Consultation Paper No. 262

LAW COMMISSION CONSULTATION ON CONTEMPT OF COURT

RESPONSE FROM THE MEDIA LAWYERS ASSOCIATION

INTRODUCTION

1. The Media Lawyers Association ("**MLA**") is an association of in-house media lawyers with broad membership from newspapers, magazines, broadcasters, news agencies and book publishers. Its members include national, regional and local news media organisations across the UK, including the major publishers and broadcasters which reach the vast majority of the viewing and reading public in the UK at national and local level. Its members include all national UK newspaper publishers and broadcasters, news agencies, representative organisations for thousands of regional, local and specialist publications, the publishers of a wide range of national and international magazines and non-fiction book publishers. (A list of the MLA's corporate members may be found at Appendix 1.)

2. Many of the MLA's members have extensive experience of the issues being considered by the Consultation Paper ("**CP**") as it affects the media. They advise crime and court reporters covering cases of local, national and international public interest and heard in a range of courts and tribunals. They have also been involved with many major developments aimed at facilitating open justice. The MLA frequently intervenes in proceedings to protect the public interest in "*a free, active, professional and inquiring media*"[1] and to assist the court in ensuring that the public interest in open justice is properly considered.

3. In preparing this Response, the MLA has consulted with journalists from those of its members who routinely cover criminal cases and court proceedings. This

[1] "*The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring*": *McCartan, Turkington Breen (a firm) v Times Newspapers Ltd [2001] 2 AC 277*, per Lord Bingham at 290.

Response therefore seeks to address the questions posed by the Law Commission ("**LC**") by reference to first-hand knowledge and examples of how the law of contempt operates in practice.

4. This Response does not cover all of the questions posed in the CP; rather the MLA has focused on those areas that are of most relevance to the media (and are identified in the contents table below). Should the LC require any further information about any of the issues raised in this Response, the MLA would be keen to assist. Some members of the MLA will also be providing individual responses to the CP.

CONTENTS

5. This Response is divided into the following sections:

A. OVERVIEW

6. Whilst the LC's efforts to improve coherence and certainty in the law of contempt are welcome, the MLA is concerned that the LC's provisional proposals for reform of the law as it affects the media fail to take account of the true extent of the impact of social media and the difficulties of enforcement, both at a platform and individual level. Social media has not only transformed how people are alerted to and informed about current affairs and who may be considered a publisher, but the way the platforms and apps operate obviate geographical borders and the speed and reach of mass online publishers has served to intensify expectations of access to information and freedom to share information and comment. Restraints on information and freedom of expression are now increasingly far less accepted, and much more easily circumvented, than in the past. Any proposed reform must take account of the practical realities and limitations as to what can be achieved in the social media age where information is sought to be restricted. Without doubt, there are aspects of the current law and LC's proposals that are outdated and unworkable in the new media landscape.

7. The law has to have regard to current realities and another of those realities is a decreasing confidence in some quarters in the criminal justice system. It is vitally important, if the administration of justice is to be promoted and public

confidence in the justice system maintained, that justice be administered in public in a manner which enables its workings to be properly scrutinised and so that the judges, the police, CPS and other participants in the process remain amenable to comment and criticism.[2] What is sometimes less readily acknowledged is that respect for the administration of justice is undermined rather than strengthened by restrictions on free speech where they are seen as unnecessary and disproportionate. Where contempt law impinges on Article 10 rights, the LC must rigorously examine whether the proposed restrictions are necessary and proportionate in the context of these modern conditions, and in making any value judgments as to competing public interests, whether the degree of risk to the administration of justice is now tolerable in the sense of being the lesser of two evils, having regard to the practicalities of what can be curtailed on social media platforms which surpass borders, that restrictions only complied with by mainstream media contribute to a "*two-tier media environment*"[3] and serve to undermine trust, so vital to the maintenance of the rule of law, in the mainstream media; and that research and judges continue to suggest that juries are robust and act with integrity.[4]

8. There is no better recent illustration of how an information gap in the free flow of information on matters of public concern can lead to damage to public confidence in the justice system and the mainstream media than the recent riots in the wake of the tragic events in Southport in July 2024.

> *"the contempt laws are clearly not fit for purpose. There are examples daily of mainstream news organisations sticking to the rules which are broken online by significant actors sometimes with larger followings. Again, Southport is a prime example but you could apply*

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[2] "*Open justice is a fundamental principle at the very heart of our justice system and vital to the rule of law… It is a principle which allows the public to scrutinise and understand the workings of the law, building trust and confidence in our justice system*": 'Open Justice, The Way Forward' (MOJ Consultation, May 2023). Contempt reform should follow the general direction of travel set out in the consultation which sought to reassess and modernise how open justice is delivered to uphold and strengthen the scrutiny and transparency of the justice system in the modern age.

[3] "*We found that a "two tier" media environment is increasingly likely: news aficionados will be well served with a variety of outlets and subscriptions while a growing demographic has limited engagement with professionally produced news. We have deepening concerns about the road ahead. Trust is low and news avoidance is rising. Local news deserts have grown… The media environment risks fracturing along social and regional lines and eroding the basis for shared conversations*": Baroness Stowell, chair of the report by the House of Lords Communications and Digital Committee on 'The Future of News' The Times, 25 November 2024. [Appendix 2/document 1/page 2]

[4] See paragraph 34.1 below.

this to virtually any other major news court story. The speculation is a recipe for misinformation, and it stokes up mistrust in not only traditional reporting, but the judicial system as well, because large swathes of the public believe that information is being kept from them and only circulated online" (Times reporter)

"It seems to me that the contempt laws are largely ignored by social media outlets and that means while responsible established media are constrained by the law, the social media wild west can flout the rules with impunity" (Times reporter)

"social media is an absolute horror show generally, it makes a mockery of contempt laws. There is a risk the Consultation is taking place in a parallel universe: what is the point of creating a new framework if there is no intention to have a level playing field between traditional publishers and social media?" (ITN journalist)

"*What all involved need to consider is the serious erosion of trust that occurs when the public are not trusted with the truth. The Government needs to ask whether the law of contempt is doing more harm to the course of justice than the ill it is seeking to cure?*"[5]

"I think we are at a point in time where trust in public institutions should not be taken for granted and when matters of high importance in the public mind happen that, as far as is possible, the police, the government and the media, should level with them. Those institutions will not continue to enjoy the trust that they have had to date if there is any general sense that things are being hidden and that is exactly what conspiracy theorists and grievance merchants depend upon. … It is better to be as level and as straight as you can because terrorism is about attacking institutions, and if institutions do not appear to be transparent, then they suffer": Jonathan Hall KC, the Independent Reviewer of Terrorism Legislation.[6]

These are broader considerations but should be considered alongside more specific questions about LC's proposals if the law of contempt is to be reformed in a way that can withstand the challenges ahead.

9. Three of the LC's provisional proposals are of particular concern.

(i) Online archives and 'Contempt by publication when proceedings are active'

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[5] "Secrecy over trials is eroding our justice system", Duncan Gardham, The Times, 7 November 2024 https://www.thetimes.com/comment/columnists/article/secrecy-over-trials-is-eroding-trust-in-our-justice-system-mr56nzkt6 (paywall). [Appendix 2/document 2/page 5]

[6] speaking at a conference organised by the Counter Terrorism Group as reported in The Times on 9 September 2024 *"Riots 'show why public must be told more about mass terrorism"* https://www.thetimes.com/article/9b03ab51-c94e-412b-8496-df37ae8bab2e (paywall) [Appendix 2/document 8/pages 35-39]

9.1 The MLA is concerned that the LC's proposal that online archives should be susceptible to the strict liability rule (to be renamed 'Contempt by publication when proceedings are active') once a publisher is notified of "*potentially prejudicial*" material will lead to the frequent and permanent removal of content from online archives. Over the past decade a consensus has emerged as to the significant contribution online archives maintained by the media make to a modern participatory democracy in preserving and making news and information available - and the critical importance of maintaining their integrity, both as a permanent record and to ensure the continued availability of information.[7]

9.2 Evaluating requests and removing content is an expensive and time-consuming exercise and is not a proportionate restriction given the value and utility of online archives to researchers and the public at large. On receiving notice by a party in a criminal case that material in an online archive is "*potentially prejudicial*" to active proceedings publishers, particularly at the regional and local level, are likely to err on the side of caution rather than risk proceedings for contempt. In practice, once material is removed it is very unlikely to be republished on an archive given the practical difficulties and resource involved.

