the various claims which have underpinned the non-reviewability of decisions by the AG.[145] Those claims include, but are not limited to, that it is "not appropriate for courts to review weighing of public interest"; that the AG "has a special or unique position"; that "allowing judicial review is not 'wise' nor consistent with the constitution"; that the AG "is accountable only to Parliament"; and "Parliament intended non-justiciability".[146] He argues that:

> the precedents holding that the exercise of [the AG's functions] is non-justiciable simpliciter [are] anomalous, especially when compared to the reviewability, however limited, of the decisions of other similarly situated executive officers and in light of the modern developments in public law.[147]

8.106 Similar arguments were put to us by consultees. Were contempt decisions to be immune from review then, as the Bar Council argued, it would be particularly anomalous because decisions made by prosecutorial authorities whether or not to prosecute a case are generally subject to judicial review.[148] Case law shows that decisions by the DPP not to prosecute, and decisions by the Serious Fraud Office not to investigate, may be judicially reviewed.[149] In *Sharma v Brown-Antoine*, the Privy Council said:

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143 *R (Halpin) v Attorney General* [2011] EWHC 3759 (Admin) at [22], cited in *R (Campbell) v Attorney General* [2025] EWHC 1653 (Admin), [2025] ACD 98 at [33].

144 See D Luo, "*The Anomalous Islands of Public Interest Functions Immune from Judicial Review*" (UK Constitutional Law Association, 14 October 2025). Luo's position was challenged in C Casey, *"The Attorney's Bridle: The Constitutional Convention Disciplining the Attorney General's Discretionary Powers"* (UK Constitutional Law Association, 20 October 2025). In response to Luo, Casey argues that the concerns articulated by Luo about a risk that the AG "could abuse an unbridled discretion" or exercise the public interest function improperly are "overstated". Conor Casey argues that the AG is "subject to the usual processes of parliamentary scrutiny" and that "even without judicial review, there are powerful and deeply ingrained constitutional constraints on the Attorney's (admittedly broad) criminal law and public interest powers". He concludes that "whatever the arguments in favour of subjecting the Attorney's powers to judicial review, it is not a well-founded argument to say they would be otherwise unbridled". However, Casey does not address the very real issue (about which we have heard from consultees) of apparent bias.

145 D Luo, "*The Anomalous Islands of Public Interest Functions Immune from Judicial Review*" (UK Constitutional Law Association, 14 October 2025).

146 Above.

147 Above.

148 See CPS Legal Guidance, *Judicial Review of CPS Prosecuting Decisions (Appeals)* (revised 27 September 2019, 30 July 2024).

149 *R v DPP ex parte Jones (Timothy)* [2000] Criminal Law Review 858; *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin). The Divisional Court reviewed a decision by the Director of the Serious Fraud Office to halt an investigation into allegations of corruption on the basis that continued investigation would be contrary to the public interest. The court said the Director had acted unlawfully. However, the Divisional Court's decision was overturned by the House of Lords in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756.

> It is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial decision to political instruction (or, the Board would add, persuasion or pressure) is a recognised ground of review.[150]

8.107 This was cited by the Divisional Court in *R (Corner House Research) v Director of the Serious Fraud Office*, as being "well-established authority" that "demonstrates how the courts protect the rule of law by ensuring the independence of the decision-maker, free from pressure and threat".[151] The Court maintained that "independence is fundamental to the proper exercise of the Director's powers".[152]

8.108 We are, however, alive to the concerns that have been raised were contempt decisions by the AG to be judicially reviewable. We heard from the AGO that making decisions of the AG open to review by the courts "could have significant broader ramifications, which would require full consideration" and "risks inconsistency with other public interest functions of the Law Officers, or otherwise calling into question their exercise of those functions". The AGO explained to us what was meant by the "broader ramifications" and the "inconsistency" alluded to in the AGO's consultation response. The AGO explained that the AG carries out a range of other public interest functions; that the position should be consistent for all the public interest functions of the AG; and the non-justiciability of decisions of the AG is justified by the AG's unique constitutional role in such functions. Despite these concerns, we remain convinced that contempt decisions by the AG should be judicially reviewable. We appreciate the possibility that this may give rise to inconsistencies between the various public interest functions of the AG (as we cannot and do not make recommendations on whether decisions to refer a sentence as unduly lenient or any other decisions taken by the AG should be judicially reviewable). However, statutory reform that renders one category of decisions reviewable need not affect decision-making or reviewability in relation to any other category. As we said in the consultation paper:

> for the avoidance of doubt, this discussion of judicial review … is limited to decisions of the AG in relation to contempt of court. The AG exercises a number of unique functions which are not under consideration in our review.[153]

What types of contempt decisions should be judicially reviewable?

8.109 As we explained in the introduction to this chapter, the AG makes different types of contempt decisions. The AG would continue to make these decisions under our new framework for liability. These would fall into two categories:

(1) decisions to bring or not to bring proceedings for contempt by publication when proceedings are active, or to grant or refuse to grant consent to another person or body to bring such proceedings (though, as indicated above, we understand

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150 *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780 at 787-788.

151 *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin) at [67]-[69].

152 Above at [70].

153 CP 262, para 7.79.

that the AGO does not in practice receive requests to consent to proceedings); and

(2) decisions to bring or decline to bring proceedings for contempt by breach of order or general contempt.

8.110 Regarding the first category, in our view decisions by the AG not to bring proceedings for contempt by publication when proceedings are active should be judicially reviewable, as should decisions to refuse to consent to another person bringing such proceedings. Decisions to bring proceedings or to grant consent should also be reviewable. As some consultees pointed out, political pressure might be what causes the AG to bring contempt proceedings inappropriately. There is no reason to limit reviewability to one or the other: the AG should be subject to judicial review whether the impugned decision amounts to an action or a refusal to act. The CPS legal guidance on judicial review provides a helpful comparison. According to that guidance:

> Decisions both to prosecute and not to prosecute can be challenged by way of Judicial Review. However, decisions *not* to prosecute are more often challenged by way of Judicial Review than decisions *to* prosecute. This is because a decision not to prosecute is final, whereas a decision to prosecute leaves a defendant in criminal proceedings, who might be considering an application for Judicial Review, free to challenge the prosecution's case in the usual way through the criminal court, arguing that there is no case to answer or that the decision to prosecute is an abuse of process.[154]

8.111 We would expect that, in practice, judicial review will likely arise only in relation to refusals by the AG to bring or consent to contempt proceedings; where consent has been granted or proceedings brought then it would be more appropriate to contest those proceedings than seek to have the decision to bring them reviewed. If the AG inappropriately brings proceedings for contempt by publication when proceedings are active and there is no case to answer, the defendant would be able to make that argument before the court.

8.112 With respect to the second category, we think that for coherence, decisions to institute or decline to institute proceedings for contempt by breach of order or general contempt should also be judicially reviewable. What was in contemplation when we asked consultees about the availability of judicial review was the concern we had heard that the AG might refuse to bring proceedings against, for example, a political ally for a possibly prejudicial publication, and therefore, whether a decision of the AG made under section 7 of the CCA 1981 should be judicially reviewable. Despite the narrow context in which this issue arose, we recommend that judicial review should be available with respect to decisions by the AG to institute or decline to institute proceedings for contempt by breach of order or general contempt, for four reasons:

(1) The force with which consultees have argued that decisions by the AG to bring or consent to proceedings under the 1981 Act should be judicially reviewable

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[154] See CPS Legal Guidance, *Judicial Review of CPS Prosecuting Decisions (Appeals)* (revised 27 September 2019, 30 July 2024).

and the reasons given suggest that there is also support for making all contempt decisions by the AG susceptible to judicial review.

(2) Consultees emphasised deep-seated concerns about the political nature of the AG. We are of the view that the supervision of the court with respect to all contempt decisions by the AG will address concerns about possible conflicts of interest.

(3) Accountable and transparent decision-making in accordance with modern public law principles requires all contempt decisions by the AG to be judicially reviewable.

(4) The need for a clear and coherent position as to which decisions by the AG can be reviewed by the courts is evidenced by the confusion that prevails in the current law. We are concerned with creating a clear and consistent contempt regime. Were we to recommend that only certain types of contempt decisions by the AG could be judicially reviewed, then it would risk creating confusion, uncertainty and inconsistency.

8.113 If all contempt decisions by the AG were to be judicially reviewable, the question arises whether this will result in an increase in vexatious or frivolous applications, as suggested by the MLA.

