

**Law Commission**  
**Consultation Paper No 209**

**CONTEMPT OF COURT**  
**Summary for non-specialists**

# INTRODUCTION

1. This document is a summary of our consultation paper on contempt of court. It is designed for people who have limited knowledge or experience of the law. We explain how the law works currently, the problems with the law, and how the law could be changed, and have used fictional examples throughout this summary to illustrate our discussion.
2. If you would like to find out more about this project, there is further information on our website including the full consultation paper with the questions for consultees. We cannot provide as much detail in this summary as we do in the consultation paper, nor all of the references to sources that we have used for our information and arguments. The website also hosts a number of appendices dealing with the background to the Contempt of Court Act 1981, human rights and contempt of court, the law on contempt in other countries, the results of some survey work, information about when a court can deal with a contempt in its face, a list of different types of contempt, and our impact assessments which look at the cost of the current problems and the cost of changing the law. All of these documents are available at <http://lawcommission.justice.gov.uk/consultations/contempt.htm>.

## WHAT IS CONTEMPT OF COURT

3. Contempt of court is the area of law which deals with behaviour which might affect court proceedings. It takes many different forms, ranging from disrupting court hearings to disobeying court orders to publishing prejudicial information which might make the trial unfair. If someone commits a contempt of court, they can be punished, although the procedures for deciding whether they are guilty and for punishing them are currently different from those used for normal crimes.

## THE NEED FOR REFORM

4. There have been various high profile cases recently, some while we were working on this project, which have shown why the law might need to be changed. These cases have included:
  - (1) a juror who was found to have researched the defendant on the internet;
  - (2) the first prosecution for contempt where the publication was exclusively on the internet: a photograph of a defendant holding a gun was shown on a website during his trial;
  - (3) contempt proceedings for the vilification of Chris Jefferies in some publications during the investigation into the murder of Joanna Yeates in Bristol; and
  - (4) prosecutions for contempt against some media organisations whose publications during the trial of Levi Bellfield led to part of the case against him collapsing.
5. Some of these cases show that the new media – Twitter, internet blogs, and so on – pose a challenge to the current law on contempt of court, which dates from a time before the internet was so widely used. The cases also show that there still

need to be limits on media reporting in order to protect the justice system and the right to a fair trial.

### **SCOPE OF THE PROJECT**

6. The law which deals with contempt of court is huge. Some of the specialist textbooks on it are over 1,500 pages long. There are also many different types of contempt (in Appendix F, on our website, we have summarised the main ones). It was therefore not possible for us to suggest ways to change the whole of the law of contempt. So, we have focussed this consultation paper on certain pressing practical problems with the law which our research of the law and meetings with stakeholders helped to identify.
7. Preliminary meetings at the earliest stages of the project were held with groups who had expertise in the law of contempt, including those working in government, the judiciary, the legal system and the media. In particular, we have consulted informally with: the Attorney General's Office; the Crown Prosecution Service; the Department of Culture Media and Sport; the Home Office; the Ministry of Justice; HM Courts and Tribunals Service; District Judges (Magistrates' Courts); Crown Court Judges and Recorders; High Court Judges; the Senior Judiciary; the Criminal Procedure Rules Committee secretariat and the Civil Procedure Rules Committee secretariat; the Criminal Cases Review Commission; the Judicial College; the Office of the Lord Chief Justice; academics; journalists; and lawyers, including those working independently and in-house lawyers working for the main newspapers and television news broadcasters.
8. In addition, we undertook some brief surveys of District Judges in the magistrates' courts and of Crown Court Judges and Recorders. These surveys are at Appendix D on our website.

### **THE PROBLEMS WE ADDRESS**

9. This summary is divided up in a way which is similar to our consultation paper. The first section looks at the law on contempt by publication. The main problem examined in this part is how to balance the right of an accused person to a fair trial by an independent and unbiased court, with the publisher's right to freedom of expression. We also consider whether the procedure for prosecuting contempt by publication needs changing.
10. Some people have concerns about the impact of new technology on the law of contempt by publication. The rise of social media and so-called citizen journalism on the internet means that there is the potential for "everyone to be a publisher". In the next section, we examine how some aspects of the law and procedure may need to be changed to meet the way in which the media has changed. It is also important that the law is "future-proof" so it can meet any problems created by the new technology of the future.
11. The following section looks at the problem of jurors who look for information about the case that they are trying beyond the evidence presented in court. It also looks at the problem of jurors who reveal what was said during their deliberations about the verdict in the case. Both of these forms of misbehaviour by jurors are contempts of court. Here, the law needs to balance protecting the system of justice, the right to a fair trial, and the rights of jurors.

12. The final section of this summary looks at contempts in the face of the court committed in the Crown Court or in the magistrates' courts. The procedure for dealing with these contempts has recently changed. Our main aim is to find out whether there are areas of the law which are still uncertain or unfair and to find ways of changing that to make the law clear, fair and practical.

#### **RESPONDING TO THIS CONSULTATION**

13. As we have explained, the full consultation paper, including the questions for consultees, is available on our website. This consultation closes on 28 February 2013. You can provide responses to our questions online at <https://consult.justice.gov.uk/law-commission/contempt>, by email to [xxxxxxx@xxxxxxxxxxxxx.xxx.xx](mailto:xxxxxxx@xxxxxxxxxxxxx.xxx.xx) and by post to Criminal Law Team, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ.

# CONTEMPT BY PUBLICATION

## INTRODUCTION

14. Contempt by publication is needed to protect the system of justice, including the right to a fair trial. This is because, in a criminal case, the jury should reach its verdict based only on the evidence which has been heard in court. Any information which the jury discovers from outside the courtroom will not have been examined by the parties and the judge. This could mean that this information which a juror relies on is mistaken or untrue.
15. On the other hand, it is also important that the law protects the right to freedom of expression and it is especially important that the public knows what happens in court in order to have confidence that the system works properly.
16. The law on contempt by publication is based on the need to protect the jury from finding out information that they should not take into account when deciding on their verdict. But the law should only do this in so far as it needs to protect a fair trial and it should not go beyond what is needed to protect that trial.
17. There are two ways of committing a contempt by publication. One is known as “strict liability” contempt, and is covered by the Contempt of Court Act 1981. This contempt is committed when a publication occurs when a case is “active” and that publication creates a substantial risk of serious prejudice or impediment to that case. The contempt occurs even if the publisher did not know that this risk would be created (that is, the publisher was not intending to prejudice the case).
18. The other form of contempt by publication is covered by the common law (that is, judge-made law). Under this law, it is a contempt to publish information with the deliberate aim of impeding or prejudicing a case even if the case is not active.
19. We explore below how the law works and what some of these terms mean.

## “ACTIVE” CASES

20. Contempt by publication under the Contempt of Court Act 1981 can be committed only if the case which appears in or is related to the publication is active at the time of publication. In general, criminal cases are active from the point the suspect is arrested or a warrant for arrest is issued, whichever happens first (there are some other things which trigger the active period but it is rare for them to apply).
21. Criminal cases stop being active when the accused person is found not guilty or is sentenced (or by any other decision which ends the case, for example, if the prosecution decide not to continue with the case). If an arrest warrant is issued but no-one is arrested, the active period ends one year from the issue of the warrant.
22. For example,

*the police are looking for Mr Smith, who has been accused of kidnapping. They want the public's help in finding him. “TV News” reports on the police search, including the fact that Mr Smith has*

*been convicted before of another kidnapping. If there is a trial the judge may decide that it is unfair for the jury to know about Mr Smith's previous conviction. So, the publication of this fact creates a substantial risk of serious prejudice. Mr Smith is arrested on Tuesday. If "TV News" reported this on Monday, there would be no contempt – the case is not "active". If "TV News" reported on Wednesday, there could be a contempt – the case was "active" when the report was published.*

23. There is a defence to contempt known as "innocent publication". This means that if the publisher does not know or suspect that a case is active, they do not commit a contempt. Finding out whether a case is active is therefore crucial.
24. It can be difficult for media organisations to find out whether a person has been arrested or an arrest warrant issued. Police forces do not all adopt the same approach to revealing the names of people arrested. It is obviously important for the media to know if someone has been arrested so they do not commit a contempt.
25. This raises the question of whether the active period should not start at arrest. Some people argue that it should start later in the criminal process, such as only when a person is charged. However, that could increase the risk of serious prejudice to the case. This is because the media would be able to publish prejudicial things in the period between arrest and charge.
26. We do not think that the law should be changed so that the active period starts at the point of charge. We think that the current period should be kept (which in practice will usually mean that the active period will start at the point of arrest or the issue of an arrest warrant).
27. However, we propose that the Association of Chief Police Officers could encourage police forces to be more consistent when deciding whether to release information about arrestees following a request from the media. Generally, the names of arrestees should be released. But there would need to be protections in place for where names need to be withheld, for example, where the arrested person is a child.
28. So, using our example from above,

*late on Tuesday evening, "TV News" calls the police force which has been looking for Mr Smith. "TV News" has heard a rumour that he has been arrested and asks the police whether this is true. The police use their new guidance on naming arrestees. They consider things such as whether Mr Smith is an adult (he is), whether their investigation might be damaged by naming him (it won't, in this case) or whether the victim might be identified by naming him (they won't, in this case). The police decide that it is safe to name him, and they confirm to "TV News" that Mr Smith has been arrested. "TV News" now knows that if it reports Mr Smith's previous conviction on Wednesday, it could be in contempt because it knows that the case is "active".*

29. Some people think that it might not be necessary for the active period to last until after sentence. They suggest that the active period could end when verdicts have

been reached in respect of all the charges. A convicted person will be sentenced by the judge/magistrates (not by the jury) so the risk of serious prejudice might be lower because a judge or magistrate could be less likely to be influenced by publicity. Many publishers already treat the final verdict as the end of the active period.

30. On the other hand, this does not mean that a judge or magistrate can never be influenced by publicity. Some people might worry that if the active period were moved to end at verdict, judges and magistrates would be more likely to be influenced and would pass a different sentence as a result. We ask consultees whether the active period should end at the final verdict in the case instead of at sentence.