9.3 This will serve to not only dismantle valuable online archives but undermine trust between members of the MLA and their audiences, particularly their younger, more web-savvy audiences, who may regard the media as being more controlled, less complete and therefore less reliable. For commercial publishers, online archives can be essential to their business model and damage to the integrity of the archive in an algorithm-driven world impacts on traffic to the archive, reduces its competitiveness in search engine results and has a negative effect on revenue streams in an already challenging economic environment for publishers.

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[7] See *Hurbain v Belgium* (App No 57292/16) [2023] 77 EHRR 34, [180-186] (GC), discussed at paragraph 28 below.

9.4 As a result, this proposal has the potential to undermine valuable public archives and public trust in the mainstream media in pursuit of an aim which will not be achievable in many cases where the public can access global media archives on their phones, as well as reams of irresponsible coverage on social media. The MLA urges the LC to reconsider the appropriateness of their proposals.

9.5 Under the current law if, exceptionally, the Attorney General or a party to a criminal case genuinely has concerns that any specific archived material creates a substantial risk of serious prejudice as a juror may inadvertently come across it they are able to seek a take-down order under s.45(4) of the Senior Courts Act 1981.[8] This, the MLA submits, reflects the correct balance between the importance of the integrity of online archives and the interests of justice. Since 2012 the MLA are not aware of any such orders being made. To adopt a process whereby anyone can put the media at risk of the strict liability rule by putting them on notice of "*potentially prejudicial*" material and leaving it the media to decide on limited information whether to remove the material or continue to publish and risk liability for contempt has the real capacity to take a sledgehammer to online archives to guard against a *potential* risk that irresponsible publishers on social media *may* link to the material, which is more appropriately and fairly dealt with by placing obligations on the social media users and platforms.

(ii) Scope of 'Contempt by publication when proceedings are active'

9.6 The question of how far the law should prohibit publications which may unintentionally create a substantial risk of serious prejudice or impediment to the course of justice is difficult and controversial because it is where the main conflict arises between the rival public

[8] The steps taken by MLA members to ensure that jurors do not inadvertently come across prejudicial material retained in online archives is addressed at paragraph 30 below.

interests in the administration of justice on the one hand and freedom of expression on the other.

9.7 Under the current law the strictness of the position in section 2 of the Contempt of Court Act 1981 ("**CCA**") is mitigated by the defence of innocent publication, namely that a person is not guilty of contempt under the strict liability rule if at the time of publication (having taken all reasonable care) the publisher does not know and has no reason to suspect that relevant proceedings are active. However, fundamental change to the privacy rights of suspects, coupled with the time it now takes to progress criminal proceedings between arrest and charge means starting the "active" period at the time of arrest has become unsatisfactory, unfair and unduly restrictive. Editors and journalists, still less members of the public active on social media, are unable to readily ascertain when proceedings are "active" or not. As a result, the law falls far short of the certainty it ought to have. There is little more chilling effect on journalists' freedom of expression than uncertainty as to the lawfulness of their actions.

9.8 Further, the restrictive period in which the strict liability rule applies endures for far too long. Years in many cases. It now takes an average of more than 300 days from the time of charge to the completion of a case and from the time of arrest the period will be significantly longer still.[9] For example, in the case of *R v Lucy Letby*, almost 2½ years elapsed between her arrest and charge, and a further 2 years and 10 months between charge and completion of her (first) trial.[10] As discussed below matters of obvious public interest are as a result

[9] https://criminal-justice-delivery-data-dashboards.justice.gov.uk/

[10] The need for realism and that restrictions may be more harmful to the maintenance of public confidence in the judicial system than the risk it is seeking to neutralise is illustrated by the case of *Lucy Letby*. In the case of *Letby*, a serious discussion of the evidence of her guilt was published in the New Yorker magazine in the US in May 2024. As reported in The Guardian, the online publication by the magazine was geoblocked in the UK but the article could still be accessed online, read in hard copy and was discussed on social media and raised in Parliament ("*There's an article I shouldn't tell you about – is contempt law in a losing battle with reality*" by Archie Bland, 21 May 2024 [Appendix 2/document 3/pages 6-9]) By reason of the fact that she faced a re-trial on one charge of attempted murder in June 2024, and notwithstanding that she stood convicted of seven murders and seven attempted murders, media publishers were restricted from discussing its content or their own investigations because it may have meant publication of information that was not part of the evidence presented to the jury at the retrial.

being shielded from investigative reporting for years. It is obviously right that the law prevents only publications which give rise to a substantial risk of serious prejudice or impediment, but journalists and media organisations are cautious about testing this threshold when the penalties for getting it wrong are so severe.

9.9 The case that proceedings should no longer continue to be considered "active" from the time of arrest, but should be considered "active" from the point of charge, is compelling as a matter of both principle and pragmatism. This is the current position in the Republic of Ireland and was the starting point for the active period recommended by the Phillimore Committee in 1974.

10. In addition to retention of the defence under s5 of the CCA 1981, which continues to serve a useful purpose in newsrooms, there is scope and need for a defence of public interest/benefit to be articulated in the statute that would allow for questions of proportionality and balance where the risk to the administration of justice falls short of subverting the right to a fair trial. There is a clear shift in more recent case law to the separate use of the "*serious impediment*" limb that engages very broad considerations and the MLA consider that it would improve "*consistency, coherence and effectiveness*" if the public interest and public benefit considerations were set out in a defence.[11] In this regard, the MLA note that Jonathan Hall KC, the independent reviewer of terrorism legislation, has also raised whether there should be a wider defence of public interest.

(iii) 'General contempt by publication'

11. The proposal to replace intentional contempt by publication at common law with a new class of statutory contempt for 'General contempt by publication' presents a serious risk for journalists, which will inevitably have a chilling effect on freedom of expression and investigative journalism. There is no justification for this new, statutory, wide class of contempt, which is neither necessary nor desirable. There has been no committal for common law contempt by publication since 1991 but the fact that proceedings are rare does not mean that

[11] see paragraphs 45-52 below.

the shadow which it continues to cast does not have a chilling effect. This would be exacerbated further by the LC's proposal to establish it as a main strand of 'General contempt'. Editors will be disinclined to invest resources in an investigation regardless of the public interest if there is a risk that publication could be in contempt or there is significant uncertainty around the potential date of publication.

(iv) The law of contempt in s12 of the Administration of Justice Act 1960

12. The MLA agrees with the view of Sir James Munby, former President of the Family Division, that the exclusion of the reach and impact of section 12(1)(a) of the Administration of Justice Act 1960 from the scope of the CP is illogical, wrong and a missed opportunity to rationalise and clarify one of the most unsatisfactory and unduly complex aspects of the law of contempt as it affects the media and participants in family proceedings.[12] Reporting of the family proceedings of Sara Sharif, a 10-year-old child murdered by her father and step-mother, discussed below, is a recent example of this.[13] As was recognised by the President of the Family Division in his Transparency Review, there is a pressing need for more transparency in the family justice system to allow the media to scrutinise the workings of the family justice system and for those involved in Family Court proceedings who want to be able to express their views publicly about what they conceive to be failings on the part of the system.[14] The President's view was emphatic:

> *"The 1960 Act was concerned to protect and support the administration of justice. Now, some sixty years after its enactment, I have concluded that s12 has the contrary effect of undermining confidence in the administration of Family justice to a marked degree. Whether s12 should be repealed and replaced by a provision that is more fit for purpose is a matter for Parliament and not the judiciary. I do however support calls for urgent consideration to be given by government and Parliament to a review of this provision."*

[12] https://transparencyproject.org.uk/contempt-of-court-the-law-commissions-consultation-a-response/
[13] See paragraph 71 below.
[14]Confidence and Confidentiality: Transparency in the Family Courts, 28 October 2021 https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf

The MLA ask that urgent consideration be given by the LC to review of this unsatisfactory provision.

B. CONTEMPT BY PUBLICATION WHEN PROCEEDINGS ARE ACTIVE

B.1 SCOPE: WHEN ARE PROCEEDINGS "ACTIVE" (Questions 36-39)?

(1) Should criminal proceedings continue to be considered "active" from the point of arrest (Q36)?

13. Since this is a branch of contempt which punishes conduct which may unintentionally create a risk of prejudice or impede the course of justice and where once established it may be severely punished, it is of paramount importance that the law should operate as fairly as possible, and its boundaries be defined with such certainty as is practicable. It is essential that the starting point and end point should be readily ascertainable so that an editor or journalist (or member of the public) who has to make a decision at short notice has a fair opportunity of informing themselves of whether proceedings are "active" or not.

