CONTEMPT OF COURT (2): COURT REPORTING - EXECUTIVE SUMMARY

BACKGROUND

1.1 In November 2012 we published our contempt of court consultation paper ("CP"). In the CP we invited responses to provisional proposals spanning a number of areas of the law of contempt of court, including contempt by publication, the impact of modern media, juror contempt and contempt in the face of the court.

1.2 We have decided to break this large and complex area of law into three stages for the purpose of publishing our recommendations.

1.3 We recently published our first report (Law Com No 340), Contempt of Court (1): Juror Misconduct and Internet Publications,[1] in which we made recommendations relating to the modern media and juror contempt aspects of our CP.

1.4 This is the executive summary to the second report (Law Com No 344), Contempt of Court (2): Court Reporting, hereafter "the Report").[2] This deals with one particular aspect of contempt by publication, namely the issue of reporting restrictions ordering the postponement of contemporary court reporting.

1.5 Our third and final report will deal with contempt in the face of the court, and the remaining areas of contempt by publication.

REPORTING RESTRICTIONS - SECTION 4(2)

1.6 The Contempt of Court Act 1981 ("the 1981 Act") provides that publication of material which has the effect of risking serious prejudice to active criminal proceedings can in some circumstances be punished as a contempt of court.

1.7 The Report looks specifically at the issue of court reporting, that is to say the accurate contemporary reporting by the media of the content of legal proceedings which take place in public in criminal courts.

1.8 We are concerned here with all forms of court reporting, whether published electronically or in print format, and whether by official press representatives or others such as bloggers.

[1] Which can be found here: http://lawcommission.justice.gov.uk/docs/lc340_contempt_of_court_juror_misconduct.pdf.

[2] Which can be found here: http://lawcommission.justice.gov.uk/docs/lc344_contempt_of_court_court_reporting.pdf.

1.9 There is a clear public interest in the transparency of legal proceedings which means that contemporary accurate court reporting is generally immune from being classified as a contempt of court, by virtue of section 4(1) of the 1981 Act.

1.10 This important "open justice principle" has found recognition in both articles 10 and 8 of the ECHR and the jurisprudence of the ECtHR.

1.11 In recognition of these important principles, it is only in certain exceptional circumstances that the courts of England and Wales have the power to order that court reporting be postponed. This power is provided by section 4(2) of the 1981 Act and only arises where such reporting creates a substantial risk of prejudice to the proceedings in question, or to other imminent or pending legal proceedings.

1.12 **Our core recommendation is the introduction of an online list of the section 4(2) orders in force at any given time, giving all prospective publishers a single easy point of reference for checking whether a court order is in force.**

1.13 The list will enable publishers to produce accurate contemporaneous reports of proceedings without the risk of liability for contempt of court. This, in turn, will avoid any undesirable "chilling effect" which may be caused by the current uncertainty, will protect potential publishers' article 10 rights, and will promote the open justice principle.

THE CURRENT PROCEDURE

1.14 The procedure to be followed in respect of section 4(2) and similar orders in criminal cases is detailed in the Criminal Procedure Rules, Part 16. The courts must not make an order unless the parties and anyone directly affected is present, or has had the opportunity to attend or make representations. Applications may be heard by the court sitting in private, so as not to defeat the purpose of the potential order.

1.15 The rules and practice direction are now supplemented by a standard form issued by the Judicial College. The practice direction states that these template orders "should generally be used".

BREACH OF A SECTION 4(2) ORDER

1.16 Breach of a section 4(2) order automatically amounts to contempt, regardless of whether or not there is a substantial risk of serious prejudice flowing from the material that is published. The necessary mental element for breach of an order is unclear however.

1.17 It is uncertain whether recklessness as to the existence of the order is sufficient to ground liability. If it is, then a failure by the publisher to make checks about whether an order is in place or what its terms might may be enough to establish a contempt, if from that failure the court can infer recklessness.

1.18 Whether in fact potential publishers have the means reasonably to ascertain what has happened in court in connection with the existence of such orders was doubted by many of our consultees. Providing such a means is the main aim of our recommendations in the Report.

PROBLEMS WITH THE CURRENT SYSTEM

1.19 The principal concern expressed by consultees from the media was the difficulty they currently experience in finding out whether an order is in place in a given case. This is obviously undesirable both in legal and practical terms. Other consultees expressed similar concerns.

1.20 Uncertainty about the existence of a section 4(2) order increases the risk that it will be breached simply because a publisher is not aware of it. This can lead to the considerable expense of abandoned trials and High Court contempt proceedings.

1.21 Uncertainty also increases the possibility of a potential publisher unnecessarily delaying or suppressing a legitimate accurate report of proceedings that is not in fact covered by any section 4(2) order. This is contrary to the interests of the media, and contrary to the public interest in receiving prompt accurate information about contemporary legal proceedings.

PROVISIONAL PROPOSAL IN OUR CONSULTATION PAPER

1.22 Our provisional proposal was the creation of an online list of section 4(2) orders in force to assist potential publishers in discovering the existence of an order.