### **SUBSTANTIAL RISK OF SERIOUS PREJUDICE OR IMPEDIMENT**

31. It is hard to know how much judges and juries are influenced by what they read in the press and see on television. There is very little research about this in England and Wales. There has been some research done abroad but there is no clear answer.
32. The courts have taken different views, although they seem to agree that jurors (who are members of the public) are more likely to be influenced than judges, who are trained professionals. Other people in the proceedings may also be influenced by prejudicial publications, for example, witnesses or the defendant.
33. For strict liability contempt under the Contempt of Court Act 1981, publication is forbidden where a case is active and the publication “creates a substantial risk that the course of justice ... will be seriously impeded or prejudiced” in a particular case. The key point is that the risk must be substantial and the prejudice or impediment must be serious.
34. Prejudice here means something which might make the judge or jury biased to the prosecution or the defence. Impediment means creating an obstruction to the course of justice, for example, by publishing information which would stop witnesses coming forward to give evidence. Prejudice and impediment are not the same thing, although sometimes they overlap. There has not been much case law on what “impeding” means.
35. There are no hard and fast rules about what can and cannot be published once the case is active. It will depend on the facts of the case. So, for example, publishing a photograph of a defendant before he or she is tried will only be a contempt where the defendant is likely to argue that there has been a case of mistaken identity. If a witness saw a photograph of the accused person in the newspaper, this might affect their memory of who or what they actually saw when the alleged crime occurred.
36. The court will look at the publication and try to assess whether a potential juror in the case would be likely to see it and whether they would be likely to remember what they saw at the time of the trial.
37. Because contempt of court has serious consequences and can lead to a publisher being imprisoned, the prosecution must prove beyond reasonable doubt that the publisher is guilty.

38. As we have explained, the test involves two questions: whether the level of risk is substantial; and whether the level of prejudice or impediment that will arise is serious. Some people say that this test should be changed. They argue that the test should be one of *any* prejudice or impediment, not just where it is *serious*. Some people also say that *substantial* risk is too low, and the test should be *likely* risk. This is because any prejudice to a fair trial should be prevented but a publisher should be able to predict with greater certainty whether the prejudice or impediment will in fact come about (that is, how likely it is). We therefore ask consultees whether the current test involves the right standards or whether it should be changed.
39. We also think that the legal meanings of the words “prejudice” and “impede”, and how the two words are similar or different to each other are unclear. There is a risk that the media could be disadvantaged by confusion between the two tests. We therefore ask whether the law would be clearer if the test were split into two – that would mean there would be one test for publications which might prejudice cases and another for publications that might impede cases.
40. When assessing whether a publication creates a substantial risk of serious prejudice or impediment to a trial, the court must look at the impact that the particular publication would have. It cannot look at all of the articles and news reports which are published about a particular case and consider them all together. This would be unfair to the individual publisher as they could be found guilty of contempt based on the reports produced by other publishers. This may also breach the publisher’s right to freedom of expression.
41. If a lot of publicity surrounds a case, and it might influence the jury to be biased against the accused, he or she can ask the judge to dismiss the case. This is known as an abuse of process application. The judge will only agree to do this if the accused person cannot have a fair trial because of the publicity.
42. Some people have suggested that the test for contempt should be the same as the test a judge applies when deciding whether publicity amounts to an abuse of process. These two tests are different because they occur in different contexts. The abuse of process test has to take into account all of the publicity about a case. It must look at how the publicity as a whole might affect the fairness of the trial. We therefore think it would be unfair to the accused person if a publisher could publish anything so long as it did not create an unfair trial.
43. On the other hand, the contempt test, as we have explained, only looks at individual publications. It would be unfair to find a publisher guilty for creating a “trial by media” if their individual publication was not at fault. This could breach the media’s right to freedom of expression. Because of this, we think that the two tests should remain separate.

#### **INTENTIONAL CONTEMPT BY PUBLICATION**

44. There is a different type of contempt which is part of the common law (judge-made law) and not part of the Contempt of Court Act 1981. This is a contempt which deliberately interferes with the course of justice. These contempts are very rare.



45. This type of contempt could apply to private communications – for example, if someone wrote a letter to a person who was going to be a witness in a case, and the letter explained why all of the things the witness saw were wrong, to try to change that witnesses' evidence, this would be an intentional contempt. This type of contempt does not require the case to be active – so it could apply before someone has been arrested.
46. For example, in one case, a newspaper published a series of articles about a doctor, suggesting that he was guilty of rape. It also highlighted that it was paying to have him prosecuted. The court said that the paper was deliberately trying to get him convicted. The publications were unfair because if he was tried the jury should decide whether he was guilty based on the evidence in court, not what they read in the newspaper.
47. Some parts of the law which deal with intentional contempt are unclear. Because of this, we ask consultees whether legislation should be introduced to make the law clearer.

## **PROCEDURE**

48. Strict liability contempt can only be prosecuted the Attorney General or by the court itself, although that is unusual. A prosecution for common law intentional contempt can be brought by anyone.
49. Most prosecutors have a prosecution policy – a list of factors which they consider before deciding whether it is in the public interest to prosecute a case. For example, if the victim of a crime is especially vulnerable, this might be a factor which would suggest that a case should be prosecuted. On the other hand, if the accused person has made up for their crime, this might suggest they should not be prosecuted. For example, if the accused person was a child who stole something of low value but later returned it and apologised, it might not be in the public interest to prosecute them.
50. The Attorney General does not have a public prosecution policy for contempt cases. Some people think this means that different Attorneys General might make different decisions so the decisions would be inconsistent. This might make it hard for the media to know when they will be prosecuted. This also means that the public may not be able to understand the decision-making process so there is a lack of transparency. We ask consultees whether the factors considered by the Attorney General when deciding whether to prosecute should be published. This would strengthen the media's right to freedom of expression because it would help them predict what will happen if they publish something.
51. Cases of contempt by publication are normally heard in the Divisional Court. This is a court which sits at the Royal Courts of Justice in London and consists of two judges: usually one from the High Court and one from the Court of Appeal. These contempt cases are conducted using the rules of procedure for civil cases, not the rules for criminal cases. But, the person accused of the contempt is still entitled to a fair trial. It is unclear whether they can get legal aid to help pay for their lawyer.

52. As we have said, this procedure is different from the one used for normal criminal offences. Some of the more serious criminal offences are tried “on indictment”, that is, by a judge and jury. We suggest that contempt by publication should be treated as a normal criminal offence. This would mean that the normal criminal investigation and trial processes would apply.
53. Since contempt can be punished by a prison sentence it seems sensible to treat it like other criminal offences. Another good reason for doing so is that historically, those facing contempt prosecutions would be newspapers and television broadcasters. With the new media and the internet, prosecutions might be against individuals, and the normal criminal trial process would be better suited to dealing with these cases.
54. Using trial on indictment would mean that the normal criminal procedure would apply. This would include the police powers of arrest, of detaining someone at a police station, of investigating the case, and of charging someone with contempt. It would also mean that the normal rules about whether a person is on bail or held in custody to wait for their trial would apply. The prosecution and defence would have to prepare the case like any other criminal trial. The criminal rules of evidence would also apply. Legal aid would be available. This change would ensure that the publisher’s right to liberty and right to a fair trial would be fully protected.
55. For example,

*Jo Bloggs is a blogger. She writes a blog in her spare time about things which interest her. Jo has heard about a case involving a defendant who is on trial for a serious theft. Jo has been told by a friend that this defendant has previous convictions for a serious assault.*

*The jury has not been told about these previous convictions because they are for assault and so are not relevant to the trial for theft. However, Jo does not know about the law on contempt. She posts a blog which provides details about the assault convictions. If someone searches for the defendant’s name on the internet, the blog is easily found.*

*Under the current law, Jo would be tried by two senior judges using a procedure not designed for prosecuting crimes. She might not be able to pay for her own lawyer, so would have to represent herself in court. There would not be a charge sheet telling Jo exactly what she is accused of doing. It is not clear what would happen about bail.*

*Under our proposed change, Jo could be prosecuted in the criminal courts. The police would investigate the contempt, and Jo would have rights which would be protected, for example, if she were arrested she could speak to a lawyer at the police station. Jo could get bail. Jo could also get legal aid to help pay for her lawyer if she could not afford to pay for one herself. The case would use the normal criminal procedure and rules of evidence.*

56. Our proposed change would be very different from the current system for dealing with contempt by publication. It would, however, also create some inconsistency because some other forms of contempt by publication dealing with reporting restrictions would still be dealt with by the Divisional Court (we discuss these forms of contempt below).
57. We ask consultees whether intentional contempt and strict liability contempt should be tried using a normal criminal procedure.
58. The easiest way to make this change would be to use trial by jury in the normal way that it used for other crimes. However, there might be worries that jurors would not understand or accept restrictions on media coverage. This is especially so if the coverage is about those accused or convicted of infamous offences. After all, jurors are also people who buy newspapers and watch the television news. They might not have any sympathy for the right to a fair trial of an accused person whose case has been prejudicially reported in the media. This is particularly so if the reporting says that the accused person has convictions for committing other crimes.
59. It is important that everyone's right to a fair trial is protected, even if they have committed crime before. An alternative to trial by jury would be to introduce trial by judge alone, but using the trial on indictment procedure. This would have the same procedural benefits as a jury trial – in relation to arrest, investigations, bail and so on – but the trial would take place in front of a judge alone without a jury. We describe this as a trial “as if on indictment”.
60. There are arguments against such a trial. It would be a new and unique procedure. On the other hand, trial by judge alone could be quicker and cheaper than with a jury. We ask consultees whether strict liability contempt and intentional contempt should be tried by a judge and jury in the usual way or whether they should be tried “as if on indictment” by a judge alone.

## **REPORTING RESTRICTIONS**

61. Under the Contempt of Court Act 1981, a “fair and accurate” report of what has happened in court is allowed and cannot be a contempt, provided the hearing was in public, and the report was published around the same time as the hearing took place. So, for example, if the television news at 10pm describes what the witnesses in a murder trial said in open court that day, this will not be a contempt. After all, it is important for the public to know what is happening in the legal system.
62. However, a judge has the power to make an order which restricts the reporting of some things said in court where publication would result in a “substantial risk of prejudice” to justice in that case or in another case. These orders are known as section 4(2) orders
63. So, for example, if a person is facing two separate trials for different offences, an order might be made preventing reporting on the first trial. This will stop the jury in the second trial from knowing about the first trial, because if the jury knew that the accused had faced other charges, they might be biased against the accused.