14. Following changes to the College of Policing guidelines[15] and the development of a general rule of pre-charge anonymity for suspects, as confirmed in the Supreme Court decision *ZXC v Bloomberg LP* [2022] AC 1158 ("**ZXC**") [16], it is no longer straight-forward for reporters and editors to ascertain whether proceedings are "active" or not. Historically, reporting of criminal investigations was governed only by the law of defamation and contempt. In **ZXC** the Court recognised that, as a legitimate starting point, a person under criminal investigation has, prior to being charged with any offence, a reasonable expectation of privacy in respect of the information that they have come under suspicion by the state. Thus, the disclosure of those details to and by the media will be a breach of an individual's reasonable expectation of privacy, as protected by the tort of misuse of private information and by Article 8 of the European Convention ("**ECHR**"). There may be exceptions to the general rule, which stands "*not as an invariable or unqualified right to privacy during an*

[15] as referred to in para 5.93-5.96 of the CP.

[16] The development of a general rule in favour of pre-charge anonymity for suspects was traced by Warby J (as he then was) in *Sicri v Associated Newspapers Limited* [2021] 4 WLR 9 at [76]-[80].

investigation but as the legitimate starting point", but a general rule of pre-charge anonymity for suspects will apply unless disclosure can be justified by the public interest in the particular circumstances of the case. It is therefore illogical and impracticable for the strict liability rule to run from this starting point.

15. Further, as discussed at para 5.93 of the CP, in accordance with the College of Policing guidance and obligations of confidentiality owed to the suspect, the police will not confirm or deny the identity of those arrested or suspected of a crime or whether a person is under investigation, other than in exceptional circumstances.[17] The media therefore cannot as a general rule ascertain whether proceedings are active unless they know through non-police sources who has been arrested. As a consequence, journalists experience real difficulties in verifying whether a person has been arrested. This is a routine issue in practice.

> *"The lack of clarity from police on arrests is a real issue. It is quite common for people to be charged with serious offences and police not to inform the media until after they've appeared in court…(There were two separate murders in September/October where that's happened). Also, there is a real problem with people being 'RUIed' [released under investigation] [18] for months or even years and proceedings remain 'active' in that case" (ITN reporter).*
>
> *"Reporters frequently express frustration in cases where it is understood an arrest has been made but no information is given as to the identity of the suspect and confirmation of an arrest is not given until first appearance. This is a recurring problem in terrorism cases. More frequently reporters report struggling to identify the status of investigations and whether or not a suspect has been released without charge" (The Times)*

[17] The policy of not releasing the names of arrestees was recommended by Sir Brian Leveson in the 2012 Report of the Leveson Inquiry. The Inquiry Report recommended that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public (Part G, Chapter 3, para 2.39). The same approach has been adopted by the Independent Office for Police Conduct (IOPC), the Commissioner of the Metropolitan Police, the Crown Prosecution Service and the Government: ***ZXC*** at [85]-[90].

[18] Release under investigation (RUI) is used by the police instead of bail – but unlike pre-charge bail it has no time limits or conditions. This can leave the press in limbo with no updates on their case for an unlimited time.

16. The MLA's concern that journalists are unfairly at risk of contempt by publishing matters about a suspect whom the journalist is unaware has been arrested is not sufficiently mitigated by the LC's proposal to reverse the burden of proof or that the requisite fault element is recklessness. It is noted that at para 5.15 of the CP the LC states that "*our provisional view is that, if liability is to be avoided, publishers should have made direct and specific enquiries about whether proceedings are active*" but it remains unclear whether, once a journalist has made a "*direct and specific*" enquiry of the police and the police have refused to answer (in accordance with the College of Policing guidance) the LC envisage that a journalist would be able to establish that they were not reckless as to whether proceedings were "active"? On the face of it, it appears that anecdotal information about an individual or circumstantial matters which give rise to grounds to suspect proceedings are active may be sufficient "*reason to suspect*"; the practical result of which is that a journalist may be found liable for contempt, after carefully making specific enquiries and without any degree of negligence on their part, by making a wrong decision as to whether the circumstances, objectively judged, gave rise to reasonable grounds to suspect that proceedings were active.

17. These problems are exacerbated by the fact that most suspects remain on bail or RUI for many months, if not years, before charges are brought (or they are informed that no further action will be taken). In 1974 the Phillimore Committee recommended that the "active" period should commence upon charge on the grounds that an arrest may not be immediately announced.[19] At the time the time scale for criminal proceedings was "*not usually very long*". It now takes an average of more than 300 days from the time of charge to the completion of a case.[20] In consequence, there is often a very significant period of time when reporting is restricted, but a trial (if any) is still many months, if not years, away.

18. The unfairness of the current position is even starker in respect of journalists trying to establish whether proceedings are no longer active. The MLA agrees

[19]Report of the Committee on Contempt of Court (1974) Cmnd. 5794 (The Phillimore Committee), para 123.

[20]https://criminal-justice-delivery-data-dashboards.justice.gov.uk/improving-timeliness/courts#time_to_completion-national--about

with the concern raised at para 5.100 of the CP as to the difficulty journalists experience in determining whether an individual has been released from bail or notified they are not to be prosecuted and proceedings have therefore ceased to be active. Journalists regularly experience such difficulties.[21] Such decisions are not made public and may never be made known to the media (the individual in question is hardly likely to tell them).[22] There is a real danger that the end of the strict liability period is indeterminate and remains in effect long after it should, if not indefinitely.

19. Restricting the scope of reporting from the point of arrest makes it much harder to discuss issues of public interest and to scrutinise the police and courts because the timeline from arrest to charge and to the end of proceedings can be years long – meaning that restrictions on the media's Article 10 rights are of very lengthy duration. A few examples are set out below to demonstrate the point:

Example (1): In 2022 a reporter from the Financial Times asked the National Crime Agency ("NCA") to confirm whether or not there were, as they suspected might be the case, "active" proceedings in England in relation to a businessman who had been accused of corruption in Malawi. There had been widespread reporting in Malawi of the alleged corruption relating to Malawian state contracts, including online reporting by the media in that country. The NCA simply told the reporter: "*The NCA does not routinely confirm or deny the existence of investigations. Sorry we cannot be of more help with your questions*." The fact that the Financial Times understood he was subject to a pre-charge criminal investigation over linked matters by the NCA in England made the public controversy in Malawi largely unreportable here. It was only when the pre-charge suspect (who it transpired was indeed subject to active criminal proceedings in England having been arrested in October 2021) applied publicly to a Magistrates' Court to vary the conditions of his police bail that the Financial Times were able to report this important public interest story. Proceedings have now been "active" for three years and the businessman has still not been charged.

Example (2): Tax investigations, particularly Cop9 investigations, have an ill-defined period between turning from civil matters to criminal. This makes it very hard indeed to determine when criminal proceedings are "active". This chills public interest reporting of tax investigations when it may be proceedings are not even "active".

[21] See the examples cited at paragraph 15 above and paragraph 19 below.

[22] The police and CPS are constrained from doing so as to do so would be to publicly acknowledge the arrest in potential breach of the former suspect's reasonable expectations of privacy.

20. Any restrictions on Article 10 rights to freedom of expression must be a legitimate and proportionate response to the conduct that the restrictions are seeking to deter. In the pre-charge period, given the length of time between charge and trial, the fade factor and the effectiveness of judicial direction (reinforced by the new offences for juror misconduct) the risk is limited to publications that create a substantial risk of serious impediment to a criminal investigation rather than trial. This risk exists but it should not be overstated. The law of defamation and misuse of private information impose significant restraints on what the media can publish about suspects. To apply the strict liability rule from the time of arrest stifles legitimate freedom of expression for an unreasonable length of time and is unnecessary either for the proper protection of the defendant or the administration of justice.