8.114 It would of course be undesirable if every refusal by the AG to bring contempt proceedings were taken to the courts. Not only would this place an expensive and time-consuming burden on the courts that could frustrate the processes of any ongoing trial, it could also erode the protection that the AG currently provides for journalists and other publishers against the threat of contempt proceedings.

8.115 The fear that making contempt decisions by the AG judicially reviewable would open the floodgates so as to inundate courts and erode the protection afforded by the AG to freedom of expression is, we think, unlikely to be realised. There is a high bar for judicial review applications, and decisions by the AG may, in practice, only rarely be reviewed by the courts:

(1) A judicial review claim must be filed "promptly" and "in any event not later than 3 months after the grounds to make the claim first arose"; that timeframe may not be extended.[155]

(2) A judicial review claim must be preceded by a permission application.[156] A court will not grant permission where an alternative remedy is available.[157] Furthermore, if it appears to the court that the outcome for the applicant would not have been substantially different if the conduct complained of had not

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155 CPR, r 54.5.

156 Above, r 54.4. See also Senior Courts Act 1981, s 31(3), which provides: "No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

157 Courts and Tribunals Judiciary, *The Administrative Court: Judicial Review Guide* (2025), para 6.3.3; *R (Ramage) v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2023] EWHC 974 (Admin) at [17].

occurred, the court must refuse to grant leave.[158] We heard from consultees that the permission filter would allow courts to "quite easily ... weed out"[159] unarguable or unmeritorious cases[160] and "the court cannot rule on the substance of a particular decision".[161] We consider that the filter of requiring permission meets any "floodgates" argument.

(3) There are limited grounds of judicial review. It may be necessary for an applicant to establish that the decision was not one a rational decision maker could take.[162]

(4) Judicial review is a remedy of last resort.[163]

8.116 In addition to the above, a judicial review claim will likely only succeed in very rare circumstances. The experience of the CPS, whose prosecutorial decisions are judicially reviewable, demonstrates that courts are reluctant to interfere with the exercise of prosecutorial discretion. The CPS legal guidance states:

> It is well-established that the High Court will only very rarely intervene in relation to the prosecutorial decision making process. This power to intervene has been expressed in a number of different, but consistent, ways by the Court:
>
> - "sparingly exercised" (*R v DPP ex parte C* [1995] 1 Cr App R 136, 140)
> - "very rare indeed" (*R (Pepushi) v Crown Prosecution Service* [2004] Imm AR 549, para 49)
> - "highly exceptional remedy" (*Sharma v Browne-Antoine* [2007] 1 WLR 780, para 14(5))
> - "very rarely" (*R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635, para 63)
> - "only in very rare cases" (*S v Crown Prosecution Service* [2015] EWHC 2868 (Admin) [2016], 1 WLR 804)

158 Senior Courts Act 1981, s 31(3D).

159 Professor Hungerford-Welch.

160 Professor Hungerford-Welch; Dr McGarry.

161 Dr McGarry.

162 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 (Lord Diplock); see also para 8.77 above.

163 See, for example, *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [2017] 4 WLR 213 at [55]-[56]; I Hare KC, C Donnelly SC and J Bell, *De Smiths Judicial Review* (9th ed 2023) para 4-007.

> The rationale that underpins the reluctance to intervene in the prosecutorial decision making process is a combination of the constitutional independence of the prosecutor and also their professional expertise and experience.[164]

8.117 In *R (Bermingham) v Director of the Serious Fraud Office*, Laws LJ said:

> … there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere.[165]

8.118 In *R (Corner House Research) v Serious Fraud Office*, Lord Bingham said:

> … only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator …
>
> The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*)
>
> > "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms.
>
> Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice.[166]

8.119 In *R (L) v DPP*, the High Court said that "applications will succeed only in very rare cases". It explained:

> That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities, in this case the Director of Public Prosecutions and those who work under him in the Crown Prosecution Service.

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164 See CPS Legal Guidance, *Judicial Review of CPS Prosecuting Decisions (Appeals)* (revised 27 September 2019, 30 July 2024).

165 *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] 2 WLR 635 at [63].

166 *R (Corner House Research) v Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [30]-[32] (Lord Bingham), citing *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 714.

> It is very important that the constitutional position of the Crown Prosecution Service as an independent decision maker is respected and recognised. The courts have therefore adopted this very strict self denying ordinance. They will, of course, put right cases where an unlawful policy has been adopted or where there has been a failure to follow policy, or where the decisions are perverse. But each of those is likely to arise only in exceptionally rare circumstances and that must be born in mind.[167]

8.120 The data on judicial review of decisions against prosecution indicates that in the three years between 2022 and 2024, there were 34 applications, of which just one received permission at the first stage but was ultimately unsuccessful. Of the others, 18 were withdrawn at or before the first stage and 15 were refused permission at the first stage.[168]

8.121 The AG's contempt function is an exercise of discretion in which they weigh policy factors and the public interest. The AG and AGO have developed experience and expertise in the exercise of the contempt function. Informed by the way that courts have understood their review jurisdiction in similar circumstances, we are not concerned that problematic consequences will result if decisions on contempt by the AG were to become judicially reviewable. It appears more likely that courts would infrequently grant permission and, more rarely still, interfere with a decision. Furthermore, even a successful application for judicial review does not allow a court to substitute its own decision for the AG's and would not necessarily result in the AG changing their decision. Notwithstanding these limitations of judicial review, we remain convinced of the value of the supervisory jurisdiction of the courts: it will disincentivise politically motivated decisions and remedy concerns about apparent or actual bias in decision-making.

8.122 Finally, it is clear that the test for who should be able to bring a judicial review claim should be the ordinary "sufficient interest" test for standing.

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167 *R (L) v DPP* [2013] EWHC 1752, [2013] 177 JP 502 at [3]-[6].

168 Data available on Ministry of Justice, *Judicial Review Interactive Data Tool* displays the number of judicial review applications lodged against a decision to prosecute (categorised within applications against the AGO, which includes decisions by the CPS to prosecute). In 2024, 13 applications for judicial review were lodged against decisions to prosecute of which: 1 received permission at the first stage; 5 were refused permission; and 7 were withdrawn at or before the first stage. None were found in favour of the claimant. In 2023, 8 applications for judicial review were lodged against decisions to prosecute of which: 2 were refused permission; and 6 were withdrawn at or before the first stage. In 2022, 13 applications for judicial review were lodged against decisions to prosecute of which: 8 were refused permission; and 5 were withdrawn at or before the first stage.

Recommendation 42.

8.123 We recommend that the following decisions made by the Attorney General should be judicially reviewable:

(1) decisions to grant or refuse consent for another person or body to institute proceedings for contempt by publication when proceedings are active; and

(2) decisions to institute or decline to institute contempt proceedings for contempt by breach of court order or undertaking, contempt by publication when proceedings are active, contempt by disrupting proceedings, or general contempt.

Chapter 9: Recommendations

Recommendation 1.

9.1 We recommend that a defendant may be liable on the basis of any one or more of the four forms of contempt in the new liability framework, which are:

(1) contempt by breach of court order or undertaking;

(2) contempt by publication when proceedings are active;

(3) contempt by disrupting proceedings; and

(4) general contempt.

Paragraph 2.14

Recommendation 2.

9.2 We recommend that a reformed framework for liability for contempt of court should discard the traditional distinction between civil and criminal contempt.

Paragraph 2.38

Recommendation 3.

9.3 We recommend that the term "kindred offences" should no longer be used. Instead, conduct currently captured by the term "kindred offences" should be described as contempt.

Paragraph 2.84

Recommendation 4.

9.4 We recommend that there should be a specific form of contempt governing breaches of court orders and undertakings, such that a person will be in contempt of court if they breach an order given by a court in England and Wales or an undertaking given to such a court.

Paragraph 3.43

Recommendation 5.

9.5 We recommend that an order or undertaking will be in scope of this form of contempt if—

(1) the order was sealed, or

(2) a contempt warning was given to the person by the court in relation to the order or undertaking (but a person cannot be subject to a contempt application under this form of contempt if the alleged breach was prior to the contempt warning being given).

9.6 A "contempt warning" is a statement by a court (however expressed and whether or not in writing) that a person who breaches an order or undertaking may be guilty of a contempt of court.

9.7 It is immaterial whether a contempt warning is given by the same means or at the same time as the order or undertaking to which it relates.

Paragraph 3.44

Recommendation 6.

9.8 We recommend that, in cases involving a breach of a sealed court order, it should generally be required to prove that a contempt warning was given to the alleged breaching party. However, the court hearing the contempt application should retain discretion to dispense with this requirement where doing so would not result in injustice.

Paragraph 3.47

Recommendation 7.