64. These orders can only restrict reporting for a limited period of time. An order can only be made if it would remove the substantial risk of prejudice and there is no other way of doing so. To decide whether to make the order, the court must consider how to balance the right to a fair trial with the right to freedom of expression.
65. When considering making a section 4(2) order, the judge will hear from journalists who may be affected by it, and the media can appeal against the judge's order.
66. Breach of a section 4(2) order is a contempt. However, the exact nature of that contempt is unclear. For example, it is not clear whether the breach needs to be deliberate or whether it might be contempt even if the publisher did not know the order existed or did not mean to prejudice the system of justice. Proceedings for breach of a section 4(2) order are normally brought by the Attorney General in the Divisional Court (again, a civil court with two senior judges).
67. Media representatives complained that it can be difficult to discover whether a section 4(2) order has been made, and if so, what it says. This is because there is no formal system for informing the media about these orders. Individual orders tend to be posted in paper form on the door of the court in which the trial is taking place. This system might in some cases conflict with the right to freedom of expression. The media need to know what they can report about a trial.
68. In Scotland, there is a more efficient system to tell the media about orders of this kind. Copies of orders are emailed to the High Court of Justiciary where the case is entered onto an online list (for example, an entry would read: *HMA v John Smith, Sherriff Court, Glasgow, 3 August 2012*). If the media want to see what any order says, they can telephone the court or sign up to an email list. When the order has expired, the entry can be removed from the list on the website. You can see the list here: <http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>.
69. We propose a similar system for England and Wales to cover section 4(2) orders made in criminal cases. There could also be an email distribution list for orders which the media could sign up to. It is unlikely that this system would be difficult or expensive to operate.
70. So, for example,

*Mrs Taylor is a journalist at "The UK Newspaper". On Tuesday morning, she goes to court and watches the witnesses give evidence in a murder trial. She has to go to a meeting in the afternoon, so she leaves court at lunchtime. When she gets back to the office later, Mrs Taylor writes a report of the morning's evidence. The Editor says it can be published in Wednesday's paper, but only if Mrs Taylor is sure that there is no order banning the reporting. If she cannot be sure the Editor won't publish it. After all, the Editor does not want to be prosecuted for contempt. Mrs Taylor was not in court in the afternoon when the order could have been made. It is after 5pm so she cannot ring the court to find out because it is closed.*

*Under the current system, Mrs Taylor cannot be sure that there is no order. She is frustrated, because she wants the Editor to publish the report as she thinks it is important that the public find out what happened at the trial.*

*Under our proposal, Mrs Taylor looks on the court website to see whether the case is listed. She finds that the murder trial is not mentioned. The UK Newspaper's lawyers have signed up to the email list to be sent details about any order. The lawyers check their email inbox. They find no email about the murder trial. Mrs Taylor can be confident that no order was made and can tell the Editor to publish the report. The Editor can be confident she will not be found guilty of contempt.*

71. The system will, of course, involve letting people on the email distribution list know the very information that the judge has ordered cannot be publicised. We do not think that this is a problem: the section 4(2) order, describing what is not to be reported, is made in open court anyway (the jury would not be there but members of the public could be).
72. In addition, the aim of the order is not to prevent the public as a whole from knowing the information, but to prevent a current or future jury from finding out the information. For this reason, the names of cases in which section 4(2) orders have been made are often stuck on notice boards in the court building. If necessary, there are different orders which a judge can make to ensure that information remains confidential from the public as a whole.
73. There is another power under the Contempt of Court Act 1981 which allows a court to give directions prohibiting publication, known as a section 11 order. Section 11 orders can last forever. For example, a section 11 order can be used to grant anonymity to a blackmail victim. That guarantee of permanent confidentiality means that blackmail victims are not deterred from reporting offences against them. The media can appeal if an order is made.
74. Breach of a section 11 order is a contempt where the breach deliberately prejudiced or obstructed the administration of justice. Again, breaches of these orders are prosecuted by the Attorney General in the Divisional Court.

## **SENTENCING**

75. The maximum punishment for all types of contempt is two years in prison or an unlimited fine. Community sentences, such as unpaid work, are not available.
76. Additionally, a "third party costs order" can be made which requires a publisher to pay the costs incurred if the proceedings were prejudiced or impeded by the contempt. So, for example, this would cover the cost of a retrial if a contempt led to a jury being discharged.
77. There are no reports of this order being made in the case of a contempt by publication. This may be because it is unclear whether the Divisional Court can make this order once it has found the publisher guilty of contempt.

78. Punishment can be imposed on both the journalist and the media organisation (for example, the newspaper as a whole can be fined), although it is rare for the individual journalist to be punished. No-one has been sent to prison for contempt by publication for over 60 years. The usual sentence is a fine and the court will calculate it by looking at things such as the seriousness of the contempt and the resources of the publisher.
79. Because the courts may have to deal with contempts by publication committed using the modern media, it might become more common for individuals who are not employed as journalists to be prosecuted. It is important that the courts have the correct powers to deal with all types of publisher. It seems unnecessarily limited for the courts to have powers only to fine or imprison in these cases. A community sentence should also be an option.
80. We ask consultees about whether the maximum sentence of two years' imprisonment is still suitable for strict liability contempt, since some argue that this penalty is too harsh, especially as the publisher's right to freedom of expression will be relevant. By comparison, breaches of other types of reporting restriction (such as the ban of identifying a person under 18 who is charged with a crime) are punished only by a fine.
81. We also ask consultees about whether the maximum sentence remains appropriate for intentional contempt under the common law and breach of section 4(2) and section 11 orders. To commit any of these types of contempt, it seems that the publisher needs to have deliberately interfered with the system of justice. This could mean that the sentencing options should include prison for the most serious cases. We also ask whether a community sentence should be an option.
82. The fines which can be imposed on media organisations – such as newspapers or television broadcasters – are determined by the court when they find the organisation guilty of contempt. Some people think that the fines imposed are too low, especially by comparison to the compensation that is paid in libel or privacy cases which can be much higher. On the other hand, some people argue that the traditional print media is struggling economically at present, and therefore a fine would have much more impact.
83. The current sentencing power may need changing to reflect differences in the resources of different media organisations. It is important that all publishers see the fines as a deterrent from committing contempt. We ask whether the courts should have the power to impose fines which are set at a percentage of the turnover of the media organisation. If this change were introduced, the Sentencing Council could provide advice to judges on how this would work.
84. If contempt by publication were still tried in the Divisional Court (not by a jury or by a judge alone "as if on indictment") we think that the Divisional Court should have the power to impose third party costs orders. As we explained above, this would mean that the publisher would have to pay for any costs wasted in the case that was prejudiced or obstructed by the publication. So, if the jury in a criminal trial was discharged because of prejudicial publicity and there had to be a retrial, the publisher should pay for the cost of the trial, if they were guilty of contempt.

# **PUBLICATIONS, PUBLISHERS AND THE NEW MEDIA**

## **INTRODUCTION**

85. The creation of the internet has brought about a huge change in the way in which people communicate. Enormous volumes of material can now be stored, communicated and redistributed to a mass audience. This creates problems for the law of contempt. Historically, newspapers would fade from memory to become “tomorrow’s chip paper”. Now, information on the internet is potentially available forever once it has been posted, and can be found by anyone using a simple search.
86. More and more people are using the internet. 84% of adults in the UK have used the internet at some time whilst 80% of UK households have internet access. There are estimated to be over 30 million UK Facebook users while Twitter has 10 million active UK users.<sup>1</sup> This situation is very different from in 1981 when the Contempt of Court Act was passed.
87. There have not (yet) been many contempt cases involving publications on the internet, so the law on the issue is sometimes unclear. This issue will become more important in the future and the law needs to be able to deal with online publications.

## **PUBLICATION**

88. Under the Contempt of Court Act 1981, strict liability contempt by publication (discussed above) only applies to publications. The Act defines publication to include speech, writing, programmes (and other similar broadcasts) and any other form of communication. These publications must be “addressed to the public at large or any section of the public”.
89. The term “speech” seems to have an obvious meaning. In one case, the courts found that a play at a theatre was a publication under the law of contempt. “Speech” would also include things said on YouTube films.
90. “Writing” has been defined in law as “reproducing words in a visible form”. Case law from a different area of criminal law concluded that something on the internet can be described as “written” as what was on the computer screen was “in writing”. A court that had to decide the issue in a contempt case would reach the same conclusion.
91. The legal definitions on what amounts to a programme are complex and technical, but it seems clear that these definitions would cover television and radio. Some forms of internet service would also be programmes under the law – for example, the BBC’s iPlayer service.
92. The meaning of “communication” is very wide indeed. We are confident that it would cover almost all of the new media, for example, the following would be

forms of communication: Facebook postings, tweets, Flickr photographs, videos on YouTube, and words, videos, music or pictures on any other website.

93. Our view is that the definition of publication under the Contempt of Court Act 1981 does not need to be changed as it already includes new technology.

#### **ADDRESSED TO THE PUBLIC**

94. To constitute a strict liability contempt, the publication must be addressed to the public at large or any section of it. There is no clear rule on what this means, but a court would examine how many people the publication was addressed to, who those people were and why the publication was aimed at them. A private communication which is only sent to one person (for example, an email from one person to another) could not be a publication addressed to the public.
95. Case law from a different area of criminal law held that posting material on a website which was available to anyone who visited the site was publication to the public. The court concluded that it was irrelevant that only one person had *actually* seen the publication – what mattered was that anyone *could* have seen it.
96. It is not clear whether the courts would treat social networking sites, such as Facebook and Twitter, as publications to the public or a section of the public – it might depend on whether the users have turned on their privacy settings so their posting or tweet can only be viewed by a limited number of people.
97. We ask consultees whether the fact that the law does not define a “section of the public” could be a problem in practice.