21. In order to redress the balance, and, equally importantly, in order to achieve greater certainty, the time when a publisher is at risk under the strict liability rule should be limited to from the point of charge. In considering the disadvantages of the later time of charge and that it would allow comparatively unrestricted comment during a police investigation, the LC is asked to note:

    (i) the case of *Christopher Jefferies*[23] has had a significant impact on media reporting and there have been no similar cases of "*serious impediment*" to active proceedings (i.e. cases of contempt prosecutions where there has been a finding that media coverage was a serious impediment to a trial) in the 14 years that have elapsed since that case;

    (ii) even in 2012 the Divisional Court commented that "*serious impediment*" to the course of justice had not received "*because it had not needed to receive*" the weight of judicial attention that had been directed towards the issue of prejudice;[24]

    (iii) the scope for profiles of suspects of the kind in issue in the case of *Jefferies*, which the court was concerned may vilify the suspect and "*discourage witnesses from coming forward*" is much reduced by ***ZXC***

[23] *Attorney General v MGN Ltd* (DC) [2012] 1 WLR 2408 (DC)
[24] *Attorney General v MGN Ltd* (DC) [2012] 1 WLR 2408 (DC) [15].

and the College of Policing guidelines as the media are generally not informed of the identification of suspects pre-charge and, if known by the media, their identity cannot be published unless the Editor is satisfied that there is a public interest justification to override a suspect's privacy rights;

(iv) interference with witnesses may amount to general contempt[25];

(v) the point of arrest can be arbitrary as suspects may be interviewed under caution (if they do not meet the PACE criteria for arrest) which does not trigger active proceedings. It is not uncommon in high profile cases that suspects are interviewed under caution but not arrested (for example the recent cases of BBC Radio 1 DJ Tim Westwood and the media personality Russell Brand[26]). Such interviews are reported by the media subject only to privacy and defamation law.

(vi) in the Republic of Ireland the window for strict liability contempt opens when a person is charged and brought before the District Court or an application is made for an extradition warrant which is also regarded as the commencement of the prosecution.[27]

22. It is obviously right that publication is delayed not prevented but the law has long recognised contemporaneous reporting as having additional value. In the law of defamation, contemporaneous court reports have an absolute privilege; those which are not contemporaneous attract only a qualified privilege. Deferment always reduces the immediacy for the journalist and for their readership/audience. In *Mosley v United Kingdom* [2011] 53 EHRR 30; [2012] EMLR 1 the ECtHR observed that delay "*even for a short period may well deprive it [publicity] of its interest and value.*". In *R. v Sarker (In re BBC)* [2018] 1 WLR 6023, [2018] EWCA Crim 1341 Lord Burnett (then LCJ) similarly commented in the context of postponement orders: "*In the modern era of communications, it is truer than ever that stale news is no news"*. Further, delay may invite uninformed speculation that it has been deferred to serve

[25] See paragraphs 66.2 and 67.5 below.
[26] CPS to consider bringing charges against Tim Westwood - BBC News; Russell Brand: Met Police send CPS file to consider charges - BBC News
[27] DPP v Independent Newspapers (Irl) Ltd [2003] IEHC 624, [2003] 2 IR 367.

undisclosed interests, the cumulative effect of which is to sap confidence in the administration of justice (see, for example the case of *R v Letby* referred to in paragraph 9.8 above). It is a social reality that individuals on social media express themselves in exaggerated, offensive and tendentious terms. Open media reporting is more likely to help moderate, or put in context, material of this type.

23. The case for moving the point at which criminal proceedings should be considered "active" to the point of charge is compelling as a matter of both principle and pragmatism. Moving to the time of charge would have the following clear benefits:

23.1 Certainty. The primary reason for moving to charge would be to create certainty in the law.

23.2 The point of charge is more consistent with the criminal justice process in that charge is the moment when it is known for sure that there will be a trial. "*Although an arrest also involves the exercise of state power, it is an executive act of a provisional nature, entirely different in character from a civil or criminal trial or other court proceeding*."[28]

23.3 It would be more proportionate – going no further than is necessary to meet the conduct that it is seeking to deter. As a general rule suspects are entitled to pre-charge anonymity and therefore the scope for impeding a criminal investigation by reporting of the kind in issue in the *Jefferies* case is now much reduced. A shorter period would permit more public interest reporting.

23.4 The crown court could use the jurisdiction under s.45(4) of the Senior Courts Act 1981 to determine applications by the prosecution or defence for removal from online archives of material said to give rise

[28] *Sicri v Associated Newspapers Limited* [2021] 4 WLR 9 at [104]. These recommendations would have the further advantage of coinciding with the sub judice rule in the House of Commons, which also restricts debate only from the time when a charge is laid.

to a substantial risk of serious prejudice (discussed at paragraph 30 below).

(2) Should extradition proceedings continue to be considered "active" from the point of warrant of arrest (Question 37)?

24. Consistent with the arguments above, the MLA consider that the trigger should be the point when the extradition subject arrives and is charged in this jurisdiction. Significant delay can occur before a suspect is apprehended and returned to this jurisdiction which results in an extended period during which reporting is restricted. Beginning the "active" period with the issue of a warrant of arrest inhibits publication here even where no proceedings in the jurisdiction are imminent and the story is being published freely online by the foreign press. Further, the active period can also lapse (after a year) and then recommence without notice when someone is arrested which leads to further uncertainty in the application of the law and means responsible publishers are likely to err on the side of caution. In some cases, statements issued by the police in this period include information that present contempt concerns for publishers, such as a suspect's tendency towards violence. For example, the police statement, discussed at paragraph 66 below, issued following the acid attack by Abdul Ezedi in Clapham in January 2024. It is accepted that the operation of the fade factor means that it is less likely that a publication will meet the threshold of serious prejudice or impediment in the period between the issue of the warrant and arrival but there is nonetheless a chilling effect caused by uncertainty, which is not justified.

(3) Should a criminal case continue to be considered "active" until sentence (Question 38)?

25. The MLA consider that the active period should come to an end at the delivery of the final verdict (or guilty plea) rather than on sentencing.

26. The active period currently runs until sentence is passed. In practical terms this is not problematic given that, by that stage, there is little that can be materially affected by prejudicial publicity. The law should reflect this reality, as suggested by the LC, and the active period should end when the defendant pleads guilty

or the verdict is given, to be reinstated if any appeal orders a retrial. There is a strong public interest in full coverage of the trial being publishable without constraint as soon as possible after verdicts, both in the interests of the victims of the crime as well as public confidence in the administration of justice.

(3) Inquests (Question 39)[29]

27. The early stage at which inquest proceedings become active for the purpose of contempt can also be problematic. Coroners often open inquests at an early stage and some inquests are then adjourned to allow for either a criminal prosecution or an inquiry. In some cases the adjournment is effectively permanent as the inquest is not resumed, although this may not be clear for many months or even years. As a result, it can be unclear what will be considered prejudicial over an extended period of time. The MLA consider that it would be preferable if the active period for inquests applied only from the time that: (i) it has been determined that a jury will hear the inquest; and (ii) when the coroner has specified a date for the beginning of its final hearing. This would serve to improve clarity and certainty and would mean that the active period for the purpose of an inquest is shorter than at present.

B.2 THE CONDUCT ELEMENT (Questions 31-35)

(1) Online archives and material first published before proceedings were active (Question 32)

28. The online archives of MLA members (the BBC, Guardian News & Media Limited, Independent Print Limited, Express Newspapers, ITN, Telegraph Media Group Limited, Associated Newspapers Limited, Times Media Limited and many other media organisations) are a valuable source of information to researchers, academics and members of the public alike. The courts have therefore considered that, while the primary function of the media in a democracy is to act as a public watchdog, it has a valuable secondary role in maintaining, and making available to the public, archives of previously published reports.

[29] The application of the law of contempt in family proceedings is addressed at paragraph 71 below.

"180. Nowadays, the content of freedom of the press must be assessed in the light of developments in information technology, as journalistic information no longer consists solely of news coverage in the printed press and broadcasting media. The Court has repeatedly held that, in addition to its primary function as a "public watchdog", the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. In that connection the Court has held that Internet archives make a substantial contribution to preserving and making available news and information. Digital archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see *Times Newspapers Ltd*, cited above, §§ 27 and 45; *Węgrzynowski and Smolczewski*, cited above, § 59; and *M.L. and W.W. v. Germany*, cited above, § 90), although the Court observes that press archives tend increasingly to be behind a paywall. This function of the press, like the corresponding legitimate interest of the public in accessing the archives, is undoubtedly protected by Article 10 of the Convention (see *M.L. and W.W. v. Germany*, cited above, § 102)…

182. On the subject of digital press archives, the Court has previously stressed the importance of their role in enabling the public to learn about contemporary history and allowing the press, by the same means, to carry out its task of helping to shape democratic opinion (see *M.L. and W.W. v. Germany*, cited above, §§ 101-02). For its part, Recommendation No. R (2000) 13 of the Committee of Ministers to member States on a European policy on access to archives also notes that archives constitute an essential and irreplaceable element of culture, contributing to the survival of human memory…

183. The Court also notes the emergence over the past decade of a consensus regarding the importance of press archives. Hence, in the specific context of the processing of personal data at European Union level, the GDPR makes express provision for an exception to the right to the erasure of personal data where the processing of the data is necessary for the exercise of the right of freedom of expression and information (Article 17(3)(a)). Like Directive 95/46/EC which preceded it, the GDPR requires EU member States to provide in their legislation for exemptions or derogations for processing carried out for journalistic purposes if they are necessary to reconcile the right to the protection of personal data with freedom of expression and information (Article 85(2)). According to recital 153 of the GDPR, particular attention is to be paid to the processing of personal data "in news archives and press libraries" (see paragraph 69 above). In the same vein, in the Council of Europe context, the explanatory report to Convention 108+ specifies that the exceptions and restrictions provided for in Article 11 of that Convention should apply "in particular to processing of personal data ... in news archives and press libraries".