9.9 We recommend that it should be a precondition of liability under this form of contempt that the order or undertaking and (where relevant) the contempt warning were given to the person by being—

(1) communicated orally when the person was present or legally represented in court, or

(2) served on the person in accordance with any requirements as to service imposed by or under an Act.

Paragraph 3.68

Recommendation 8.

9.10 We recommend that a person who breaches an order is not in contempt of court under the contempt by breach of court order and undertaking provisions if it is proved on the balance of probabilities that—

(1) the order—

(a) was communicated orally when the person was not present in court and was not served on the person, or

(b) had effect against the whole world, and

(2) the person did not know of the existence of the order.

Paragraph 3.69

Recommendation 9.

9.11 We recommend that a person who breaches an order or undertaking is not guilty of a contempt of court under this form of contempt if it is proved on the balance of probabilities that the conduct constituting the breach was accidental.

Paragraph 3.73

Recommendation 10.

9.12 We recommend that a person who breaches an order or undertaking is not guilty of a contempt of court under this form of contempt if it is proved on the balance of probabilities that, because the person had made an innocent mistake of fact (one that is not the result of dishonesty or negligence), they did not realise that they were breaching the order or undertaking.

Paragraph 3.90

Recommendation 11.

9.13 We recommend that the conduct threshold for contempt by publication when proceedings are active should be creating "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

Paragraph 4.70

Recommendation 12.

9.14 We recommend that a public interest defence in the form of section 5 of the Contempt of Court Act 1981 be retained.

9.15 However, we recommend that the statute clarify that the question of whether a publication is merely incidental depends on how closely the subject matter of the publication relates to the specific legal proceedings.

Paragraph 4.140

Recommendation 13.

9.16 We recommend that the burden and standard of proof of the public interest defence should be specified in statute (namely that the defendant should bear the burden of adducing sufficient evidence to raise the defence, but that the applicant should bear the burden of disproving the defence beyond reasonable doubt).

Paragraph 4.142

Recommendation 14.

9.17 We reject a broader form of public interest defence, whether on the grounds of public interest explicitly or on the narrower grounds of public safety or national security.

Paragraph 4.143

Recommendation 15.

9.18 We recommend that for the purposes of contempt by publication when proceedings are active, to "publish" means to make available to the public or a section of the public.

Paragraph 4.197

Recommendation 16.

9.19 We recommend that, for the purposes of contempt liability, the act of publication should not be understood as continuous and instead should be defined as having been completed when the material is made available.

Paragraph 4.245

Recommendation 17.

9.20 We recommend that criminal proceedings should be considered active for contempt purposes from the point at which a defendant is charged with an offence.

Paragraph 4.285

Recommendation 18.

9.21 We recommend that criminal proceedings should be considered active for contempt purposes until the point of verdict or guilty plea.

Paragraph 4.301

Recommendation 19.

9.22 We recommend that extradition proceedings should be considered active for contempt purposes from the point at which a person first appears before a court in England and Wales, whether they have been extradited to the UK or are being extradited from the UK.

Paragraph 4.318

Recommendation 20.

9.23 We recommend that coronial proceedings should continue to be treated as active from the point at which an inquest is opened.

Paragraph 4.349

Recommendation 21.

9.24 We recommend that coroners should be required to announce publicly their decision not to resume an inquest following an adjournment.

Paragraph 4.350

Recommendation 22.

9.25 We recommend that, to establish liability for contempt by publication when proceedings are active, the applicant should be required to prove that the defendant knew that proceedings were active or was aware of a risk that proceedings were active.

Paragraph 4.408

Recommendation 23.

9.26 We recommend that contempt by disrupting proceedings should be established by proof beyond reasonable doubt that:

(1) the defendant acted in a way that was abusive, threatening or disorderly and the act resulted in the disruption of proceedings;

(2) the defendant intended to do the act and, at the time of the act, was aware that legal proceedings existed; and

(3) the defendant's act was witnessed by the judge or a court official (for example it was seen or heard).

Paragraph 5.48

Recommendation 24.

9.27 We recommend that section 12(1)(b) of the Contempt of Court Act 1981 and section 118(1)(b) of the County Courts Act 1984 should be repealed.

Paragraph 5.52

Recommendation 25.

9.28 We recommend that the conduct element of general contempt should be satisfied where a person's conduct interferes with the administration of justice in a non-trivial way or creates a substantial risk of a non-trivial interference with the administration of justice.

Paragraph 6.67

Recommendation 26.

9.29 We recommend that the fault element of general contempt should be satisfied by intention, which will be established where it is proved that the defendant intended to interfere with the administration of justice in a non-trivial way.

Paragraph 6.114

Recommendation 27.

9.30 We recommend that general contempt should apply before proceedings have commenced, including when proceedings are imminent and also before proceedings are imminent.

Paragraph 6.151

Recommendation 28.

9.31 We recommend that general contempt should continue to apply after proceedings have concluded.

Paragraph 6.171

Recommendation 29.

9.32 We recommend that Government consider reviewing and amending:

(1) the offence in section 40 of the Criminal Justice and Police Act 2001 so that it applies to proceedings in the Family Court, coroners' courts and tribunals; and

(2) the offences in section 40 of the Criminal Justice and Police Act 2001 and section 51(2) of the Criminal Justice and Public Order Act 1994 so that they apply to relevant conduct committed against judges, legal representatives, court staff and jurors (in addition to those already protected).

Paragraph 6.172

Recommendation 30.

9.33 We recommend that Government arrange for clear and accessible guidance about general contempt to be issued for professional and lay users of the courts.

Paragraph 6.186

Recommendation 31.

9.34 We recommend that section 12(1)(a) of the Contempt of Court Act 1981 and section 118(1)(a) of the County Courts Act 1984 should be repealed.

Paragraph 6.212

Recommendation 32.

9.35 We recommend that:

(1) section 14(1)(b) of the County Courts Act 1984 should be repealed; and

(2) the Government consider repeal of section 14(1)(a) of the County Courts Act 1984.

Paragraph 6.222

Recommendation 33.

9.36 We recommend that the Government consider reviewing section 41 of the Criminal Justice Act 1925 and section 85B of the Courts Act 2003 with a view to ensuring:

(1) that the criminal offence in section 41 is modernised, so it applies to photography, video recording, and transmission or live-streaming of audio or video;

(2) that the criminal offences in section 41 and section 85B are coherent and consistent, with a particular attention to consistency in application to in-court and remote proceedings.

Paragraph 6.245

Recommendation 34.

9.37 We recommend that section 9 of the Contempt of Court Act 1981 should be repealed.

Paragraph 6.246

Recommendation 35.

9.38 We recommend that section 85B(9) of the Courts Act 2003 should be repealed.

Paragraph 6.247

Recommendation 36.

9.39 We recommend that the procedure rule committees consider the development of an authorisation process to enable the responsible and secure audio recording of proceedings by accredited journalists.

Paragraph 6.258

Recommendation 37.

9.40 We recommend repeal of the exceptions to the general rule in section 12(1) of the Administration of Justice Act 1960 found in paragraphs (a), (b) and (e).

Paragraph 7.27

Recommendation 38.

9.41 We recommend that Government consider repeal of section 12(1)(d) of the Administration of Justice Act 1960.

Paragraph 7.28

Recommendation 39.

9.42 We recommend that the Attorney General should retain the contempt function.

Paragraph 8.33

Recommendation 40.

9.43 We recommend that the Attorney General or a court (having the power to deal with contempt) on its own motion may bring proceedings for contempt of court based on any of the four forms of liability: contempt by breach of court order or undertaking; contempt by publication when proceedings are active; contempt by disrupting proceedings; or general contempt.

Paragraph 8.39

Recommendation 41.

9.44 We recommend that proceedings for contempt by publication when proceedings are active may be brought only with the consent of the Attorney General.

Paragraph 8.54

Recommendation 42.

9.45 We recommend that the following decisions made by the Attorney General should be judicially reviewable:

(1) decisions to grant or refuse consent for another person or body to institute proceedings for contempt by publication when proceedings are active; and

(2) decisions to institute or decline to institute contempt proceedings for contempt by breach of court order or undertaking, contempt by publication when proceedings are active, contempt by disrupting proceedings, or general contempt.