#### **WHO IS RESPONSIBLE FOR A PUBLICATION?**

98. The Contempt of Court Act 1981 does define who or what is a “publisher”. There are, clearly, many ways that a person can be involved with a publication: it can be authored, edited, approved, changed, emailed and so on. A publication will normally be communicated by complex means which themselves need to be created, managed and maintained. For example, someone needs to maintain the cabling which establishes the internet connection which makes it possible to email. This raises interesting questions about who should be considered to be a publisher for the law on contempt of court.
99. This digital world is very different from the one which existed in 1981 when there was only radio, television (with no on-demand service) and print newspapers. One important difference is that it is more likely that contempt of court laws will apply to communications by individual people (say, on Twitter), rather than media organisations (such as a newspaper). Not only are professional journalists publishers under the law, but so is any person who writes a blog or tweets to a section of the public. Another major difference is that an online publication is available for the public to read for far longer than a printed copy would be.

<sup>1</sup> Sources: Office of National Statistics, *Internet Access Quarterly Update*, (Aug 2012); Ofcom, *Communications Market Report* (Jul 2012) at 4.2.1; <http://www.internetworldstats.com/europa.htm>; @TwitterUK, 15 May 2012.



100. The use of the internet to publish information makes it more likely that the courts will have to address the issue of who should be treated in law as a publisher. Merely sending an email involves many different people/companies – for example, the person who wrote the email and clicked the send button, the company which provides that person’s email service (for example, Gmail or Hotmail), the company which provides the internet connection (for example, Virgin Media or Talktalk), the company which owns the server on which the email is stored (which may be abroad), the company which provides the internet connection for the person who receives the email and the company which provides their email service, and so on.
101. There are also the people and companies needed in order for a person to be able to post on their blog, update their Facebook status or to tweet.
102. The question about who is a publisher could create problems for the law of contempt. For example, if something appears on the internet revealing seriously prejudicial information about a trial, who should be held responsible under the law? The answer could be:
- (1) the author or user who wrote the words;
  - (2) the author’s broadband provider;
  - (3) the providers that stores the content (for example, a social networking site);
  - (4) the company which provides the web address;
  - (5) the company that allows other people to find the material (for example, a search engine); or
  - (6) someone else?
103. Those listed at points (2) to (5) (and other similar organisations) are known as “intermediaries”.
104. It is obvious that an author, speaker, or tweeter is a publisher under contempt law. However, it is more difficult to say that the intermediaries are also publishers.
105. Part of the reason for this problem is that contempt law requires intention to publish – so the publication must be deliberate. But, it is not clear whether this means that the publisher must have deliberately posted those particular words.
106. If intermediaries were treated as publishers, they might have certain defences. For example, as we have explained above, there is a defence if the publisher takes reasonable care but “does not know and has no reason to suspect” that there is an “active” case (see above at paragraph 23). Intermediaries would often not be aware that cases were active.
107. There are other defences under EU law for intermediaries who carry or store information to be sent between computers. However, these defences will not apply if the intermediary has been asked to remove the information (for example, by a court order) and the intermediary has not done so. The defence will also not apply in some cases where the intermediary knows that the publication is illegal.
108. In practice, we think that intermediaries are unlikely to be publishers in the law of contempt.

## THE TIME OF PUBLICATION

109. Strict liability contempt can only be committed if the case was active “at the time of the publication”. The problem is, it is not clear what this means.

110. Consider this example:

*The police are investigating a murder. “The UK Newspaper” finds out that the victim’s friend, Mr Jones, has a previous conviction for manslaughter. On Monday, they publish the story with the headline: “Murdered girl’s pal has killed before”. The story is also on their website. At this point, there are no active proceedings.*

*On Wednesday, Mr Jones is arrested by police on suspicion of the murder. The story is still on the website and proceedings are now active. Although “The UK Newspaper” is no longer on sale in the shops, anyone can still read the story on the website and find out about Mr Jones’ previous convictions. “The UK Newspaper” might be prosecuted for contempt. But were proceedings active “at the time of publication”?*

111. There are two possible meanings of “time of publication”.

- (1) It could mean that publication is a continuing event that begins with the first appearance of the report and carries on. So, for example, as long as a publication is available to the public (for example, the webpage is still on the internet) this still counts. Under this meaning, “*The UK Newspaper*” would be guilty of contempt.
- (2) Or it could mean that the case needs to be active only when the report was first published – in our example this would only be on the Monday when the webpage went live. Under this meaning, “*The UK Newspaper*” would not be guilty of contempt, because the proceedings were not active at the time of publication.

112. The interpretation of the time of publication is clearly significant in many cases. Consider this further example:

*Mr Brown is convicted of rape and sentenced to 4 years in prison. There is lots of coverage about the case in the media, and lots of articles on the internet, because Mr Brown is quite famous. The case is not active at this point because it has finished.*

*Mr Brown serves his sentence and is released. A few months later, he is arrested for a serious theft and is sent for trial by jury. All of the internet articles about his previous conviction are still available for anyone who searches for them. Are the publishers of these internet articles in contempt? This again depends on whether the “time of publication” is continuing so that it includes the point at which the theft case became active.*

113. There is no doubt that the new media has made such scenarios more likely: in 1981, finding old news reports required a trip to the library or a newspaper archive. Now, anyone, anywhere in the world, with a computer or smartphone can find the information within seconds.

114. This issue is important because the law needs to protect Mr Brown's right to a fair trial, and also ensure that he is presumed innocent until proved guilty. However, the law also needs to be fair to the publisher. If publication is a continuing act, the publisher might be guilty of contempt, even though the new case became active through no fault of the publisher. There was nothing the publisher could do to control whether or when the new case became active. Yet, the publisher could have committed a contempt because of it.
115. There is little case-law in England and Wales on this concept of time of publication. However, there is a Scottish case which held that publication is a continuing act under the law. This would mean that the publishers in Mr Brown's and Mr Jones' cases could be in contempt.
116. For various reasons, the law in this area needs clarification. We have particular concerns that under the present law, following the Scottish case, publishers might need to continually monitor their internet archives to ensure that they do not include old publications which relate to people who are now subject to new, active, cases. If the publishers do not do this monitoring, they might be guilty of contempt.
117. We think this is too onerous an obligation for publishers – especially as some of the media have huge internet archives (for example, the BBC). This monitoring responsibility might breach the publisher's right to freedom of expression. We therefore ask consultees whether the law needs to be changed so that publication is *not* a continuing act.
118. However, if that proposal is accepted, further change would be necessary in order to prevent old news articles from causing prejudice to new criminal trials. The law needs to protect the right to a fair trial, and prevent juries from being prejudiced against either the prosecution or the defence by old publicity.
119. The need for this is obvious from cases such as Harwood, the police officer who was tried and acquitted of the manslaughter of Ian Tomlinson at the G20 protests. Before Harwood's criminal case became active, various articles were published (including on the internet) which accused Harwood of previous misconduct, including allegations of violence. When these articles were first published, the media was justified in publishing them – there was an important public interest in knowing about the behaviour of police officers. However, once Harwood was arrested and the criminal case became active, there was a significant risk that these allegations would cause him prejudice. They were allegations that the jury was not allowed to know about because there was a risk it would rely on that prejudicial information in reaching its verdict. It was right that Harwood was presumed innocent until proven guilty.
120. Unless the courts have the power to restrict access to historic reports on the internet, such as in the Harwood case, there is a risk that criminal cases will be prejudiced or impeded by these publications.
121. Whilst in the Harwood case, the risk was to prejudicing the defence in the trial, there could also be a risk to the prosecution. For example, a person could publish material on the internet (before they are arrested for an offence) explaining why they are innocent. Some of this information might be wrong, or untrue, or not used in court for other reasons. Unless the court can make the person remove

the material, it is possible a juror will see it and believe it. This would be unfair to the prosecution.

***A new power to remove reports from the internet***

122. Our proposal to resolve this problem is to create a new form of contempt of court. We propose that if a case becomes active, and an old report (that is, first published before the case became active) is still available, the judge should be able to order this report to be removed temporarily from the internet.
123. The judge would only have this power where the publication creates a substantial risk that the course of justice will be impeded or prejudiced (the same as the test for strict liability contempt, which we explained above). The judge would also have to specify for how long the report would need to be removed. For example, the order could be made the first time an accused person appears in the Crown Court, and could last until the jury has reached a verdict (this would usually take a few months).
124. The judge will need to assess how likely it is that a juror will find or see the old publication, and what impact the publication would have on the juror. The judge will also need to assess whether other people might be affected by the old publication being accessible, for example, witnesses might be put off coming forward.
125. These orders ought to be rarely imposed because there will not often be a substantial risk of serious prejudice. (An order similar to this was made by the judge in the Harwood case).
126. For example, an order might be something like this:

*It is ordered that "The UK Newspaper" shall remove from their website the following articles relating to the case of R v Williams:*

*(1) "Williams convicted of rape", available at [www.theuknewspaper.co.uk/williams-convicted-of-rape-march-2009](http://www.theuknewspaper.co.uk/williams-convicted-of-rape-march-2009).*

*(2) "Williams attacked before, say cops", available at [www.theuknewspaper.co.uk/williams-attacked-before-march-2009](http://www.theuknewspaper.co.uk/williams-attacked-before-march-2009).*

*These articles shall be removed from today for a period of 3 months, until the trial is over.*

127. If, in that example, "The UK Newspaper" does not comply with the order, this should be a contempt of court, unless there is a good reason why they did not do so.
128. The advantage of this proposal is that it means that a publisher will only commit this form of contempt if they are subject to a specific court order. That means the media will not have the obligation to monitor their web archives, and will have an obligation to remove only the identified articles for only a short period of time. This protects the media's right to freedom of expression.

129. Most of these orders would be made against the publisher in the normal sense of that word – the author of the blog, or the newspaper or television broadcaster themselves.
130. However, in some cases the order may need to be made against other organisations. For example, what if the author of a blog cannot be identified or lives abroad? In these cases, the judge should have the power to order anyone who has enough control over the publication to remove it temporarily.
131. So for example, the judge could order internet service providers to disable access to a particular webpage. Or, the judge could order search engines to remove a particular webpage from their search results, so that no-one can find it for the duration of the trial.
132. The courts will decide whether someone has enough control that the order should be made against them. That may depend on whether the person or company is based in the UK: the courts cannot make orders against people abroad.