> 184. For the press to be able properly to perform its task of creating archives, it must be able to establish and maintain comprehensive records. The Court considers – that, since the role of archives is to ensure the continued availability of information that was published lawfully at a certain point in time, they must, as a general rule, remain authentic, reliable and complete.
>
> 185. Accordingly, the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributes to the preservation of memory, especially if, as in the present case, the lawfulness of the article has never been called into question.
>
> 186. Lastly, although the freedom of expression protected by Article 10 of the Convention is not absolute, including when it comes to media coverage of matters of public interest, and regard being had to all the foregoing considerations, the Court considers that the national authorities must nevertheless be particularly vigilant in examining requests, grounded on respect for private life, for removal or alteration of the electronic version of an archived article whose lawfulness was not called into question at the time of its initial publication. Such requests call for thorough examination." [30]

A strong statement of this principle is reflected in the ICO Data Protection and Journalism Code of Practice (2023) at 12.24:

> *"There is a strong, general public interest in the preservation of news archives and protecting the integrity of records, which contributes significantly to people's access to information about the past and contemporary history. This is a strong factor in favour of not erasing personal information from news archives if someone asks you to."* [31]

29. For some commercial news publishers their online archive is an important part of their business model. The BBC has specific obligations in respect of its public archive. In their individual responses to this Consultation Paper members of the MLA will provide further details of the social utility of their archives.

30. Under the current law once proceedings become "active" most, if not all, national news organisations take reasonable, practical steps to ensure that historic material is not linked to current online news coverage where such material could create a substantial risk of serious impediment or prejudice to

[30] *Hurbain v Belgium* (App No 57292/16) [2023] 77 EHRR 34, [180-186] (GC).
[31] https://ico.org.uk/media2/migrated/4025760/data-protection-and-journalism-code-202307.pdf

those active proceedings. The general practice of MLA members once a trial commences is that it will publish fair and accurate online reports of the proceedings, but those articles will not contain hyperlinks to articles published before the trial commenced.[32] As a result such material can only be accessed by tailored or specific searches being made for subject matter within that material. The MLA consider that these precautions are sufficient to protect the administration of justice. If, however, exceptionally, a defendant or prosecutor in a criminal case genuinely has concerns that any specific material in online archives creates a substantial risk of serious prejudice as a juror may inadvertently come across it without conducting research (which is now a criminal offence) they are able to seek a take-down injunction from the Crown Court judge under s.45(4) of the Senior Courts Act 1981. The MLA are not aware of any examples of archived journalistic material being held to create a substantial risk of serious prejudice or impediment to the course of justice or of any take-down orders being made since *R v Harwood* in 2012.[33]

31. The MLA is therefore seriously concerned about the LC's provisional proposal to extend liability under the strict liability rule to online archives once the publisher has notice of identified material in the archive that is "*potentially prejudicial*" to active proceedings.[34] As stated above, the MLA consider that this is likely to have serious and damaging implications for the maintenance and integrity of valuable online archives of both national, regional and local media. The MLA apprehend the following problems with the LC's proposals:

32. The proposal that the strict liability rule will apply to online archives once a publisher has been given notice that specific material in the archive is

[32] "This last point bears emphasising. Journalists and their editors will strive to avoid any publication which risks putting them in breach of the strict liability rule. They are well used to ensuring that on-line reporting of a trial does not refer to earlier prejudicial material or contain links to that material": *R. v Sarker (In re BBC)* [2018] 1 WLR 6023, [2018] EWCA Crim 1341 at [32(iii)(b)] per Lord Burnett (LCJ).

[33] [2012] EW Misc 27 (cited in Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.82.

[34] The MLA have therefore previously argued that the existence of material in an archive should not be held to constitute publication as a continuing act, contrary to the decisions in the cases of *HM Advocate v Beggs (No 2) 2001 Scot (D) 31/10; 2002 S.L.T 139* and in *R v Harwood* on the grounds that news archives are best viewed by analogy with a newspaper library. Contemporary publications on the internet can be distinguished from archives due to the necessity with the latter to apply search criteria which is a quite deliberate and directed act and in most cases a member of the public would need some degree of background knowledge and persistence for it to become available.

"*potentially prejudicial*" to active proceedings, and that any person can give notice to publishers, is likely to lead to the media becoming inundated with requests to remove material from the archive and the use of such notices becoming standard practice for parties in a criminal case, and in particular in the armoury of solicitors seeking to cleanse their clients' reputations from damaging online material.

> *"I think the point about being inundated especially by defence solicitors is the right one. To me, it feels like the appropriate balance - given the implications in terms of resources, chilling effect, risk of material being permanently removed - is to require any such request to be court-ordered." (ITN reporter)*

33. The MLA apprehend that notices will be deployed in respect of any material where there might be a potential risk rather than in respect of material which creates a substantial risk of serious prejudice or impediment as per the current threshold test, leaving the publisher in the invidious position of having to decide on necessarily limited information (and very likely the incomplete information provided by the requester giving notice) whether to refuse the request and risk proceedings for contempt.[35] The complexity and uncertainty in the law, coupled with the professional reality that media law is not a specialism for most criminal lawyers is likely to result in ambiguous and misconceived notices,[36] which will nonetheless have to be properly explored because of the severity of the consequences.

34. Moreover, undermining the integrity of online archives is a disproportionate approach:

    34.1 Firstly, research and judges continue to suggest that juries are robust and that a properly directed jury will disregard outside reporting and

[35] See paragraph 34.5.3 below for the particular problems faced by regional and local media.

[36] Such is the complexity that even media lawyers can misunderstand the law as demonstrated by the recent media advisory in relation to Russell Brand investigation referred to in the CP at 3.42, which was heavily criticised in the media: 'Attorney General is showing contempt for press freedom' by Sean O'Neill https://www.thetimes.com/article/attorney-general-is-showing-contempt-for-press-freedom-vng2zfbcn (paywall) [Appendix 2/document 4/pages 10-11]; 'Media Freedom', letter to the editor of The Times, Gavin Millar KC, 29 September 2023 [Appendix 2/document 5/page 12]

consider only the evidence presented in court.[37] At trial, the court will proceed, as Lord Burnett, then Lord Chief Justice, stated in *R. v Sarker (In re BBC)* [2018] 1 WLR 6023, [2018] EWCA Crim 1341, [32], on the basis of the efficacy of judicial directions to the jury, that juries have a passionate and profound commitment to the right of a defendant to be given a fair trial, and that jurors' integrity is an essential feature of the trial process.[38] He added: "We note these statements are borne out by the evidenced-based conclusions of the Law Commission in their 2014 Report Contempt of Court (2): Court Reporting (Law Com No.344) paragraph 2.30(3) that "*jurors find the trial process absorbing, and significantly prioritise what they hear during the trial over what they might have heard from the media outside of the trial*".

34.2 Secondly, it is naïve to suppose that the content from online archives, even if removed by a publisher from its archive in this jurisdiction, will not be retrieved by some social media publishers using global online archives of cached web pages or similar tools and published on their feeds. Further, there have been several high-profile incidents where the media here has been directed or chosen not to publish sensitive or offensive material which media based outside this jurisdiction have continued to publish freely, e.g. commentary on the case of *R v Lucy Letby*. The LC's proposals do not affect Scotland, which also leads to cross-border complexity. In high profile cases, it can be plausibly argued that attempts to limit information are almost certainly doomed to be circumvented and give rise to a '*Streisand*

[37] reinforced by the new juror offences, in particular, s20a of the Criminal Justice and Courts Act 2015, which creates a specific offence for jurors who research a case during a trial period and that it will be an offence for a juror to "*search an electronic database, including by means of the internet*." By s.20B of the Act it is also an offence for a juror to share any such extraneous information with another member of the jury.

[38] See also comments by Sir Igor Judge, then President of the Queen's Bench Division in *R v B* [2006] EWCA Crim 2692 at [3]: *"juries up and down the country have a passionate belief in, and a commitment to, the right of a defendant to be given a fair trial. They know it is integral to their responsibility … the integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court*".

effect' where the effort to suppress instead backfires by increasing public awareness of the information.