Paragraph 8.123

Appendix 1: General contempt – examples of conduct

INTRODUCTION

1.1 General contempt is a residual category of contempt. As we explain in chapter 6, to establish general contempt an applicant must prove beyond reasonable doubt that:

- the defendant's conduct interfered with the administration of justice in a non-trivial way or created a substantial risk of a non-trivial interference with the administration of justice; and
- the defendant had an intention to interfere with the administration of justice

1.2 Proof of the conduct element for general contempt is not reliant on proof of any specific type or category of conduct; there is no constraint on what kind of conduct may give rise to liability under general contempt.[1] The question will always be whether the conduct threshold is met. That is, whether the conduct interfered with the administration of justice in a non-trivial way or created a substantial risk of a non-trivial interference with the administration of justice.

1.3 In our consultation paper we provisionally proposed in CQ 16 that "any statutory provision setting out what constitutes general contempt should be accompanied by a non-exhaustive list of examples of conduct that is capable of constituting general contempt".[2] In CQ 17 we provisionally proposed what should be in that list and asked an open question about whether there should be any alterations to that list.[3]

1.4 In chapter 6 of this report, we look at CQ 16. We explain that we do not recommend a non-exhaustive list, but we do recommend "that Government arrange for clear and accessible guidance about general contempt to be issued for professional and lay users of the courts".[4] We make no recommendation about the content of such guidance.[5] However, we anticipate that this report will be of assistance for anyone wishing to understand the scope and application of general contempt, including those who may issue guidance.

1.5 The aim of this Appendix is to aid that understanding by providing readers with consultee views and our analysis of the issues that arose from CQ 17 where those do not already appear in the report. Throughout the discussion below, the responses and our analysis are expressed with reference to whether the types of conduct discussed

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1 Para 6.173 above.

2 Contempt of Court (2024) Law Commission Consultation Paper No 262 (CP 262), para 3.178.

3 Above, para 3.179.

4 Para 6.186 above.

5 Para 6.185 above.

would have warranted inclusion on a non-exhaustive list had we recommended one. This reflects what consultees were asked in CQ 17.

1.6 For the avoidance of doubt, we reiterate three points before addressing the different types of conduct that were raised in our consultation. First, the question and responses were concerned with a non-exhaustive list; the conduct that may satisfy the conduct element of general contempt is not limited to the examples we consider. Secondly, proof that the defendant has engaged in this conduct does not constitute proof of the conduct element for general contempt; that requires proof that the conduct interfered with the administration of justice in a non-trivial way or created a substantial risk of a non-trivial interference with the administration of justice. Thirdly, proof of the conduct element will not of itself be sufficient to establish contempt: the applicant must prove that the conduct was done with an intention to interfere with the administration of justice.

1.7 We begin by explaining the consultation questions. We then group the different types of conduct under four headings:

(3) conduct in court or in the vicinity of the court;

(4) conduct associated with court orders;

(5) conduct associated with proceedings; and

(6) conduct associated with representation.

CONSULTATION

1.8 In the consultation paper we looked at examples of conduct that could potentially satisfy the conduct element for general contempt.[6] We concluded that discussion with a provisional proposal that set out what we thought might warrant inclusion on a non-exhaustive list and sought the views of consultees. We set this out in CQ 17:

> We provisionally propose that the following should be included in a non-exhaustive list of examples of conduct that is capable of constituting general contempt to accompany a statutory statement of what constitutes general contempt:
>
> (1) disrupting court proceedings;
>
> (2) obstructing court officers or staff in the execution of their duties;
>
> (3) threatening or assaulting court officers or staff, parties to proceedings, witnesses or jurors;
>
> (4) taking photographs in court;
>
> (5) making non-permitted audio or video recordings of proceedings;
>
> (6) misconduct by jurors;

[6] CP 262, paras 3.118-3.175.

(7) disobeying a court order made for the purpose of protecting the administration of justice;

(8) subverting an order of the court by destroying the subject matter of an action;

(9) encouraging or assisting another to disobey a court order;

(10) providing false statements or disclosures to a court;

(11) accessing court documents without authorisation; or

(12) misconduct by legal representatives.

Do consultees agree?

Are there other examples that should be included?[7]

1.9 We received 46 responses this consultation question: 27 consultees agreed; 3 disagreed; and 16 gave an answer categorised as "other". The support generally reflected the support for a non-exhaustive list that was expressed in the responses to CQ 16. The comments accompanying responses indicated clear support for the inclusion of some types of conduct, with more cautious or qualified support for others. There was a rejection of some examples and suggestions for the inclusion of others.

1.10 The headings we use below emerged from our analysis of the consultation responses.

CONDUCT IN OR IN THE VICINITY OF THE COURT

1.11 Several types of conduct in courtrooms may potentially provide grounds for general contempt. It is well-accepted that conduct outside the courtroom, but in the vicinity of the court, may meet the threshold of contempt. As we pointed out in the consultation paper:

> disruption may be caused by conduct that occurs in waiting spaces outside the courtroom or other parts of the premises, or outside the court building. Hearings may be disrupted by the conduct of those attending remotely online. The Criminal Procedure Rules refer to conduct that is "in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings".[8]

1.12 Some consultees (for example, the Law Society) saw this as very important. The Criminal Bar Association (CBA) noted that it may include conduct directed at judges, staff and other participants in proceedings going to or returning from court.[9] We also heard from several consultees that it would be helpful to have clarification about how far outside the courtroom conduct may be captured. While such clarification may not

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7 CP 262, para 3.179.

8 Above, para 3.124; CrimPR, r 48.5(1)(a).

9 This reflects the position regarding statutory contempts in magistrates' courts (Contempt of Court Act 1981, s 12(1)) and the County Court (County Courts Act 1984, s 118(1)). These statutory contempts, for which we recommend repeal, are discussed at paras 5.49-5.52 and 6.201-6.212.

be needed in the context of contempt by disrupting proceedings (recommended in chapter 5) because the elements do not rely on the concept of vicinity, these concerns about clarity may arise in general contempt.

1.13 The five types we identify here reflect the issues we discussed in the consultation paper and points raised by consultees.

Disrupting proceedings

1.14 The responses on, and analysis of, this type of conduct are discussed in detail in chapter 5.

Obstructing court officers or staff in the execution of their duties

1.15 In the consultation paper, we said that "it is a contempt at common law and in statute to interfere with court officials in the exercise of their duties".[10] Consultation responses cast no doubt on the view expressed in the consultation paper that this type of conduct would be caught by general contempt.[11]

1.16 Two consultees suggested that there should be a more expansive description of this form of conduct. The Law Society told us it should include "disobeying an instruction to do something". Martin Chapman (responding in a personal capacity and with experience of delivering collection and enforcement services) argued that those who have powers under section 125B of the Magistrates' Court Act 1980 "should be included as court staff". Section 125B provides that approved enforcement agencies have the power to execute warrants of arrest and the people with these powers include directors and employees of such agencies.

1.17 We are not persuaded that the category of conduct should be described more expansively than the way we expressed it in CQ 17. Failure to obey the instructions of staff is not the same as a failure to comply with the instructions of a judge. There may be uncertainty about whether instructions are lawful; it has long been a complaint of journalists and court observers that court staff will question or restrict note-taking in the gallery when they have no power to do so.[12] We have also heard that in some courts, even the judges do not welcome notetaking using pen and paper during proceedings, unless the person doing so is a journalist or otherwise has a "valid reason" to do so. Given legal proceedings are public, we do not see how there could be such a restriction in law. But regardless of this, as it is not clear that non-compliance with instructions from court staff would necessarily be (or create a substantial risk of) a non-trivial interference with the administration of justice, we do not see it as appropriate for inclusion on a non-exhaustive list.

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10 CP 262, para 3.138 citing *IRC v Hoogstraten* [1985] 1 QB 1077; County Courts Act 1984, s 14(1).

11 CP 262, para 3.138.

12 There have, however, been steps taken to see that this does not happen; see, for example, HM Courts and Tribunals Service, *Staff Guidance on Supporting Media Access to Courts and Tribunals* (24 October 2018, updated 10 November 2025).

1.18 Regarding Martin Chapman's suggestion, we do not think a list should include every example of what could constitute "obstructing court officers or staff". In the consultation paper we said that:

> the circumstances in which a court officer or official would be executing their duty will vary. However, they may include circumstances in which … an enforcement officer is executing an arrest warrant.[13]

1.19 It is clear that such circumstances could amount to general contempt and there is no need to provide a more expansive statement.

Threats and assaults

1.20 In the consultation paper the third type of conduct we provisionally included on the list was "threatening or assaulting court officers or staff, parties to proceedings, witnesses or jurors".[14]

1.21 Two aspects of this conduct presented some complexity and challenges.

1.22 First, section 14 of the County Courts Act 1984 makes provision for an assault to be treated as a criminal offence or (in effect) as contempt, but does not cover threats. In CQ 15 we asked whether this warrants reform. We discuss this in chapter 6.[15]

1.23 Secondly, there was a question about whether this wording was sufficiently wide to capture conduct directed at judges and legal representatives.