***What happens if the order is breached?***

133. If one of these new orders is made against a person or company, and that person fails to comply with it (without good reason) this would be a contempt. We ask consultees whether such a case should be prosecuted in the Divisional Court (this is a court with two senior judges, where contempts by breach of section 4(2) or section 11 orders are currently tried) or tried by judge and jury like other criminal cases, or by a judge alone but with the procedure normally used in criminal cases (we explained above that we call this a trial “as if on indictment”).
134. The maximum sentence for any type of contempt of court is two years in prison or an unlimited fine. We ask consultees whether this is the right maximum sentence for the new contempt of court for breach of this order. We also ask whether community sentences, such as unpaid work, should be available.

**PLACE OF PUBLICATION**

135. The criminal law of England and Wales normally only applies in England and Wales, although there are some exceptions to this. However, with crimes that involve the internet, it can be difficult to say where they occurred. Under the current law if the crime was completed here or if the crime was “substantially” undertaken here, then it will come within the criminal law of England and Wales.
136. How does this work with contempt? For example,

*Ms Wilson lives in Brighton. At her home, she uploads a blog post. There is a serious robbery trial in London and the blog post relates to that trial. Because of what the post says, it amounts to a contempt. Ms Wilson’s blog is hosted on a server in California. It can be read by people in England and Wales, but also those in France, Canada and New Zealand. Where has the contempt occurred?*

137. In Ms Wilson’s case, the answer might be straight-forward: the crime has been committed substantially in England and Wales because that is where she

uploaded her blog post and that is where the case was taking place that could be prejudiced.

138. But, it is easy to think of more difficult cases:

*Mr Johnson lives in New York and is a journalist for "The US Newspaper". "The US Newspaper" is mainly read by Americans, but sometimes people overseas read it too. It also has a website. An American tourist has been abducted in Bristol, England, and a man is on trial there for the abduction.*

*Mr Johnson uploads an article to The US Newspaper's website about the trial. Because of what the article says, it creates a substantial risk of serious prejudice and so amounts to a contempt. Mr Johnson's article is hosted on a server in California. It can be read by people in America, but also by people in England and Wales, including in Bristol. Where has the contempt occurred?*

139. The courts have not yet had to deal with an alleged contempt of this kind, so there is no clear answer. However, it is likely that the courts will have to consider this in the future. It is important to protect the process of justice in England and Wales and the rights of people being tried here, but the law also needs to be fair to publishers. For example, it could seem harsh to prosecute a foreign newspaper with only an office in London for their journalists, when the newspaper's target audience is readers in the foreign country, not people in England and Wales.
140. We therefore ask consultees whether there needs to be a definition of place of publication in statute law and if so, what it should be.

# JUROR CONTEMPT

## INTRODUCTION

141. Recent cases have highlighted concerns about misbehaviour by jurors during criminal trials. We focus in this chapter on two particular types of misbehaviour:
- (1) Jurors who try to find out information about the case outside of court, for example, by searching for the defendant's name on the internet (this is currently a contempt of court under the common law, that is, judge-made law);
  - and
  - (2) Jurors who reveal information from their deliberations (this is currently a contempt of court under section 8 of the Contempt of Court Act 1981 so we call this "section 8 contempt").
142. Although jurors have probably been committing various forms of misconduct for as long as there have been juries (which is since at least the 12<sup>th</sup> century), the internet has changed the situation. Because of the new media, it is now easier for jurors to find out information about the case that they were trying, and to share their deliberations with other people.

## JURY INSTRUCTIONS

143. In England and Wales, jurors are randomly selected members of the public who are on the electoral register. When a person receives their jury summons, they also get a booklet from the court service called *Your Guide to Jury Service*. This explains that during the trial jurors must not "discuss the evidence with anyone outside your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter or Myspace". It also says that if a juror is "unsure or uneasy about anything", they can write a note to the judge.
144. In general, on arrival at court on the first day of jury service the jurors will be shown a video (you can see the video at <http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu>). This provides a brief description of the court process and the role of jurors. The video explains that "it is vital" that jurors "are not influenced by any outside factors" so they must not discuss the case with family or friends. Jurors are also told explicitly not "to post details about any aspect of ... jury service", including their deliberations, on social networking sites or to reveal their deliberations to anyone.
145. Jurors are warned that they "may also be in contempt of court" if they "use the internet to research details about any cases" they "hear, along with any other cases listed for trial at the court". The video also tells jurors that they should raise any concerns with court staff.
146. Aside from the video, court staff also themselves give the jurors a warning. They say:

The judge will tell you that you DO NOT discuss the evidence with anyone outside of your jury either face to face, over the telephone or

over the internet via social networking sites such as Facebook, Twitter, or Myspace. If you do this, you risk disclosing information, which is confidential to the jury. Each juror owes a duty of confidentiality to the other jurors, to the parties and to the court. Jurors can only discuss the evidence when all 12 jurors are in the jury deliberating room at the conclusion of the evidence in the trial.

147. Different courts have different systems for dealing with jurors' electronic devices that can connect to the internet, for example, mobile phones, laptops, iPads, iPods, Kindles, and so on.
148. In some courts, jurors are permitted to keep these devices with them in the area where they have lunch and sit during breaks in the trial. However, the devices must be switched off in court, and are removed when jurors are reaching a verdict in the case in the jury room. In other courts, jurors' devices are removed from them for the whole time that they are at court. And in other courts, jurors can keep their devices even when reaching a verdict in the jury room.
149. When a juror is picked to sit on a trial, he or she takes an oath, speaking that oath out loud in the court room, in front of the other jurors, the judge, lawyers and the defendant. The juror's oath is that they swear to "faithfully try the defendant and give a true verdict according to the evidence".
150. After the oath, the judge should also give jurors the following warnings.
  - (1) Jurors should not discuss the case with anyone (including family and friends) whether face to face, or over the telephone, or over the internet (including on Facebook or Twitter).
  - (2) If jurors do talk to other people they would be breaching confidentiality. They might also listen to someone else's views about the case and let it affect their own opinion, even without realising it.
  - (3) Jurors should reach their decision based on what they hear in court, and should not take into account any publicity. After all, the publicity is only the publisher's view of events.
  - (4) Jurors should not seek information about the case from outside the court, for example, by searching on the internet or visiting the crime scene. The prosecution or the defence would not be able to say anything to the jury about that information so doing this would be unfair. For example, the prosecution might want to show the jury that the information from the internet is a lie. They cannot do that if the jury has looked at it in secret.
  - (5) Jurors should speak to the court staff if they have any concerns about the case. If they find out that another juror has misbehaved, they should also tell the staff.
  - (6) If a juror does any of the things they have been told not to do, it will be a contempt of court and they could go to prison.



- (7) After the case is over, jurors can tell other people about the case, but can never reveal their deliberations – that is, the discussions they had with the other jurors about the verdict in the case and why they reached it.
151. Despite these warnings, research and case law suggests that jurors may still not be getting the message. This might be because the warnings are not clear, or jurors do not agree with them. We propose further safeguards which could be adopted to try to prevent this misbehaviour and we explain them below after examining the problems in more detail.

### **JURORS SEEKING INFORMATION**

152. Jurors who look for information about the case that they are trying may be guilty of contempt of court. The law on this comes from the case of Dallas. While she was a juror, Dallas undertook internet research into the case. She discovered that the defendant had previously been tried for rape (but found not guilty). Dallas told her fellow jurors what she had found and they told the judge. There had to be a retrial with a new jury.
153. Dallas was prosecuted before the Divisional Court (that is, a court with two senior judges and no jury). The Lord Chief Justice found that Dallas was in contempt of court because the judge had warned her not to undertake this research. Dallas knew she had been ordered not to do this but, she “deliberately disobeyed the order”. This caused prejudice to the trial because this information might have been used by the jury in reaching their verdict. There was also prejudice because there had to be a retrial which meant, for example, that the victim had to give evidence again. A retrial wasted time and cost public money. Dallas was sentenced to six months in prison.
154. Some people have concerns about this type of case. For example, they think that the procedure used in this type of case (before the Divisional Court) might not properly protect the accused person’s rights as the procedure is very different from trial by jury, which is used to try other serious crimes.
155. Some people also think that the law in this area is not clear enough, particularly since it is founded mainly on the Dallas case. It is unclear, for example, what would happen if a juror did not understand the judge’s warning, or if a juror looked up the defence barrister on the internet, but not the defendant. It is also unclear what would happen if a juror accidentally found information about the case on the internet (for example, while searching for something else). We make proposals to clarify the law.
156. There are many reasons why jurors might try to find information about the case from outside the courtroom. For example, jurors may:
- (1) Try to find out as much about the case as possible because they are worried that they might reach the “wrong” verdict;
  - (2) Want to be “good jurors” which they might mistakenly think means knowing everything about the case (even things which, for legal reasons, cannot be included in the evidence heard in court);

- (3) Want to fill in the gaps in the evidence or try to find information to make clear bits of evidence which are unclear;
  - (4) Not understand the judge's instructions on what the law is, for example, the law on murder. They may think that if they look this up, it will help them understand it;
  - (5) Not understand why doing their own research is banned and so think that it is a rule without good reason;
  - (6) Not understand the judge's warnings or not be able to work out what it means in practice. If a judge says "don't research the case on the internet" what does this mean? Is searching for the name of the judge allowed? What about the name of the defence lawyer? What about using online maps to view the crime scene?
  - (7) Just be curious or even mischievous.
157. Before the internet, jurors trying to find out about the case would have been less of a problem. For example,

*It is 1980. Mr Davies is a juror trying a case involving a fight in a park. A member of the public thinks she saw what happened. Mr Davies wants to visit the crime scene. He wants to know whether the witness could have got a good look at the crime from where she was standing. However, getting there is inconvenient. Mr Davies travels to the park after court. It is not on his usual way home but takes a bus journey of 40 minutes each way, and he has to travel after court has finished at 4.30pm. It is dark when Mr Davies gets home. Also, he is worried that someone might have seen him in the park or on the bus. If someone saw him, they could tell the judge.*

158. Compare that to the situation today:

*Mr Davies goes home after court. There is no-one else at home. He makes a cup of tea and turns his computer on. He opens up Google and searches under maps for the name of the park. Within seconds, he has the park showing on the map. Mr Davies selects the street view. He views the photographs of the park taken from different angles, trying to work out where the witness was standing and where the fight took place. Mr Davies thinks the witness could not have got a good view. After all, there are no street lights that he can see nearby and there are bushes which he thinks would have blocked the view. Mr Davies thinks the witness must be mistaken. It has taken him only minutes to look for himself and see this. How will the judge find out that this is what Mr Davies has done? How will the prosecution be able to explain that Mr Davies might be wrong, and the witness could have got a good view, if they don't know that Mr Davies has done this?*

159. It is easy to think of other examples where it would have been difficult to find the information out before the internet was widely used – newspaper reports of an accused person's previous convictions are a good example. To get copies of old

newspapers would have needed a trip to the national newspaper archive at the British Library at Colindale. Today, an internet search engine will produce huge numbers of results in seconds. As we have explained above, internet access and use is widespread in the UK today. Because of this, it is much harder to keep information from the jury.