34.3 Thirdly, the presence of prejudicial material in an online archive does not as a general rule create a substantial risk of serious prejudice as jurors would not inadvertently come across it for the reasons explained at paragraph 30 above, but would need to conduct research into a defendant that would be contrary to judicial directions and a criminal offence. The case of *R v Linton* is instructive. In that case a defendant sought an injunction under s45(4) of the Senior Courts Act 1981 to remove references to his previous conviction for murder and his imprisonment in the USA on archives belonging to a local newspaper and the BBC for the duration of the defendant's trial on the grounds that jurors might read the references and thereby acquire damaging information about the defendant which had not been introduced in evidence at the trial. Lavender J rejected the application on the grounds that (i) a juror could not find out about the conviction from archived material without conducting research into the defendant which would be both contrary to judicial directions and an offence and he was therefore not persuaded that the likelihood of a juror conducting research into the defendant was such as to give rise to a "substantial risk"; and (ii) that, even if the threshold test was met, he would not grant the injunction sought in circumstances where websites hosted in the USA and Jamaica, and available to any juror, held reports of the conviction.[39]

34.4 Fourthly, responsibility for publishing links to prejudicial material held in an online archive during active proceedings rests fairly and squarely on those responsible for publishing such links and the platforms and apps which facilitate publication.

34.5 Fifthly, dismantling online archives is likely to be more harmful than the potential risk posed by an irresponsible social media user creating

[39] Unreported, 28 June 2021. A copy of the judgment is at Appendix 2/document 6/pages 13-17.

a link to prejudicial material buried deep in online archives (which would be more appropriately tackled by educative and enforcement measures against social media publishers).

34.5.1 Removal of material from the archive is likely to be permanent in practice. It is a labour intensive, time-consuming operation. It requires a member of the editorial staff to identify the specific content of concern in their systems, some of which are no longer in daily use, and remove it. If content is replaced and republished, further time and effort is required. Staff would have to be hired or deployed from other workstreams to manage the process. As a result of the regular removal of content from online archives, publishers' websites are less likely to be ranked in search results as the algorithms treat websites that regularly remove content differently. In sum, they assess them as less trustworthy over time. Removal therefore not only has serious consequences for the integrity of the archive and the historical record, but it also impacts the commercial value of websites which are an increasingly important part of some commercial publishers' business models. It would put publishers required to remove content from their archives at a significant disadvantage to foreign publishers.

34.5.2 When a trial or retrial has finished, the content then needs to be reviewed again for risks which might militate against the republication of the removed content. The single publication rule in defamation law will no longer apply[40] and therefore in respect of defamatory content, as well as private or confidential information, the potential defences and risks need to be re-assessed. Therefore, although, in principle, articles taken down

[40] The Defamation Act 2013 s8 provides for a 'single publication rule', which prevents a defamation action being brought in relation to publication of the same material by the same publisher after a one-year limitation period from the date of the first publication of that material to the public or a section of the public. This replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own one-year limitation period (the 'multiple publication rule').

following notification of "*potentially prejudicial material*" can be republished at the end of a trial, this is of itself so time-consuming and expensive that removal is likely be permanent in practice.

34.5.3 The proposal should not be considered from the point of view of the national media only. In addition, to the national newspapers and broadcasters who maintain archives, a majority of regional and local newspapers have associated websites. The local and regional press routinely report local crimes, criminal investigations and criminal proceedings before the magistrates and the crown courts in their circulation areas. The local police force enlists the help of local people though the local media, issuing CCTV footage, appeals for witnesses and information. Many titles also publish weekly round ups of cases heard by local magistrates courts. Regional and local newspapers reporting what is happening in their local courts is important for confidence in the criminal justice system. It helps publicise the day-to-day workings of the courts. These reports all form part of regional/local titles' online archives and it would be onerous, unnecessary and disproportionate for the local media to have to routinely consider and remove such material. For regional/local titles, who do not have the resources of the national media, the spectre of being involved in contempt proceedings is bound to have a chilling effect and discourage the maintenance of these valuable local resources. Given the financial pressures on local and regional titles the reality is that once on notice of "*potentially prejudicial*" material they are likely to automatically remove the material. The impact of such a proposal on the regional and local press strongly militates against its adoption.

34.5.4 The removal of articles is likely to erode public trust between the mainstream media and their audiences, who may be seen as

censoring their archives at the request of the state or other undisclosed interests. One BBC journalist commented that local news outlets were again likely to suffer more than national news organisations.

> *"Local news outlets have a loyal and trusted local readership and are vitally important to their communities. A requirement to remove a substantial proportion of their news on a case would undermine that trust" (BBC journalist).*

35. Sixthly, key questions as to how requests for removal of archived material, which "*call for thorough examination*" and "*particular vigilance*" remain unclear.[41] Who will adjudicate if the publisher declines to remove the material voluntarily, at whose cost and when? Does it apply to material that potentially impedes the course of justice or only to "*potentially prejudicial*" material (as suggested by **Question 32**)? If it remains a requirement that the consent of the Attorney General is required before contempt proceedings can be instituted, are refusals to be referred to the Attorney General who will then decide whether to seek permission to bring proceedings or not? If so, what useful purpose is served by allowing parties to a criminal case to put a publisher on notice that they are liable in principle in advance of the Attorney General considering the risks in issue? If, alternatively, a party faced with a publisher declining to remove the material can seek permission in the High Court without referral to the Attorney General (as proposed by **Question 51**) then an expedited permission hearing will be required, which will in turn burden the court, the media and the Attorney General in respect of archived material which may well fall far short of the threshold test. In the MLA's submission the answers to these questions point to the current position set out in paragraph 30 above being maintained. It is an injunction from the crown court which applicants will be most interested in.

36. Seventhly, as referred to above it is the experience of the MLA that many will see this as an opportunity to get defamatory content removed from archives.[42]

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[41] *Hurbain v Belgium* (App No 57292/16) [2023] 77 EHRR 34, [180-186] (GC), cited at paragraph 28 above.

[42] This is already a well-known practice under data protection law and 'right to be forgotten' applications. Publishers can provide examples on a confidential basis if helpful to the LC.

If a request is complied with for the duration of a trial, it leaves the publisher with a difficult decision later as to whether to republish the original article again when circumstances may have changed and it will be arguable that the republication amounts to a fresh publication with a fresh limitation period. The following examples illustrate the point:

Example (1): The Financial Times were asked by a criminal defendant's lawyers in 2022 and 2023 to take down online articles from FT.com regarding the FT's pre-charge journalistic investigation into sexual misconduct allegations against businessman Lawrence Jones, which had been published in 2019. Mr Jones faced two jury trials on sexual offence charges in Manchester in 2023 (and was ultimately convicted of the majority). The Financial Times declined to remove their archived articles before and during trial proceedings, broadly on the basis of the arguments set out above. Mr Jones did not apply for a takedown injunction under s45 of the Senior Courts Act, probably because he did not think an application would succeed.

Example (2): Solicitors for Thomas Adams, who faced a criminal trial at Woolwich Crown Court, due to start in October 2017, wrote to Guardian News & Media shortly before trial regarding an October 2004 article. The article referred to an infamous incident in 2002, in which Mr Adams was brought along to a meeting with the football agent Paul Stretford as protection. The article described Mr Adams as *inter alia* a 'notorious gangster' and the 'head of London's top criminal factory'. Mr Adams' solicitors said "*We have undertaken a search against his name on Google and a number of articles have been returned which we believe may be prejudicial to our client's right to a fair trial. We will be making an application to stay the proceedings as an abuse of process based on the adverse publicity available on the internet concerning our client. Should that application fail, we will be seeking an order from the trial judge that the offending articles be removed from the internet for the duration of the trial*." The request was refused and no application was made.

Example (3): In April 2021, Guardian News & Media received a request from solicitors in Scotland for former MP Natalie McGarry for an article entitled "*Ex-MP Natalie McGarry jailed for 18 months for embezzlement*" from June 2019 to be temporarily removed on the basis that it might be seen by potential jurors and witnesses at a re-trial set to begin before Glasgow Sheriff's court in May 2021. In April 2019 Ms McGarry had pleaded guilty to charges of embezzlement, but had subsequently attempted to withdraw the pleas, been found by the appeal courts to have suffered a miscarriage of justice and ordered to stand trial again. The request was refused, but a note was added to the top of the article: "*Update: On 31 March 2021, we were contacted by the solicitors for Ms McGarry. On 19 December 2019, Ms McGarry's conviction was quashed after an appeal court ruled she had suffered from a miscarriage of justice. There will be a retrial*."