1.24 The CBA suggested that the wording in the provisionally proposed non-exhaustive list should have a wider scope. We agree.

1.25 Where the kind of conduct in this example is directed towards legal representatives or judges it is clearly capable of meeting the conduct threshold, and we see no reason why such threats would not be caught by the current law.[16]

Insults

1.26 We discuss insults in chapter 6.[17]

CONDUCT ASSOCIATED WITH COURT ORDERS

1.27 Some conduct that gives rise to an application for general contempt will be associated with disobeying court orders. The two types of conduct that we think would warrant inclusion on a non-exhaustive list are subverting a court order and encouraging or assisting another person to breach a court order. In these instances, the defendant is

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13 CP 262, para 3.139 (references omitted).

14 Above, paras 3.140-3.143 and 3.179.

15 See paras 6.213-6.222 above.

16 See also paras 6.158-6.172 above and our recommendation regarding amendments to the threats and intimidation offences in section 51 of the CJPOA 1994, so that legal representatives and judges also fall within the scope of that section.

17 See paras 6.201-6.212 above.

not bound by the order and so an applicant could not prove the elements of contempt by breach of order.

Disobeying a court order made for the purpose of protecting the administration of justice

1.28 In the consultation paper we provisionally proposed in CQ 17 that a non-exhaustive list of conduct capable of satisfying the general contempt conduct threshold should include "disobeying a court order made for the purpose of protecting the administration of justice".[18] The examples we gave included breach of a Civil Restraint Order, where the applicant was likely to be the AG.[19] Several consultees argued that this category of conduct lay squarely within contempt by breach of court order and so its inclusion in a non-exhaustive list for general contempt was both inappropriate and unnecessary.[20] We are persuaded by these views and have concluded that a distinction based on the purpose for which an order was made is not a helpful or clear way to approach breaches of these orders. They should be dealt with as contempt by breach of order and "disobeying a court order made for the purpose of protecting the administration of justice" should not be included on a non-exhaustive list of conduct that may satisfy general contempt.[21]

Failure to comply with a jury summons

1.29 The Commercial Bar Association (COMBAR) response argued that failure to comply with a jury summons should be included on a non-exhaustive list. We observed in the consultation paper that it is punishable under the Juries Act 1974 "either on summary conviction or as if it were criminal contempt of court committed in the face of the court".[22] We characterised a failure to comply as an instance of failure to comply with a court order, but that does not seem correct as a jury summons is not issued as a court order. We do not discount the possibility that a court could find that a failure to comply with a jury summons could reach the conduct threshold for general contempt depending on the circumstances but, in our view, it is more adequately and appropriately dealt with as a criminal offence. We have concluded that it should be included on a non-exhaustive list. In part two of the report, we will consider as part of our discussion of contempt procedure what should be the position where an offence may be treated "as if it were" contempt.

Subverting an order of the court by destroying the subject matter of an action

1.30 Under the current law, contempt liability arises "where a non-party to proceedings subverts or frustrates the purpose of a court order by destroying the subject matter of

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18 CP 262, paras 3.149-3.152 and 3.179.

19 Above, para 3.150.

20 The Crown Prosecution Service (CPS); the Commercial Bar Association (COMBAR) (the COMBAR response was prepared by a sub-committee and represents the views of that group rather than the views of COMBAR as a whole. We refer to it as the COMBAR response for convenience); Greg Callus; GNM; the Change for Children International; DJ Rachel Watkin.

21 This does not mean that general contempt could not be established when there has been a breach of an order that was made for the purposes of protecting the administration of justice. As we explain at para 2.12 above where any court order is breached then an applicant may seek to establish general contempt.

22 Juries Act 1974, s 20(2); CP 262, para 4.11.

the action".[23] This form of liability arises because the non-party has interfered with an order "and has thus interfered with the administration of justice in the action between the parties".[24] It does not arise on the basis that the non-party is bound by the order, because they are not, nor does it arise on the basis that they have encouraged or assisted a bound party in breaching it.

1.31 In this context, the "purpose" of the order refers to "the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil".[25] For example, where proceedings are concerned with whether particular material should be permitted to be published, the court may make an order prohibiting publication in order to maintain the confidentiality of the material pending its decision in those proceedings. A non-party who nevertheless publishes that material may be said to have subverted the order by destroying the confidentiality of the material.[26]

1.32 In the consultation paper we provisionally concluded that "it is necessary that this type of conduct continues to be prohibited".[27] We recognised the potential overlap between this conduct and encouraging or assisting a bound party in disobeying an order. In light of that, we considered that it may be clearer and more useful to identify "subverting an order of the court by destroying the subject matter of an action" as a distinct type of conduct to be included in a non-exhaustive list.[28]

1.33 Some consultees found it confusing that this type of conduct was proposed for inclusion as an example of what might meet the conduct element for general contempt.[29] Greg Callus, barrister and editor of the contempt section of the White Book,[30] andGuardian News and Media Limited (GNM) said that such conduct should be dealt with under contempt by breach of an order or undertaking. GNM considered this necessary to "avoid there being two potential routes to deal with the same factual scenario" and to ensure the law is "clear and precise". As we explained in the consultation paper and reiterate here, it is well established that contempt liability can arise where a person subverts a court order by destroying the subject matter of an action and that such liability does not arise on the basis that the person is bound by the order (which they are not). With respect to presenting alternative bases on which liability may be established, we address this in chapter 2 and see it as

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23 CP 262, para 3.157. See *Attorney General v Newspaper Publishing* [1988] Ch 333; *Attorney General v Times Newspapers* [1992] 1 AC 191.

24 CP 262, para 3.157.

25 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 223.

26 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) (*Arlidge, Eady & Smith*) para 6-201; see for example, *Attorney General v Newspaper Publishing* [1988] Ch 333.

27 CP 262, para 3.160.

28 Above, paras 3.160, 3.179.

29 Greg Callus; GNM; COMBAR.

30 The White Book (formally titled *Civil Litigation*) is widely accepted as the leading guide to civil procedure in the High Court and County Court in England and Wales.

unproblematic.[31] Therefore, we conclude that this example should be included in a non-exhaustive list of examples, subject to some modification, which we now explain.

Wardship

1.34 Sir James Munby, former President of the Family Division, raised a concern about whether general contempt liability would arise where a person:

> without the consent of the court undertakes or facilitates some "important" or "major" step in the life of the ward of a kind that cannot lawfully be taken without the prior consent of the court.

1.35 Sir James explained that an "important" or "major" step may include marrying the ward, removing them from the jurisdiction, materially changing their education or residence, changing their name, or subjecting them to significant forms of medical treatment.[32] He said that, under the current law, such conduct constitutes contempt "if the court has made no order at all other than an order warding the child". Ultimately, he considered it unclear whether interference with a ward would satisfy the conduct element for general contempt:

> To speak bluntly, what is proposed is, as it stands, absolutely useless for the family practitioner or judge. Consider, for example, the very specific and practical question, "Is it a contempt of court to expose the ward to a psychiatric examination for forensic purposes without the prior permission of the court?" I defy anyone … to say whether or not, if the Commission's provisional proposals were enacted, this would or would not remain a contempt of court. …
>
> In the context of the law of contempt in relation to wards of court the Commission's provisional proposals are unworkable. Far from creating "greater certainty" they would, if enacted, cause confusion and uncertainty, and, one has to fear, generate years of litigation of profit to no-one but the lawyers.

1.36 Our view is that interfering with a ward would be capable of satisfying the conduct element for general contempt. It is likely that, where a court has made an order warding a child, undertaking or facilitating "some 'important' or 'major' step in the life of the ward" without the court's consent will constitute a non-trivial interference with the administration of justice (or, at the very least, create a substantial risk of a non-trivial interference). We consider this an example of subverting the purpose of a court order, albeit not by destroying the subject matter of an action.[33] Given that during consultation events we heard from judges in the Family Division of the High Court that wardship cases are now relatively rare, we do not consider it necessary to identify this

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31 See paras 2.10-2.14 above.

32 The response cited as an example a judgment of Sir James: *Kelly v British Broadcasting Corpn* [2001] Fam 59, [2001] 2 WLR 253 at 75-76.