160. It is difficult to know how big this problem is as there has been limited research. One study by Professor Cheryl Thomas in 2010 found that in high profile cases up to 12% of jurors who were asked admitted that they had looked for information on the internet about the case they were trying. This might only be the minimum number of jurors, because some jurors might not have wanted to admit their behaviour if they thought they were wrong to do it. Almost half of jurors who were asked said they would not know what to do "if something improper occurred during jury deliberations".<sup>1</sup>
161. We also have some evidence that the Court of Appeal is ordering more investigations into cases of juror misbehaviour (these investigations are done by the Criminal Cases Review Commission). Between 1998 and 2005, the Court only asked for four investigations. From 2006 until mid-2012, there were at least 27 investigations ordered.
162. There may also be many other cases where the juror's misbehaviour is never discovered.
163. The issue of jurors undertaking their own research is a problem for two reasons. First, the public and the defendant have a right to know what information the jury used to reach their verdict. The court and the lawyers also need to know this. This is important so that the public can have confidence in the system of trial by jury.
164. Secondly, both the prosecution and the defence need to have a chance to dispute the evidence in the case. They might want to show that certain information is wrong, or mistaken or is a lie or that the accused has a good reason for it. They cannot do this if they do not know what information the jury is using. Without these two principles, there cannot be a fair trial. After all, justice must be done but justice must also be seen to be done.
165. Sometimes, the information which a juror finds might be trivial. However, in other cases it might be important, and the jury might be influenced by it in reaching their verdict. As we all know (and recent examples have highlighted), the internet is full of rumour and gossip.

### **Proposed reforms**

166. There is no single simple solution to this problem. The reforms we propose, above at paragraphs 122 to 132, in removing access to some websites will help prevent jurors from finding things that they should not. However, it is clearly not possible to remove everything from the internet about a case that might be found by jurors. For example, it would not be possible or sensible to remove all maps of the place where the crime occurred from the internet.

<sup>1</sup> *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 43 and p 39.

167. One way of trying to persuade jurors not to look up information on the internet about the case that they are trying and to emphasise how important it is not to do so would be to make that behaviour a specific crime. This would help to make the law in this area clearer. It would also send an important message to jurors. Some Australian states have created crimes such as this.
168. However, there are concerns that a new crime might make jurors less likely to admit to doing these things because they would be worried about being prosecuted. A juror who thinks that another juror has done something wrong might also be reluctant to report them. This could be a problem because the aim of the new crime is to protect the trial process. If the courts are never told that something has gone wrong, they will never know that the trial was not fair.

### **JURORS DISCLOSING INFORMATION**

169. Section 8 of the Contempt of Court Act 1981 makes it a contempt to obtain or to reveal any “statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations”. There are some exceptions to this which mean that revealing deliberations to a court will not be a contempt in certain circumstances.
170. The law on this type of contempt is unclear, but the law applies to people who pass on the information. So, if juror Mr Green tells journalist Miss Thompson about the jury’s deliberations, and Miss Thompson publishes a newspaper article about them, both Mr Green and Miss Thompson have committed the contempt. The contempt is not limited to jurors.
171. Some people have argued that because section 8 is so wide in its application it might breach human rights law, particularly because there is no defence for a juror revealing information in order to uncover a miscarriage of justice. The courts have found that because the juror can reveal the information to the court itself, section 8 complies with human rights law. The European Court of Human Rights, in a case where the juror argued that the conviction for contempt breached the right to freedom of expression, rejected that argument. But, the Court implied that it might have decided the case differently if it had involved a conviction for doing research about juries or if the juror had been trying to expose a miscarriage of justice.
172. The maximum punishment for contempt under section 8 is a fine or up to two years in prison. In a recent case, a juror (Fraill) and one of the accused in the trial (Sewart) discussed the jury’s deliberations on Facebook. Fraill was sentenced to eight months in prison, whilst Sewart was sentenced to a suspended prison sentence. The difference in sentence was because of the different circumstances of Sewart and Fraill (for example, Sewart had a very young child).
173. Many people argue that section 8 should be amended. Some argue that it is too wide because it even prohibits revealing the jury’s deliberations anonymously – they think that if neither the juror nor the case they were involved in could be identified there would be no problem. Some also argue that section 8 breaches the right to freedom of expression, especially where the juror is trying to reveal a miscarriage of justice.

174. Others have argued that there is an important public interest in knowing what is going on in the jury system so the public can be confident that it operates effectively and fairly. By discovering how the system works it would be possible to improve the system. Openness and accountability are important values and should be applied to the jury system.
175. There is also a public interest in research into the system of trial by jury. Some academics argue that section 8 makes jury research “impossible”,<sup>2</sup> because the questions which can be asked without breaching section 8 are so limited.
176. On the other hand, others argue that section 8 should remain. They say that jurors must feel that they can express their views, without fear that other people might make fun of them or threaten them. Jury secrecy helps protect jurors from these reactions.
177. There is also the need to protect the principle that the jury’s verdict is final. If the jury’s deliberations were not secret, the issues discussed could be reopened by the media after the case. The privacy of jurors also needs to be protected (for example, to stop the media from trying to contact them). In the US it is common for jurors to give press interviews to explain why they have reached their verdict. This often seems to be a media circus, with reporters camped outside the court or tracking down jurors, trying to unpick the verdict and why it was reached. Many people would be very concerned about this happening in the England and Wales.
178. Jurors also seem to support the restrictions placed on them by section 8: one study found that 82% of jurors felt it was correct that “jurors should not be allowed to speak about what happens in the deliberating room”.<sup>3</sup>
179. There may be worries that section 8 is being breached more often than it used to be. The internet and social media may make it easier for friends, families and others to speak with jurors to find out information about their jury service. Likewise, it is easier for jurors to contact other people in the trial (such as the defendant) and communicate with them.

### **Proposed reforms**

180. We consider that it may not be sufficiently clear to jurors at present that they can reveal their deliberations to a court but to no-one else and that it might be necessary to protect well-meaning jurors who reveal information to someone who is not a court official. We also think this could prevent miscarriages of justice because jurors would be more likely to tell someone if they had concerns about what had happened on their case. The juror would be less worried about telling the wrong person by mistake, and committing a contempt in error.
181. On the other hand it would not be a good thing to encourage many jurors to make inappropriate revelations about anything related to their case. But we also need to protect jurors and make sure that the courts can discover if a wrongful conviction has occurred. We therefore ask consultees whether it should be a defence to a breach of section 8 if the jury’s deliberations were revealed only to

<sup>2</sup> H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) p 228.

<sup>3</sup> *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 39.

the police or the Criminal Cases Review Commission. This defence would only apply where the juror genuinely believed that the revelation was necessary to uncover a miscarriage of justice.

182. For example,

*Ms Evans is a juror in a serious assault trial. The defendant, Mr Walker, says it is a case of self-defence – he was attacked first. The jury finds Mr Walker guilty. The jurors become friendly over the course of the trial and they keep in touch. A few weeks after the case, another juror tells Ms Evans that he knew the victim of the assault and there was no way it could have been self-defence as he is sure the victim would never start a fight with anyone. That is why he tried to persuade the other jurors to find Mr Walker guilty. Ms Evans thinks this is pretty unfair – after all, the judge asked at the start of the trial whether the jurors knew anyone in the case and nobody said anything. Also, what if the other juror is wrong and the victim did start the fight – that juror wasn't there to witness it, was he?*

*Ms Evans thinks she should tell someone about what she now knows, but she is not sure who. She decides that the best thing to do is go to the local police station and explain the problem to them. After all, the police are responsible for law and order, so they must be able to help.*

*Under the current law, Ms Evans will commit a contempt of court under section 8 if she tells the police what has happened. She could go to prison for this. The only way she could not commit a contempt would be to tell a court – presumably in her case the Crown Court where the trial happened.*

*Under our proposal, Ms Evans would not be in contempt for telling the police, or for telling the Criminal Cases Review Commission.*

183. In 2005, the Department for Constitutional Affairs asked for views about whether section 8 should be changed to allow academic research into jury deliberations.<sup>4</sup> A majority of people who responded thought that some form of research should be allowed. However, they also thought that there would need to be controls on any research. For example, they thought that the research would need the agreement of the Lord Chief Justice. The jurors involved would need to agree to be part of the research and would be guaranteed anonymity. There should also be a code of conduct for researchers. A majority of people who responded thought that researchers should not be allowed access to the jury deliberating room itself.

184. The Department replied that more research into juries should be done, but that it needed to be clear that there were research questions which cannot be answered because of section 8. In our consultation paper, we ask whether section 8 unnecessarily prevents research. If so, we ask whether section 8 should be amended, and what safeguards would be needed if it was.

<sup>4</sup> Department for Constitutional Affairs, *Jury Research and Impropriety: Response to Consultation CP 04/05* (2005).