37. The principal safeguards for the administration of justice lie in the process itself and in the conduct of the trial by the trial judge, which includes express

directions to the jury against using the internet to conduct research (reinforced by the new statutory offences which seek to control the actions of jurors in relation to research). In an age in which information is so easily available trying to stem the sources of information is a Sisyphean task. Save where the court exceptionally considers a take-down order is justified the degree of risk posed by online archives should be regarded as tolerable having regard to the importance of the integrity of online archives.

(2) Place of publication (Questions 33-34)

38. What the legal position should be where material which meets the threshold test is produced and/or uploaded outside the jurisdiction will be addressed by members of the MLA in their individual responses.

(3) Publication to the public at large or any section of the public (Question 35)

39. The MLA agrees with the provisional view of the LC that the statutory definition of publication as "*publication to the public at large or to a section of the public*" should remain unchanged and be left to develop on a case-by-case basis. "*Section of the public*" does not create problems in practice.

(4) The conduct threshold (Question 31)

40. The MLA are content that the conduct threshold should be the same as that which currently applies. The wording of s2 of the CCA 1981, i.e. "...*substantial risk of serious impediment or prejudic*e…" is somewhat elastic leading to uncertainty in its application but it is acknowledged that if the strict liability rule is to remain it may be difficult to improve on the wording of the threshold test.

B.3 THE FAULT ELEMENT (Questions 29-30)

(1) The fault element (Question (29)

41. The fault element for publishers is discussed at paragraph 16 above.

42. The MLA disagree with the suggestion in paragraph 5.18 of the CP that Facebook or Instagram are "*distributors*" or that the binary division between "*publisher*" and "*distributor*" is apposite in the digital age. Online platforms and apps are commercial enterprises who benefit from user-generated content

and arrange and promote content to enhance their product. As such they are more than mere "*distributors*" of information. Further, in the defamation context, those publishers who innocently disseminate defamatory content (i.e. 'secondary publishers' who may avail themselves of an innocent dissemination defence at common law) assume primary liability, once on notice, by their failure to remove the material as they are taken to have acquiesced in or authorised the continued publication.

(2) Who may be liable for contempt (Question 30)

43. **Question 30** raises a question about who should be liable for contempt in the context of contempt by publication where proceedings are active only. The MLA consider this question is relevant to all forms of contempt by publication and general contempt (to the extent it impacts on newsgathering) and that liability should primarily lie with the media organisation where the journalist, editor etc is acting in the course of their employment/engagement and/or is not acting negligently. If an organisation considers an employee/freelancer to be at fault, then they have appropriate internal processes to deal with this (including dismissal, disciplinary action, requiring training) which are sufficient deterrent.

44. It is problematic to hold individual journalists personally liable for trying to do their job but it would also be problematic if, for example, individual journalists (including e.g. freelancers, bloggers, etc.) could not be held to account for contempt regarding content they had published so we see no obvious way to exempt individuals from liability.

B.4 THE PUBLIC INTEREST DEFENCE (Question 40)

45. The defence under section 5 of the CCA 1981, which operates to limit the scope of the strict liability rule, serves a useful purpose in newsrooms, has been invoked with success on several occasions and the MLA favour retaining it.[43] Greater clarity would be achieved in respect of the operation of the defence if the Attorney General were to publish a prosecution policy, as proposed by the LC and supported by the MLA in paragraph 75 below.

[43] The current protection of sources in the s10 of the CCA 1981 should and must be retained in any reform of the CCA 1981.

46. The problem with section 5 is that it is unduly limited in scope through the requirement that the risk of prejudice or impediment be "*merely incidental*" to the discussion. This means that the section appears not to apply if it is the proceedings themselves which constitute the matter which is of general public interest. Therefore, to ensure that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active, the section headed '*Discussion of public affairs'* has to be read as permitting the court to dispense with the restriction in the strict liability rule where the right of freedom of expression under Article 10 requires it.[44] Freedom of expression cannot justify an interference with fair trial rights, which are unqualified. However, where the law is concerned with interferences with the administration of justice that fall short of subverting the right to a fair trial, there is scope for a principled balancing of the competing interests of justice and free speech.

47. Further, although there is considerable overlap between the 'impediment' and 'prejudice' limbs, their focus is different and not all serious impediments to the course of justice will engage Article 6 rights. "*The notion of impeding the course of justice is a distinct one that engages very broad considerations, to do with the administration of justice and the public interest.*"[45] In light of the high standard for serious prejudice, the fact that the judiciary are convinced of the robustness of juries, and the time it takes to progress criminal proceedings, more recent case law has shown a clear shift towards the separate use of "*serious impediment*".[46]

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[44] Whether section 5 should be read down in this way has not been addressed by the courts, but it was implicitly acknowledged by the Divisional Court in *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (DC) per Sharp LJ that where the interference with the administration of justice in issue falls short of subverting the right to a fair trial, any interference with Article 10 must be necessary for and proportionate to the legitimate aim of "maintaining the authority and impartiality of the judiciary" in Article 10(2): [90]-[91].

[45] As Oliver LJ said in *Attorney General v Times Newspapers Ltd* (The Times, 12 February 1983), "*The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law". As he went on to explain, the course of justice may be impeded in many ways, including "external pressure which impedes or restricts" the "freedom of a person accused of crime to elect the mode of trial he prefers, or to conduct his defence in the way which seems best to him and his advisers*." See further the observations of Lord Judge in the MGN case at [31]: *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (DC) per Sharp LJ at [72-73].

[46] See for example: *Attorney General v MGN Ltd* (DC) [2012] 1 WLR 2408 (DC); *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (DC)

48. This has in turn thrown into sharper relief that need for a defence which recognises the possibility of a more broadly based balancing of the competing interests. For example, it is possible to imagine circumstances in which proceedings are active but a dangerous suspect absconds and public warnings about the suspect are given which may impede the course of justice but do not give rise to a risk of serious prejudice because of jury directions and the fade factor. These circumstances do not fall within section 5 but the position should not be that warnings cannot be published given the strong public interest in protecting public safety. Similarly, where the media are investigating serious corruption, regulatory failings or other issues of public concern and/or political controversy and police investigations are following similar lines, or where ongoing police inactivity is the subject of investigation, the law should permit scope for the public interest to outweigh serious impediments to the course of justice even if proceedings are active. The need for such a defence would be less acute if the "active" period did not endure for so long and the starting point moved back to closer to trial.

49. The MLA propose therefore that a defence of public interest/benefit should be articulated which allows for questions of proportionality and balance where the risk to the administration of justice falls short of subverting the right to a fair trial. Such a defence would require the court to have particular regard to the extent to which (i) the material has, or is about to, become available to the public; and (ii) it is, or would be, in the public interest for the material to be published.[47] This, for example, would permit an urgent statement by the Home Secretary in the face of a challenge to public order, a public safety warning issued by the police or finding of serious regulatory failure to fall safely on the right side of permissible reporting, notwithstanding that the reporting creates a substantial risk that the course of justice will be seriously impeded.

50. That said, to decide whether, in respect of a particular matter, a defence of public interest could be successfully advanced would be extremely uncertain and

[47] In defamation, reporting privilege for certain statutory categories is disapplied if the matter is "*not of public interest*" and its "*publication is not for the public benefit*". "*These are different issues, as the language and legislative history shows. The first condition is about the qualities of the "matter" under consideration. The second is concerned with the impact and value of its publication*": *Iqbal v Geo TV Ltd* [2024] EWCA Civ 1566.

hazardous. The MLA note that Jonathan Hall KC, the independent reviewer of terrorism legislation, in response to the recent riots following the Southport tragedy, has raised whether there should be a wider defence of public interest/benefit. The MLA consider that transparency remains the best weapon against false speculation and disinformation, that the principal exercise will always be one of risk assessment and the best remedy lies in restricting the applicability of the strict liability rule to when the risk to proceedings is acute and a trial is due to take place in the near future. For the reasons explained above, maintaining the strict liability rule throughout the lengthy period from arrest to trial is no longer proportionate.[48] A shorter period, closer in time to the trial, would also have the benefit of the court seized of the case being able to consider what reporting restrictions are strictly necessary and proportionate, including in respect of what is available in online archives and, where the case has an international dimension or is particularly high profile, in light of what is being published widely here by reputable media outlets based abroad.