33 In some circumstances it may be that contempt by breach of order will be available to an applicant. Where there is a *contra mundum* order (see chapter 3), then interfering with a ward may amount to contempt by breach. In circumstances where a person has interfered with a ward by, for example, removing them from the jurisdiction, the court may make an order requiring that person to reveal the ward's location and effect their return to the jurisdiction. In that case, the person is bound by the order and thus failure to comply may result in liability for contempt by breach of order: see, for example, *Re W (A Child) (Abduction: Committal)* [2011] EWCA Civ 1196, [2012] 1 WLR 1036.

category of conduct as a specific example in a non-exhaustive list. We do, however, take from Sir James' response and example the point that it may not be necessary to destroy the subject matter of a court order for that order to be subverted. Accordingly, we conclude that some revision to the wording in our provisional is appropriate and the category is better described simply as: "subverting an order of the court".

Encouraging or assisting another to disobey a court order

1.37 In the consultation paper we provisionally proposed that "encouraging or assisting another to disobey a court order" should be included in a non-exhaustive list.[34] We explained that under the current law such liability arises on the basis that a non-party to proceedings, who is not bound by the order, "has assisted the named person to disobey the order and has thereby himself interfered with the administration of justice which requires that the order be obeyed".[35]

1.38 No single or dominant theme emerged from the comments on this example.

1.39 The Change for Children International saw its inclusion in a non-exhaustive list as important and thought it should be "emphasised" in family proceedings, suggesting wording should focus on the family law context. For example, it could read, "encouraging or assisting another to disobey a court order, particularly in cases involving children and matters like contact or treatment". We appreciate that it may be relevant in the family context but are not persuaded that any additional focus is necessary.

1.40 Herbert Smith Freehills LLP argued that general contempt liability for assisting a party in disobeying a court order should not apply to "legal advisers in another jurisdiction where they are acting properly according to the laws and standards of professional conduct that apply to them in that jurisdiction". Such circumstances may arise where, for example, in the course of proceedings in England and Wales a court makes an order prohibiting a party from commencing or continuing alternative proceedings in another jurisdiction. Herbert Smith Freehills suggested that a lawyer advising that party in any alternative proceedings in another jurisdiction, which were commenced or continued by the party in breach of the order, should not be liable for general contempt:

> While this may be a clear contempt of court on the part of the client, who is subject to the English court's jurisdiction, we suggest that it should not be a contempt of court for the lawyer where they are not contravening any laws or professional conduct obligations that apply to them in the relevant jurisdiction.

In our view, there is no principled reason why a lawyer in a different jurisdiction should be exempt from liability if the elements of general contempt can be satisfied, though it would be hoped it is unlikely that the lawyer intended to interfere with the administration of justice.

1.41 GNM again argued that encouraging or assisting another to disobey a court order should be dealt with as a contempt by breach of an order. It relied on the same

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34 CP 262, paras 3.161-3.162 and 3.179.

35 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 228.

reasoning given in respect of subverting a court order by destroying the subject matter of an action.[36] Liability that arises where a party to proceedings breached an order by which they are bound is distinct from liability arising on the basis of encouraging or assisting *another* to breach an order. As explained in the consultation paper, a person who is not bound by an order cannot be liable for breach:[37]

> This would conflict with the fundamental principle that the courts act *in personam*, meaning "[t]hey adjudicate disputes between the parties to an action and make orders against those parties only"[38] and cannot bind by an injunction a person "who is not a party in the cause for the purpose of the cause".[39]

1.42 Our view is that encouraging or assisting disobedience to an order is capable of constituting or creating a substantial risk of a non-trivial interference with the administration of justice. It should be included in a non-exhaustive list of conduct that may satisfy the conduct element of general contempt.

Obstructing another person from obeying a court order

1.43 The CBA suggested that "obstructing another person from obeying a court order" should also be included in a non-exhaustive list as it is well established that such conduct may constitute contempt under the current law. No other consultees made this argument and no authorities were cited. We accept that it may be conduct capable of satisfying the conduct element for general contempt, though whether the conduct threshold was met would of course be for the courts to determine on the facts of any given case. We do not have sufficient evidence to conclude that it should be included as an example in a non-exhaustive list of conduct.

CONDUCT ASSOCIATED WITH PROCEEDINGS

1.44 Some types of conduct associated with proceedings will be capable of constituting or creating a substantial risk of a non-trivial interference with the administration of justice. We look at four here.[40]

Prejudicial publications

1.45 In chapters 4 and 6, we note that general contempt applies where there is a publication of prejudicial material, regardless of whether proceedings are active.[41] In

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36 See Appendix 1 para 1.33 above.

37 CP 262, para 3.161 (emphasis in original).

38 *Attorney General v Newspaper Publishing Plc* [1988] Ch 333 at 369.

39 *Iveson v Harris* (1802) 7 Ves Jun 251 at 256; *Attorney General v Newspaper Publishing Plc* [1988] Ch 333 at 378. We note that actions and orders *in rem* that can bind persons other than parties may now be made in some areas of law in the civil courts.

40 There were other possibilities put to us in consultation responses. Among them was the CBA's suggestion that the following should be included on a list: "a witness refusing to be sworn having been called to give evidence, or refusing to answer an admissible question having been sworn". The CBA added that this would be subject to "the court upholding a claim to privilege or holding that the exception currently within section 10 of the Contempt of Court 1981 applies". Section 10 limits the circumstances in which a person (typically a journalist) may be required to disclose a source. We consider this to be better viewed as disobedience to a court order, and so the usual form of liability would lie in contempt by breach of order.

41 See para 4.282 and 6.128 above.

the consultation paper we did not provisionally propose that prejudicial publications should be included on a non-exhaustive list in CQ 17. This was because our provisional proposals in general contempt had a specific strand for publication, which was general contempt by publication. As we have discarded that distinction, we have concluded that publications, including on social media, may satisfy the conduct threshold for general contempt. Although publications associated with proceedings will ordinarily fall to be considered under contempt by publication when proceedings are active, it is both clear and important that they are recognised as conduct that may be the basis of an application for a contempt finding based on general contempt when an intention to interfere with the administration of justice can be proved.[42]

Misconduct by jurors

1.46 In the consultation paper we included misconduct by jurors on the provisionally proposed non-exhaustive list. We explained that although there are criminal offences for specific forms of juror misconduct, they did not cover all possible misconduct:[43]

> Disclosing deliberations will be an offence under the Juries Act. There are offences relating to jurors doing research to find information that is relevant to the case, sharing research with other jurors, or intentionally engaging in conduct that indicates they intend to try the issue otherwise than on the basis of the evidence in the proceedings; these types of juror misconduct may also constitute contempt. A failure to serve on a jury when summoned to, or attending but being unavailable due to intoxication, may be treated as an offence or as a contempt. Some juror misconduct will not be a criminal offence but will be a contempt. For instance, where a juror disobeys an order of a judge to surrender any electronic communications device, then that will be a contempt of court.[44]

1.47 GNM preferred that juror misconduct be treated as a criminal matter:

> The advantage with specific legislation is that the exact remit of the wrongdoing can be defined. If there are alternatives in the punishment for the same factual background (for example, the behaviour of jurors which is regulated by the Juries Act 1974), then the use of general contempt as contemplated in the examples given here could lead to inconsistent decision making and confusion.

1.48 We appreciate this concern and see some force in it, especially with regard to the potential for confusion. However, juries are a fundamental part of the administration of criminal justice and misconduct should remain both a contempt and a criminal offence. It is significant that not all juror misconduct is a criminal offence. We conclude that it would warrant inclusion on a non-exhaustive list.

1.49 There is one further issue that arises, which is that under section 20(1)(b) of the Juries Act 1974 it will be an offence, and may also be treated as if it were a contempt, “if a person, after attending in pursuance of a summons, is not available when called on to

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42 See also para 6.128.

43 CP 262, para 3.144; Juries Act 1974, ss 20-20I; Criminal Justice and Courts Act 2015, ss 69-74, amending the Juries Act 1974.

44 CP 262, para 3.144 (references omitted).

serve as a juror, or is unfit for service by reason of drink or drugs".[45] We will look in part two of our report at the position where an offence may be treated "as if it were" a contempt.

Providing false statements or disclosures to a court

1.50 We discuss false statements in two parts of chapter 6, noting that is a category of conduct that clearly falls within the scope of general contempt.[46] We note here some further comments by consultees that indicate how significant they saw this conduct to be.