## PROCEDURE

185. As with some other forms of contempt, the Attorney General can prosecute a juror who does research about their case or who breaches section 8. These cases are normally prosecuted in the Divisional Court (that is, trial by two senior judges and no jury). Because of this, the normal criminal procedure and rules are not used. However, measures are in place to try to protect the juror's right to a fair trial. It is not clear whether jurors who are tried like this can get legal aid (that is, help to pay for their lawyer if they cannot afford one).
186. We think that it is strange that these contempts are treated differently from other similar crimes. We also think the current procedure might not properly protect the juror's right to a fair trial. For example, the current procedure may not allow the juror to know properly the case against them, because there is no charge sheet. It is also not clear whether the law on bail applies to these cases, which could mean that the juror's right to liberty is breached.
187. We propose that the law here could be changed so that breaches of section 8 could be tried like ordinary crimes in the Crown Court. If our proposal, to make jurors researching the case that they are trying a crime, is adopted, this crime could also be tried like an ordinary crime. The Attorney General would still be responsible for prosecuting in such cases but one of the advantages of this change would be that the normal criminal rules of evidence and procedure would apply. So, the usual police powers of arrest, detention at the police station, investigation and charge would apply. There could be legal aid. The law on bail would also apply.
188. The advantage of changing the procedure like this would be that jurors accused of committing contempt would benefit from rules and procedures which fully protect their right to a fair trial and their right to liberty. On the other hand, this would be a major change from the current procedure, and could make cases more complicated. We ask consultees whether they agree with these changes.
189. However, it may not be appropriate to have a jury trial for these contempts. For example, if jurors themselves do not understand or accept that they are not allowed to undertake research about the case that they are trying, they may be unwilling to convict other jurors for doing this. On the other hand, this concern might be misplaced given that, as mentioned previously, jurors are very supportive of section 8. An alternative to trial by jury would be to use the normal criminal procedure and rules of evidence, but to have the trial with a judge alone, not a jury. Again, we call this a trial "as if on indictment".
190. This would be a new and unique procedure because no other crimes like this are automatically tried without a jury (some are tried by magistrates only but this is a different procedure). Trial by judge alone could be quicker and cheaper than with a jury. We ask consultees whether they think these juror contempts should be tried by a judge alone (as if on indictment), or by a judge and jury.
191. The maximum punishment for breach of section 8 is a fine or two years in prison. It is odd that the courts cannot sentence someone to community sentence, such as unpaid work. Some people might consider that a prison sentence of up to two years would be regarded as harsh for breach of section 8. This is especially so because the court would have to consider the juror's right to freedom of

expression when deciding on sentence and make sure that the sentence was reasonable. On the other hand, the consequences of committing this contempt could be serious for the public's confidence in the system of trial by jury. We ask consultees about what the appropriate punishment is for breach of section 8 and would be for the new offence of juror research (if it is adopted).

## **PREVENTATIVE MEASURES**

192. We also think that there are other practical steps which could be taken to discourage jurors from misconduct during their jury service. We think that the following should be considered:

- (1) There should be more teaching in schools about the role and importance of jury service.
- (2) All jurors should be told clearly, specifically, repeatedly and consistently that they must not undertake research about any matters related to the trial or reveal their deliberations in breach of section 8. Jurors should also be told the reason for this.
- (3) All jurors should be told that they could go to prison if they do these things. They should also be told how to report misbehaviour by other jurors.
- (4) These warnings should be in the booklet sent to jurors before they start jury service, in the jury video, in the speech done by court staff, on posters around the court building and on conduct cards which jurors should carry with them to use as a reminder.<sup>5</sup>
- (5) These warnings should be repeated in the instructions given by judges in court. The warning should include examples and be up to date with new technology. Jurors should be reminded about the warning at the end of the every day of the trial.

193. At present, jurors take an oath which we have described above. We consider that the oath should be changed, so that the wording makes clear that the juror is agreeing to the limits imposed by section 8 and that he or she will not conduct research about the case. We ask whether the oath should also be written down, and jurors should sign the oath after they have spoken it out loud.

194. Some people have discussed with us concerns about jurors using internet-enabled devices at court. On the one hand, some people thought that preventing jurors from having these devices at court at all times could be an important symbolic change. It would show jurors that they can only consider the evidence they hear in court. It would also reduce the opportunities for jurors to search for information related to their trial or inappropriately to contact friends, family or other people in the case.

195. On the other hand, concerns were raised that removing these devices could be frustrating for jurors. This is particularly because they may spend periods of the

<sup>5</sup> This was also suggested by Professor Cheryl Thomas in *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) p 50.



day waiting around whilst other matters are dealt with in court. Jurors who care for other people, such as children or an elderly relative, might also be worried about being out of touch. Removing and returning the devices could also be time-consuming for court staff.

196. If these devices were removed, this would not stop jurors from accessing the internet or speaking to friends and family at home in the evening and at weekends. We therefore do not think that all internet-enabled devices should automatically be removed from all jurors for the whole day at court.
197. We conclude, however, that sometimes the devices should be removed for short periods. At the moment, it is unclear that court staff or judges have the power to order jurors to hand in their devices. We think that judges should have this power.
198. The standard practice ought to be to prevent jurors having access to these devices in the jury room whilst they are deliberating. It is at this time that jurors are away from the trial judge and may be most tempted to undertake research on the internet in order to fill in gaps in their knowledge.
199. We also think that there may be other circumstances, although they will be rare, where the judge thinks devices should be removed from jurors, not just when they are deliberating. We consider it is best if judges are left to decide when this might be.
200. It is important that jurors can tell someone if they are worried about how another juror has behaved. At the moment, jurors might not know who to tell or might feel intimidated about telling someone, because the group of 12 jurors is usually kept together at all times. Jurors might also be pressured not to tell anyone. We ask whether steps should be taken to make it easier for a juror to tell someone. There could, for example, be drop boxes into which jurors can place notes for the trial judge. These boxes could be put in areas where jurors can access them without their 11 colleagues being around.
201. We also ask consultees whether other preventive measures should be used to try to stop jurors' misbehaviour, and if so, what those measures should be.

# CONTEMPT IN THE FACE OF THE COURT

## INTRODUCTION

202. Contempt in the face of the court concerns misbehaviour, usually in the courtroom itself, that disrupts or shows disrespect towards the court or challenges the authority of the court. However, there is no precise legal definition of contempt in the face of the court.
203. Examples of contempts in the face of the court include:
- (1) assaulting anyone in court;
  - (2) insulting the judge in court;
  - (3) throwing a dead rat at the court clerk (a live rat would also count!);<sup>1</sup>
  - (4) wearing offensive clothing or not wearing any clothing at all in court;
  - (5) refusing to answer a question when ordered to do so by the judge; and
  - (6) creating a disturbance elsewhere (such as in the corridor outside the courtroom) so that the court hearing is disturbed.
204. There is a lack of clarity about some areas of the law. The behaviour must be deliberate, but it is not clear whether the person accused of the contempt must also have intended to disrupt the court proceedings. For example, they might do something deliberately, but not realise that doing it would disrupt the court. It is not clear whether that would be a contempt.
205. Anyone can be found to have committed a contempt of court. This includes witnesses (for example, if they ignore a witness summons or refuse to answer questions), jurors (for example, if a juror sends someone else to do jury service for them, this will be a contempt), and lawyers (although it is important to protect the accused person's rights and therefore their lawyer cannot be punished except in extreme circumstances).
206. Our consultation paper only looks at what happens in relation to contempt in the face of the Crown Court and the magistrates' courts, not in other courts.
207. The court's response to behaviour which seems to be a contempt will depend on the circumstances in which it occurs. A minor disruption can, of course, be ignored. If it cannot be ignored, the court may simply ask the person to apologise and take no further action. Judges may warn a person not to carry on with their behaviour. A person disrupting a case may be removed from the courtroom, even if that person is the accused.
208. Some kinds of behaviour will amount to ordinary crimes as well as to a contempt of court, for example, if someone hits the judge, this could also be an assault. The court can decide whether to ask that the person be prosecuted for the assault in the normal way or to treat it as a contempt. If the court treats it as a

<sup>1</sup> A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 531, 533.

contempt, the court can deal with it itself or can ask the Attorney General to prosecute it as a contempt in the Divisional Court (that is, a court sitting with two senior judges and no jury).

***The immediate enquiry procedure for dealing with contempt***

209. If the court decides to deal with the alleged contempt, and the person accused of committing it admits it, then they can be dealt with by the judge/magistrates straight away.
210. However, if that person does not admit it then there has to be an “enquiry”. This has the same purpose as a trial – to find out whether someone has done what they are accused of – but is called an “enquiry” rather than a trial when it is for contempt in the face of the court. The enquiry happens before the magistrates (in the magistrates’ court) or before the judge without a jury (in the Crown court).
211. Whatever the court decides to do about the contempt, the procedure must protect the right of the person accused to a fair trial. If there is an enquiry, the person’s guilt must be proved beyond reasonable doubt.
212. There is an *immediate* enquiry procedure – literally holding the hearing there and then to decide whether the person is guilty. This process is rarely adopted these days because the court needs to explain to the person accused of the contempt what they are said to have done and the accused person may want to find and speak to a lawyer. The court also needs to allow the person time to think about their behaviour and to apologise. The immediate enquiry will therefore be a last resort. Usually, the enquiry will be postponed until the accused person has had time to prepare for the enquiry (although in the magistrates’ court the enquiry must take place on the same day as the contempt).
213. It is important that the procedure used by the court to deal with a contempt in its face protects the right to a fair trial. The right to a fair trial requires that:
  - (1) A person accused of contempt be told quickly and in detail what they are accused of doing.
  - (2) The accused person has enough time to prepare their defence, and facilities to do so – for example, access to a lawyer and legal aid to help pay for the lawyer if the person cannot afford it themselves.
  - (3) The trial must be fair and the judge or magistrates must be independent and unbiased. The trial must be within “a reasonable time” so the case cannot drag on for years.
214. So, the risk with the immediate enquiry procedure is that the judge could be the victim of the contempt (if, for example, the contempt involved insulting the judge), the main witness, the prosecutor and the judge of the case, all at once, which would be unfair.

**CONTEMPT IN THE FACE OF THE CROWN COURT**

215. In the Crown Court, the judge can deal with contempts in the face of his or her court. These are contempts under the common law (that is, judge-made law).