1.23 An online list of section 4(2) orders made in criminal cases is currently in operation in Scotland.

1.24 In essence, under such a system an electronic standard form is completed by the court providing the terms of the order. A copy is then emailed to a central office where the case is entered onto an online list. The list provides limited details about the case. Those who want more information about the terms of the order can telephone the central office or the court to which it applies.

RESPONSE OF CONSULTEES

1.25 The response of consultees to the suggestion that a "Scottish style" online list of section 4(2) orders in force be introduced in England and Wales was overwhelmingly positive. This was true of practitioners, the judiciary, the police, representatives of the media and academics alike. This support was subject only to some practical reservations, based on the possible resource implications of the system.

THE PILOT SCHEME

1.26 In order to test whether such practical concerns were well-founded, we conducted a pilot scheme, in which a sample of Crown Courts were asked to email all section 4(2) orders made during a two month period to the Commission.

1.27 Our pilot showed that if such a scheme were implemented, the administrative burden would be modest. It would be in the region of a minute or two per order received.

1.28 Extrapolating roughly from the results of the pilot, one would expect a maximum number of orders across England and Wales to be in the region of 120 per month. This estimate is probably considerably too high, since the pilot sample included the Central Criminal Court, which produced more orders over the trial period than the other six court centres put together.

1.29 The burden on the administering agency could therefore reasonably be predicted to be in the region of three or four hours per month (1.5 or 2 minutes multiplied by 120 orders). Even allowing for some additional time for other administrative tasks in practice, for instance periodically checking the list for expired orders and removing them, this not an excessively burdensome or expensive recommendation.

FINAL RECOMMENDATIONS

1.30 **We recommend the adoption of a publicly available online list of existing section 4(2) orders in force in England and Wales similar to that currently in place in Scotland**.

1.31 Orders would be communicated to an administrator on being made (as in our pilot scheme) and placed on the online list immediately. They would be removed from the online list on the date of their expiry (though the continued presence of an order on the list after its expiry would of course not itself extend contempt liability).

1.32 **We recommend an addition to the standard form to make clear that where a section 4(2) order includes a prohibition on reporting the existence of the order or its terms, this does not apply to the order's publication on the official online database.**

1.33 **We recommend that for those orders whose expiry is contingent upon another event, such as the conclusion of named legal proceedings, reasonably frequent checks are undertaken by the administrator of the list to ensure that expired orders are removed from the list promptly.**

1.34 Regarding concerns expressed about an online list compromising the very confidentiality that section 4(2) orders are designed to protect, our primary response is that this fails to take into account the limited purpose of a section 4(2) order, and has caused no problems in Scotland.

1.35 However, to the extent that such concerns are well-founded, **we recommend limiting the information displayed on the publicly available online list to the name of the case in which the order has been made, and the date on which the order expires (or if the order expires on the conclusion of another case, rather than on a fixed date, then a record of this fact, and the name of the linked case)**.

1.36 Access to the online list would be open to the general public, and therefore to all potential publishers of online and print material, including individual bloggers and other small-scale publishers in addition to the major media organisations.

1.37 Where a potential publisher accessed the list and saw the name of a case about which they wished to publish, the webpage would direct them to telephone the court at which the case was being heard in order to discover further details about the terms of the order.

1.38 To protect anonymity where appropriate, **we recommend that where there are reporting restrictions in place relating to the names of parties to the proceedings, the online list will identify cases by number, with a suitably anonymised case name**.

1.39 The online list should carry a warning to potential publishers to the effect that case numbers rather than names are the determinative identifier of a case, and that the mere absence of a case's name on the list should not be relied upon if the list includes anonymised case numbers. In the event that there is an anonymised case listed at the court centre in which the potential publisher is interested, and if the potential publisher is uncertain whether this number refers to the case about which they wish to publish, then they should contact the court by telephone to check before publishing.

1.40 Although the content of section 4(2) orders can be discovered by those sitting in the public gallery at court, we considered that making this information available to a potentially limitless audience via a public webpage increases the chance of exactly the prejudice that such orders are designed to prevent.

1.41 On further consultation, however, media representatives stated that proactive distribution of the terms of section 4(2) orders (as is the practice in Scotland, to a limited mailing list of media representatives) would assist them in establishing their legal obligations.

1.42 Our final recommendation in this area is therefore that **the publicly accessible list of orders be supplemented by an additional restricted database which would contain the terms of section 4(2) orders themselves.** We recommend that the cost of administering this more detailed database be borne by its users, and hence that there would be a subscription charge for access to the fuller list.

1.43 The restricted nature of this additional database would guard against the slim chance of a juror stumbling upon the contents of an order when online.

1.44 We consider that charging for this extended service is justifiable, since those potential publishers who did not wish to pay would still have access to the basic list free of charge and would be able to enquire as to the details of any orders in which they were interested in the usual way, by contacting the relevant court.

1.45 In addition to keeping costs to the public purse down, charging for access to the extended list would have the further advantage of ensuring that users of this extended service were traceable. Paying for access using a bank transfer, debit or credit card would enable users' identities to be verified and linked to a UK postal billing address (either an individual's home address, or a media organisation's business address). This would enable users of this restricted list to be traced.