1.51 Consultation responses from the Forum of Insurance Lawyers (FOIL), the General Council of the Bar of England and Wales (the Bar Council) and the Personal Injuries Bar Association (PIBA) all suggested, either in terms or in effect, that the wording in a non-exhaustive list should at least include statements made in anticipation of proceedings. The comments from FOIL capture the underlying concern well. They expressly endorsed what was said in *South Wales Fire and Rescue Service v Smith*, which we also cite in the consultation paper:

> Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. … The courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.[47]

1.52 There were also some suggestions that it should be more specific. For instance, the Bar Council suggested adding "verified by a statement of truth …". This seems to us unnecessary and potentially constraining. It seems entirely possible that a false statement could be made that is not verified and yet still reaches the conduct threshold.

1.53 There was a particular concern raised about claimants who mislead expert witnesses. FOIL argued that statements made to experts or expert witnesses (such as "misrepresenting or exaggerating the true extent or impact of an injury") should be caught, though they acknowledged that evidential difficulties might arise where there is disagreement over what was said given that there would be no transcription. PIBA said:

> In personal injury claims, a claimant is required to orally explain their condition [to] and, often, to permit a physical examination by, a medical expert witness. They may also have to explain the effects of their injuries to non-medical expert witnesses. It would be helpful to have clarification if misleading an expert witness (by statement or physical conduct) or generally imparting false information to such a witness would constitute general contempt. This point [ie, information relayed to expert witnesses], of course, applies generally across all types of litigation.

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45 Juries Act 1974, s 20(1)(b), (2). This provision was recently considered by the Court of Appeal (Criminal Division) in *R v Szobollodi* [2025] EWCA Crim 1204.

46 See paras 6.142-6.147 and 6.188-6.198 above.

47 CP 262, para 3.164; *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [4].

1.54 In our view, a non-exhaustive list should include "providing false statements or disclosures to a court or in anticipation of proceedings". This is consistent with the wording in the Civil Procedure Rules.[48] We do not think any more specificity is needed. It should lie with the courts to determine in any given circumstances whether the conduct threshold has been met.

Accessing court documents without authorisation

1.55 We provisionally proposed in the consultation paper that "accessing court documents without authorisation" should be included in a non-exhaustive list on the grounds that it was a clearly established form of contempt given the 1992 decision in *Dobson v Hastings*.[49]

1.56 We received responses that have persuaded us that, although this is clearly a form of conduct that could satisfy the general contempt conduct threshold, it should not be included in a non-exhaustive list.

1.57 GNM pointed out that during the course of their ordinary work, "journalists frequently access court documents". They explained that sometimes journalists obtain permission from the court but, since this can be a slow process, they also obtain copies from the parties without obtaining court authorisation. The concern is that the provisionally proposed wording could be interpreted widely with the effect that journalists will be subject to contempt findings and sanctions if they access court documents without seeking the express authorisation of the court. This, they said, "runs contrary to open justice principles, including those articulated by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring*" and "would be a disproportionate interference with freedom of expression and open justice".[50]

1.58 There is considerable force in the concerns raised by GNM. The courts have steadily increased non-party rights of access to case materials, especially since *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*,[51] through to *Cape Intermediate Holdings v Dring* in the UKSC.[52] Recently, *In re HMP*[53] set some limits on access, elaborating on the effects of *Dring*, but maintaining the importance of open justice and document access.

1.59 One option to alleviate GNM's concern would be to add the words "in circumstances where court authorisation is required". However, that would not be satisfactory. One reason is that the protocols and directions on access are not always stated in terms of authorisation. There are several provisions that enable the media to access documents that may be used in proceedings, either directly from the court on request

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48 CPR, r 32.14; see also paras 6.143-6.145 above.

49 CP 262, paras 3.168-3.169 and 3.179; *Dobson v Hastings* [1992] Ch 394.

50 *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, [2020] AC 629.

51 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618.

52 *Dobson* was not addressed in the UKSC, but it was addressed in the Court of Appeal, where the Court of Appeal reviewed a wide range of authorities, including those since *Dobson* that had expanded the non-party access right: *Cape Intermediate Holdings v Dring* [2018] EWCA Civ 1795, [2019] 1 WLR 479.

53 *In re HMP* [2025] EWCA Civ 824.

or from parties, without the need for authorisation.[54] The *Commercial Court Guide* provides a good example of how authorisation or its absence may not always be completely straightforward:

> The general rule is that a hearing is to be in public: [CPR] rule 39.2(1). In consequence, parties and their legal representatives should be prepared to provide a copy of that party's skeleton argument for the hearing, by email, to any law reporter, media reporter or member of the public who requests it. Unless a party has solid grounds for declining to provide a copy, a party should comply with the request voluntarily, without the need for intervention by the Court. Where a skeleton argument contains information which is subject to a confidentiality order or which is to be referred to at a hearing in private, a suitably redacted version of the skeleton argument can be made available.[55]

1.60 The rules of court do not give a right of access, and the Commercial Court Guide sets out practice. That practice may vary widely and may be developed. The UKSC in *Cape Intermediate Holdings* added a postscript suggesting development:

> We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case.[56]

1.61 Overall, although accessing court documents without authorisation could meet the conduct threshold for general contempt, its inclusion on a non-exhaustive list would be at odds with the pattern of development and with the consultative approach promoted by the Supreme Court. Its absence from a list therefore better reflects the developments in the area where it has been relevant.

CONDUCT ASSOCIATED WITH REPRESENTATION

Misconduct by legal representatives

1.62 We provisionally proposed in the consultation paper that a non-exhaustive list should include "misconduct by legal representatives". The essence of the rationale was that

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54 See, for example: CPS protocol on media access (currently out to consultation on an updated protocol); *CPR r 5.4C;* Practice Direction 52 C – appeals to the court of appeal, para 33; see also HMCTS, *Jurisdictional guidance to support media access to courts and tribunals: Civil courts guide* (updated 10 November). There is also the judiciary's Transparency and Open Justice Board response to its public consultation, which has a lot in keeping with the general trend, published 22 July 2025 Message from the Transparency and Open Justice Board: Key Objectives - Courts and Tribunals Judiciary}.

55 Courts and Tribunals Judiciary, The Commercial Court Guide (July 2023) para J.7.3.

56 *Cape Intermediate Holdings v Dring* [2019] UKSC 38, [2020] AC 629 at [51].

"the administration of justice relies on the appropriate conduct of legal representatives".[57] We quoted the judgment of the High Court in *Re Balli*:

> It is an essential feature of the due administration of justice that the court should be able to trust that those who conduct litigation as legal representatives (1) are qualified and authorised so to do, and (2) that they can be… relied upon to do so in accordance with certain basic standards, which are laid down in their professions' respective codes of conduct.
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> … All of this is fundamental to the due administration of justice, to the furtherance and attainment of the overriding objective, and to the observance and upholding of the rule of law.[58]

1.63 We said that:

> This does not mean that all misconduct by legal representatives will constitute contempt under the current law, nor that all misconduct will be captured by general contempt. However, where misconduct carries a substantial risk of a non-trivial interference with the administration of justice, or actually interferes in a non-trivial way with the administration of justice, then we consider that it will be caught by general contempt. This is consistent with the current approach of the courts.[59]

1.64 We received a number of comments on this aspect of CQ 17. Several individual consultees told us about their frustrations with the legal process and that they felt they had experienced lawyer misconduct that was not addressed. Sunny Gill, supporting the provisional proposal said, "there is a legal community that aids and protects each other".

1.65 Three legal professional bodies gave comments agreeing that this type of conduct should be on a non-exhaustive list. Each suggested that there should be more specificity. The Law Society argued that it should refer to "professional" conduct. The Social Housing Law Association wanted some more explanation of what was meant by "misconduct". The Chartered Institute of Legal Executives (CILEX) said there should be "substantive guidance on the threshold needed for legal representatives to amount to misconduct". They said, "it is important to draw a clear distinction between circumstances where a legal representative engages in mere discourtesy or a dereliction of duty, and those who (through their conduct) threaten the proper administration of justice".

1.66 Two consultees thought that this example should not be included in a non-exhaustive list. A contributor to the COMBAR response said that "spurious contempt allegations" can be made simply to "driv[e] a wedge between litigants and their lawyers during the course of proceedings or mount[] collateral attacks on unwelcome outcomes". The CBA thought it could "cause confusion":

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57 CP 262, para 3.170.

58 Above; *Re Balli (aka Singh)* [2011] EWHC 1736 (Ch) at [17]-[18].

59 CP 262, para 3.171.

> Misconduct is an umbrella term encapsulating a very wide range of unprofessional behaviour, and most misconduct would not amount to a contempt of court. It [is] also unnecessary to include misconduct. Relevant actions of legal representatives would be caught by the other examples, which are better defined forms of contempt and are appropriately anchored to interference with court proceedings.