216. It is hard to tell how big a problem contempt in the face of the court is. We carried out a survey of 100 Crown Court judges. 43 responded and those responses referred to only 8 cases of contempt in the face of the Crown Court that had been dealt with in the previous year (see Appendix D on our website). We ask consultees whether they think this is an accurate representation of how frequently cases of contempt in the face of the court come up.
217. It seems to be generally assumed that a judge has the power to order someone who she or he thinks has committed a contempt to be kept in custody. However, that person might have the right to be released on bail whilst waiting for the enquiry to occur. The court should presume a person has the right to liberty and we think that there must be a right to apply for bail. We think that a person can only be denied bail (and therefore kept in custody) if one of the conditions in the Bail Act 1976 applies (for example, if there is a risk the person might flee and not return).
218. The law dealing with the rules of evidence for cases of contempt in the face of the court is also unclear. One aspect of this is hearsay evidence. Normally, the court can only hear evidence from a witness who appears in court in person. Hearsay occurs when evidence is produced in court which is not from the witness who experienced it first-hand. Hearsay rules prevent the court from hearing this evidence, unless certain circumstances apply. It is unclear whether these hearsay rules apply to cases of contempt in the face of the court, although they probably do.
219. The maximum sentence for contempt in the face of the Crown Court is two years in prison or a fine. The court cannot sentence the person to do community sentence, such as unpaid work.
220. A person who has been found guilty of contempt in the face of the Crown Court can appeal against that finding, and/or against the sentence imposed.

#### **CONTEMPT IN THE FACE OF THE MAGISTRATES' COURTS**

221. The powers of magistrates' courts to deal with contempt are contained in section 12 of the Contempt of Court Act 1981. Section 12 allows the magistrates to prosecute for contempt anyone who deliberately insults anyone at the court, who deliberately interrupts the proceedings or who misbehaves in court. This section does not include the power to deal with anyone who threatens another person at court.
222. The magistrates' court can sentence a person who has committed a contempt to prison for up to one month or to a fine.
223. Again, it is hard to know the scale of the problem of contempt in the face of the court. We carried out a survey of 145 judges who sit in the magistrates' court. 52 replied and 31 of them said that they had dealt with at least one instance of contempt in the face of the court in the last year (see Appendix D on our website). We ask consultees whether they think this is an accurate estimate of how frequently cases of contempt in the face of the court arise.
224. The procedure for dealing with contempt in the magistrates' court is very similar to that in the Crown Court. However, the magistrates cannot postpone the case

beyond the day that the contempt occurred so, for example, they would not be able to delay the hearing until the next day or the next week.

225. As with the position of the Crown Court, it is not clear whether an accused person has a right to bail. A person can be held in custody by the magistrates' court but not beyond the end of the day (that is, not overnight). Under human rights law, in order to keep someone in custody, and remove their right to liberty, there must be a procedure in place which is set by the law. If the bail position is unclear, it may be that the law does not comply with this requirement.
226. A person who is found guilty of contempt in the face of the magistrates' court can appeal against the finding of contempt and/or against the sentence.

### **MAIN PROBLEMS**

227. In summary, the main problems with the law in this area are as follows:
- (1) It is unclear what behaviour will count as a contempt in the face of the court. For example, it is unclear whether the contempt always has to be deliberate.
  - (2) It is odd that section 12 does not include powers to deal with a person threatening anyone in the courtroom as a contempt in the face of the court, given that it does include powers to deal with insults and interruptions.
  - (3) Contempt in the face of the court is dealt with differently by different courts. So, there is inconsistency – for example, section 12 only applies in the magistrates' court, not in the Crown Court, where the common law applies.
  - (4) Some forms of contempt are also ordinary crimes (for example, assaulting someone in the courtroom would be both the crime of assault and a contempt). Prosecuting this as an ordinary crime might be better as it would involve using the normal criminal procedure. This would properly protect the accused person's rights. That said, letting the court deal with the case itself can be quicker and more flexible and shows the court's authority.
  - (5) It is unclear how the right to liberty is protected and what the law on bail is for someone accused of contempt.
  - (6) In the magistrates' courts there is no power to postpone the contempt hearing beyond that same court day.
  - (7) It is not clear which rules of evidence apply to a contempt hearing.
  - (8) The sentence is limited to prison or a fine with no community sentence, such as unpaid work, available. It is unclear whether the magistrates can impose a suspended prison sentence.

- (9) Under the current law if there is a risk that the trial might not seem fair, the court should postpone the hearing, and let another judge or panel of magistrates hear the case. The fact that the magistrates cannot postpone a case beyond the end of the day therefore presents a problem if there is no other panel available that same day to deal with the contempt.

### **PROVISIONAL PROPOSALS FOR REFORM**

228. We ask consultees about 3 different options for changing the law in this area:

- (1) Leave the law as it is;
- (2) Create a new power for dealing with contempt in the face of the Crown Court that is similar to the section 12 power in the magistrates' court. This would make the law more consistent.
- (3) Abolish the current rules relating to how contempt in the face is dealt with in both the Crown Court and the magistrates' courts and have one new power for both courts which is clearer than section 12 currently is. This would also make the law consistent. We propose that this new law would give the courts the power to deal with deliberate threats or insults to people in the court or nearby, and misconduct in the court or nearby, committed with the aim that a court case will or might be disrupted.

### ***Crown Court***

229. We also think that if a person accused of contempt is held in custody by the court, it should be clear that they have certain rights. These rights would be similar to if someone was arrested by the police and taken to the police station. So, the person would be able to tell a member of the family or a friend that they are in custody (this might be particularly important if, for example, the person in custody has children that need looking after). We also think that the law could be clearer that the person has the right to speak to a lawyer.
230. Under the current law, the person in custody who has been accused of the contempt has to be brought back to court to review the case on the "next business day". But when there are weekends and bank holidays, the next business day for the court could be three or four or even five days away. This is too long for a person to be in custody without the court thinking again about the case and whether the person should have bail. After all, at this stage, the person has only been *accused* of the contempt. They have not been tried or found guilty. The person might be innocent – for example, it could be a case of mistaken identity.
231. Because of this, the person's detention should be reviewed at the end of the day when they were first held in custody. The right to bail should apply, under the Bail Act 1976, in the same way as it does for ordinary criminal offences. This would mean that the person would be granted conditional or unconditional bail, unless one of reasons under the Bail Act allowed them to be kept in custody (for example, the court thinks that the person would carry on disobeying the court or disrupting the court proceedings).

232. The maximum penalty in the Crown Court under the current law is two years' in prison. The maximum penalty in the magistrates' courts is one month in prison. This is a significant difference. We doubt that many cases would be so bad that they deserve two years in prison. So, we ask consultees whether the maximum sentence should be reduced.
233. We also ask consultees whether the law should say clearly that the normal criminal hearsay rules apply to contempt in the face of the court. We also ask whether some other criminal rules and procedures (for example, other rules about evidence) should be applied to an enquiry for a contempt in the face of the court.
234. The need for some of these reforms is clear from the following example,

*Mr White is due to be sentenced on Friday for committing a crime. His mother, Mrs White, goes to court with him. Mr White's lawyer thinks he will probably get a community sentence of unpaid work as he has not committed a crime before but Mrs White is very worried that her son will be sent to prison. Mr White has a young daughter, Jane, who Mrs White will have to look after if he is sent to prison.*

*Mrs White spends hours at court waiting for the case to start, and by the time it does she is even more anxious than before. The judge sentences Mr White to six months in prison. Mr and Mrs White are both very distressed – they worry about what will happen to Mr White in prison and how Jane will cope without him. In the heat of the moment, Mrs White stands up in court and shouts abuse at the judge.*

*The judge tells Mrs White to go outside and calm down. Mrs White leave the room The next case in the courtroom starts but Mrs White comes back – she is still very distressed and starts shouting abuse at the judge and the lawyers this time.*

*The judge orders Mrs White to be taken into custody. She is taken by one of the custody officers down to the cells where she is locked in. Mrs White has never been in trouble before. She is terribly worried about Jane. She does not know when she will be released and she was planning to collect Jane from school at 4pm. There is no-one to look after Jane over the weekend. She does not know whether she will be entitled to bail or what will happen next.*

*Under the current law, the court reviews Mrs White's detention the next business day, which is Monday. She spends the weekend in prison. Mrs White would not have the right to make a phone call to find out about Jane, although the custody officer might allow her to make a call.*

*Under our proposed reform, when Mrs White is taken into custody on Friday, the law would say that she has the right to a phone call. Mrs White's sister is called and arrangements are made for her to pick up Jane from school and care for her for the weekend. The law would also be clear that Mrs White has the right to speak to a lawyer and the custody officer calls one, who comes to the cells and speaks in*

*private to Mrs White. She explains what happened and the lawyer gives her advice.*

*At 4.30pm on Friday, Mrs White is brought back into court before a different judge because the other judge was the victim of the contempt and it would be unfair for him to be the judge in Mrs White's case. Mrs White's lawyer applies for bail, explaining to the court that Mrs White has never been in trouble before and that she will agree to live at her address so that the police can check on her if needs be. The court agrees to bail Mrs White, on the condition that she comes back to court the week after to deal with the contempt. Mrs White is freed from court at 6pm.*

### **Magistrates' courts**

235. Unlike the Crown Court, the magistrates' courts do not currently have power to impose a suspended prison sentence – that is, a sentence where the person does not go to prison unless they commit another crime in future. We think that the magistrates' court should have this power.
236. Under the current law, magistrates cannot postpone a case of contempt beyond the end of that court day. This causes obvious problems. For example, what if, 10 minutes before the court day is due to finish, someone throws something at the magistrates and hits them? The court will either have to try to case instantly, there and then, or the court will have to let the person go.
237. So, the magistrates should be allowed to postpone the case to another day (and another court). This could be important where the case might need to be tried by a different panel of magistrates or a judge in order to make the hearing fair. If the magistrates had this power, they might also have to review the position of someone in custody, or they might have to release that person on bail.
238. We also ask consultees whether there should be more detailed instructions to courts about when to pass the case to a different court.