1.67 The decision of the Divisional Court in *R (Ayinde) v Haringey LBC*,[60] considered whether contempt proceedings should be initiated where fictional cases produced by an AI tool were cited in counsel's submissions, The case points towards including misconduct by legal representatives on a non-exhaustive list. The Court did not institute contempt proceedings in that case but, plainly saw contempt as an important tool for courts to ensure that legal representatives discharge their professional duties appropriately. The court said:

> The court has a range of [inherent] powers to ensure that lawyers comply with their duties to the court. Where those duties are not complied with, the court's powers include public admonition of the lawyer, the imposition of a costs order, the imposition of a wasted costs order, striking out a case, referral to a regulator, the initiation of contempt proceedings, and referral to the police. …[61]

> Placing false material before the court with the intention that the court treats it as genuine may, depending on the person's state of knowledge, amount to a contempt. That is because it deliberately interferes with the administration of justice.[62]

1.68 Our view is that misconduct by legal representatives should be in a non-exhaustive list of conduct that can meet the general contempt conduct threshold. We recognise that some misconduct may sit within other categories of conduct on the list (for example, where the relevant conduct is a false statement to a court) but it is not apparent that all misconduct would sit in other categories. We also appreciate that the generality of the word "misconduct" leaves the scope of this category of conduct fairly wide and so there is some uncertainty about what will fall into it. However, we think it is wrong to close off that category and better to leave it to the courts to decide whether in any given circumstances the impugned conduct constitutes or creates a substantial risk of a non-trivial interference with the administration of justice.

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60 *R (Ayinde) v Haringey LBC* [2025] EWHC 1383 (Admin); see also *R (Ayinde) v Haringey LBC* [2025] EWHC 1040 (Admin), [2025] 4 WLR 71. The Divisional Court decision is also discussed at paras 6.192-6.197 above.

61 *R (Ayinde) v Haringey LBC* [2025] EWHC 1383 (Admin) at [23], see also [2].

62 Above at [26].

Appendix 2: List of consultees

A total of 139 responses were received during the initial consultation, and 17 responses were received during the supplementary consultation. The following is a consolidated list of consultees who responded to either or both consultations. Some names may appear more than once where joint responses were submitted. Some consultees responded in a personal capacity, rather than representing their organisation or employer.

JUDGES, MAGISTRATES, COURTS AND TRIBUNALS[1]

Association of His Majesty's District Judges

Chief Coroner of England and Wales, HHJ Alexia Durran

Competition Appeal Tribunal

Comptroller-General of Patents, Designs and Trade Marks (and Copyright Tribunal, the Company Names Tribunal, and the Appointed Persons)[2]

Council of Employment Judges

Employment Tribunals (England and Wales)[3]

Environment and Traffic Tribunal

Family Division of the High Court of Justice[4]

First-tier Tribunal (Property Chamber)

Gangmaster Licensing Appeals Tribunal

The judiciary, on behalf of the courts of England and Wales[5]

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1 We include current and former judges or magistrates.

2 This response was submitted by the Comptroller as a tribunal established by statute.

3 This response was submitted by the President of the Employment Tribunals (England and Wales) and Regional Employment Judges.

4 This response was submitted by the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and from the senior judge of the Court of Protection.

5 This response was described in the following terms: "This document is a high level response which attempts to identify the principal issues which the judiciary wishes to address. It is prepared with the support of the Lady Chief Justice and the Heads of Division. It does not seek to prevent separate responses by jurisdiction specific working groups. It has evolved from discussion with judges nominated by the Heads of Division to support this exercise. It has also involved consultation with the Chief Coroner and the Chief Magistrate. … This document is presented on behalf of the courts of England and Wales of which the Lady Chief Justice is President (s7 Constitutional Reform Act 2005)".

Justices' Legal Advisers and Court Officers' Service (formerly the Justices' Clerks' Society)

Parole Board for England and Wales

President of the Gender Recognition Panel, Judge Paula Gray

President of Welsh Tribunals, Sir Gary Hickinbottom

Reserve Forces Appeal Tribunal

Road User Charging Adjudicators Tribunal

Supreme Court of the United Kingdom

Traffic Penalty Tribunal

Valuation Tribunal for England

HHJ Nigel Bird

Professor Simon Burtonshaw-Gunn JP

Adam Gungah

Phillip Marcus

Sir James Munby

Mr Justice William Trower

DJ(MC) Kathryn Verghis

DJ Rachel Watkin

LEGAL ORGANISATIONS AND ASSOCIATIONS, BARRISTERS AND SOLICITORS

Association of Lawyers for Children

Anthony Collins Solicitors LLP

Central England Law Centre

Chartered Institute of Legal Executives

Chancery Bar Association

Chancery Masters

Commercial Bar Association[6]

Constitutional and Administrative Law Bar Association

Court of Protection Bar Association

Court of Protection Practitioners Association

Criminal Bar Association

Criminal Law Solicitors' Association

DAC Beachcroft LLP (Claims Solutions Group)

Forum of Insurance Lawyers

General Council of the Bar of England and Wales

Garden Court Chambers, Civil Liberties Team

Herbet Smith Freehills LLP

Housing Law Practitioners' Association

Incorporated Council of Law Reporting for England and Wales

Janes Solicitors LLP

Kingsley Napley LLP

Law Society of England and Wales

Legal Aid Practitioners Group

London Solicitors Litigation Association

Personal Injuries Bar Association

Social Housing Law Association

Greg Callus

Sam Hussaini

Anastasia Karseras

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6 This response was submitted by a sub-committee of the Commercial Bar Association, comprising Helen Evans KC, Edward Gilmore, Joshua Hitchens, Matthew Hoyle, Shobana Iyer, Gurprit Kaur Mattu, Seohyung Kim, Helen Pugh, Katherine Ratcliffe, Jeremy Scott-Joynt. The response represents the views of that group rather than the views of COMBAR as a whole.

ACADEMICS

Professor Stephen Bailey

Dr Richard Danbury

Professor Helen Fenwick

Dr Rona Epstein

Paul Foster on behalf of Paul Foster; David Toomer; Carole Watson; Andrew Knight; Amanda Ball; Dan Townend

Kathryn Harvey

Professor Peter Hungerford-Welch

Professor Caroline Hunter and Dr Rona Epstein

Dr Richard Jones

Dr John McGarry

Dr John McGarry and Kate Astall

Open University Law Reform Clinic Open Justice Centre

Professor Jacob Rowbottom

Gavin Sutter

Professor Cheryl Thomas KC

David Toomer

University of Sheffield School of Journalism, Media and Communication and the Centre for Freedom of the Media[7]

Dr Dimitris Xenos

GOVERNMENT DEPARTMENTS, PUBLIC BODIES AND LAW ENFORCEMENT

Association of Police Communicators and the National Police Chiefs' Council

Attorney General's Office

Civil Justice Council

[7] The contributors to this response were Mark Hanna, Dr Irini Katsirea and Dr Gemma Horton.

Criminal Appeal Office

Crown Prosecution Service

Domestic Abuse Commissioner, Dame Nicole Jacobs

Independent Reviewer of Terrorism Legislation and Independent Reviewer of State Threats Legislation, Jonathan Hall KC

Information Commissioner's Office

Legal Ombudsman

National Police Chiefs' Council, the College of Policing and Counter Terrorism Policing

Official Solicitor

Probation Services

INDIVIDUALS

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Sarah Benn

Anthony Benson

Martin Chapman

Nigel D Cook

Dr Clive Dolphin[8]

Tracey Edwards

Sunny Gill

Amanda Gore

Velson Horie

David Iwi

Valerie Lewis Williams

James Orme-Kirby

[8] This response was submitted by Dr Clive Dolphin on behalf of Dr Dolphin, 11 people arrested for Contempt of Court outside Southwark Crown Court and on behalf of Defend Our Juries.

Graham Quintana

Benjamin Spain

Trudi Warner

Biff Whipster

Barbara Williams

Judith Woods

MEDIA

British Broadcasting Corporation

Chartered Institute of Journalists

Guardian Foundation

Guardian News and Media Limited

Impress

Independent Television News Limited

Media Lawyers Association

News Media Association

PA Media

Reach PLC

techUK

Rebecca Camber

Charles Thomson

NON-GOVERNMENTAL ENTITIES

Amnesty International UK

Association of Consumer Support Organisations

Change for Children International

Hacked Off

Liberty

Not1More

Open Justice Court of Protection Project

Phonographic Performance Limited and Performing Right Society Limited

Resolve

Rights of Women

Transparency Project

Transform Justice

Unlock

ANONYMOUS

Five consultees provided an anonymous response.

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