51. For the reasons set out at paragraphs 66.6 and 67.10 below the MLA consider that the section 5 defence and the public interest defence proposed above should also apply to 'General contempt by publication'.

52. There have been several occasions in recent history members of parliament have published statements which are potentially a breach of the strict liability rule or reporting restriction orders. In the defamation context, there are protections for journalists in publishing fair and accurate reports of what is said in Parliament on the grounds that the media should, as a matter of public interest, be free to report what has been stated in our legislature without fear of incurring liability.[49] Similarly, there are also protections for fair and accurate reports of statements made by the police and certain other public bodies. The MLA consider there should be equivalent protections in the law of contempt for the media when fairly and accurately reporting parliamentary proceedings or statements made by the police and other specified public bodies.

[48] See paragraphs 13 -24 above.
[49] s15 of the Defamation Act 1996.

C. CONTEMPT BY BREACH OF A COURT ORDER OR UNDERTAKING

C.1 THE CONDUCT ELEMENT (Question 18)

53. The MLA note that it is proposed that (i) 'Contempt by breach of court order' should apply to all breaches of orders whether those orders were intended to bind an individual party to litigation or to bind the world at large (para 4.14); (ii) the LC's provisional view is that, within the proposed framework for contempt, all court orders ought to be brought within the scope of 'Contempt by breach of court order', whether currently characterised as criminal contempt (whether or not as contempt in the face of the court) or civil contempt (para 4.12); and (iii) therefore this category will encompass not only orders made at the instance of an opposing party to protect private rights, but also orders made to protect the administration of justice.

54. As this category applies to the media, it will therefore include alleged breaches of:

(i) reporting restriction orders issued under sections 4(2) and 11 of the Contempt of Court Act 1981;

(ii) anonymity orders and/or reporting restriction orders in respect of private hearings made under CPR 1.1, 3.1(2)(m), s.6(1) of the Human Rights Act 1998 and/or the Court's inherent jurisdiction;

(iii) orders under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any documents or information relating to these proceedings (and the equivalent provision under the First-tier Tribunal rules);

(iv) holding reporting restriction orders to 'hold the ring' until an application to restrain publication can be determined;

(v) reporting restriction orders and non-solicitation orders made in the Family Court under its inherent jurisdiction (but not the automatic restraints under s12 Administration of Justice Act 1960 which presumably fall under 'General contempt by publication'); and

(vi) injunctions contra mundum for lifelong anonymity orders under the *Venables* jurisdiction derived from s.6(1) Human Rights Act 1998 and s.37 of the Senior Courts Act 1981.

55. This categorisation has important implications not only for the fault element required to prove the contempt, but also for:

(i) the availability of coercive interim remedies. Under the LC's proposal coercive interim remedies are available for 'Contempt by breach of court orders' (CP pp92-94); and

(ii) the jurisdiction/power of the inferior courts. Under the LC's proposal protected inferior courts, tribunals and other bodies (a) will have power to deal with 'Contempt by breach of court orders' (but not 'General contempt by publication' or 'Contempt by publication when proceedings are active'); and (b) will not have power to refer 'Contempt by breach of court orders' (only 'General Contempt by Publication' or 'Contempt by publication when proceedings are active'). This is notwithstanding that the LC accepts that the High Court has particular expertise in dealing with the Article 10 rights that are engaged in contempt by publication and the lower courts do not.

56. In view of the fact that the above orders are made to safeguard the public course of justice, that the High Court has particular expertise in dealing with the Article 10 rights which the lower courts do not and that proceedings for contempt against the media in respect of such orders raise public interest and proportionality considerations, the MLA considers that contempt by breach of reporting restriction orders ("**RROs**") (including anonymity orders) (as listed above) should be a specific sub-category with its own procedure, remedies and sanctions within 'Contempt by breach of court order' (as countenanced by the LC in para 4.14). Specifically, it should provide that:

(i) the powers given to the protected inferior courts, tribunals and other bodies to deal should not be extended to include 'Contempt by breach of court orders' where the alleged breach is by publication or otherwise engages Article 10 (for example, non-solicitation orders);

(ii) as with 'General contempt by publication' and 'Contempt by publication when proceedings are active', the protected inferior courts, tribunals and other bodies should have the power only to refer such contempts by publication to the High Court and not to another superior court of record (such as the UT or the EAT);

(iii) no coercive interim remedies should be available; and

(iv) permission must be required to address public interest and proportionality considerations.

57. These safeguards are important as the need for precision and formality and an assessment of public interest and proportionality considerations are particularly acute in cases which engage Article 10.

Example: In 2023 an application for contempt by breach of an anonymity order was brought against ANL, publishers of the Daily Mail and MailOnline in the Upper Tribunal (Immigration and Asylum Chamber) by YSA, a foreign national criminal who had brought proceedings in the immigrational tribunal against a decision by the Secretary of State to remove him from the UK. The application for committal for contempt was brought in reply to an application by ANL to lift the anonymity order. After two days of oral argument before the Upper Tribunal with both YSA and ANL represented by leading and junior counsel at considerable cost, the Upper Tribunal refused YSA permission to bring contempt proceedings on the grounds that the application was defective in a number of elementary respects.[50]

C.2 THE FAULT ELEMENT (Questions 20-22)

58. To establish the fault element for 'Contempt by breach of a court order or undertaking' the LC propose that (i) it should not require proof that the defendant knows the precise terms of that order, provided that it is shown that the defendant had received notice of the order containing the relevant terms; and (ii) it should require proof that the defendant had knowledge of the facts that made the conduct a breach.

[50] *YSA v Secretary of State for the Home Department* [2023] UKUT 75(IAC) [80].

59. While in principle, the MLA do not object to this proposal, the MLA suggest the following:

59.1 there should be an 'innocent publication' defence similar to that in s3 of the CCA 1981;

59.2 there should be a general obligation to provide the names of parties to ensure orders are properly recorded and complied with. The media often experience applicants for RROs refusing to give the media the names of the parties; and

59.3 a national database of RROs and a streamlined notification system direct to in-house teams (as opposed to the Press Association) should be implemented, not least because the media need to be properly informed of any derogations to their Article 10 rights.

> *"The view from one of our court reporters is that the media are generally not put on notice of reporting restriction orders, and that for the most part the courts carry on their business without telling anyone not in the courtroom what's going on."*
>
> **Example**: *"A random example from the past 18 months: Ahmed Alid was convicted of murder after attacking his housemate then killing someone at random. At one of his pre-trial video link court hearings at the Old Bailey he appeared head on desk, making strange noises and with four prison officers dressed in riot gear. The judge made an order postponing reporting of his appearance at that hearing, but it was one of several orders made and if you had missed the relevant order you would not know about the order. I realise that orders cannot be made public because it would defeat the aim of preventing reporting; equally though you could miss one hearing and not know that an order existed. The main court I know about is the Old Bailey where they would (sometimes) pin an order outside court. But post-Covid I almost entirely follow proceedings via CVP, or video link, which does not include those warnings" (ITN reporter)*

59.4 In addition there are examples where a publisher has published in breach of an order that had not been served on it via PA or otherwise:

Example: *In the recent proceedings against solicitor Phil Shiner, a publication by The Times in September 2024 inadvertently breached a section 4(2) order dated 18 January 2024, made to protect linked proceedings against Mr Shiner. The Order was not served on the newspaper or brought to the attention of the journalist in the course of his pre-publication enquiries. The publication was listed for a hearing arranged without notice to The Times. The CPS has yet to provide The Times with a copy or to explain the failure to serve the Order.*

"On service – I've had two direct experiences where a lack of service has caused us unwittingly to be in contempt or nearly in contempt. The most recently involved the prosecution of the former solicitor, Phil Shiner…Several years ago, we had a similar experience involving a prosecution brought by the SFO of individual business executives in a wake of a deferred prosecution agreement with a company. In summary, despite having spoken to a senior SFO official about the trial of the individual we were not put on notice of reporting restrictions. The judge had some hard words for the SFO as a result" (Times reporter)

A further example is the s46 YJCEA 1999 order anonymising the witnesses in the prosecution of Virginia McCullough. It was made on 11 October 2024, was not served on The Times and was only identified to the journalist in the course of investigations following the verdict.

60. The MLA consider that the establishment an online reporting restriction database should be revisited (as was previously recommended by the LC in 2014 and referred to at para 4.41 of the LC). There is little consistency in the provision of RROs to the media. RROs are not identified on court lists nor stored centrally in a way that the media can access. Nor are they consistently or reliably communicated to the media: for instance, some are sent via the CPS; some are sent by email; some are confirmed orally to journalists (and sometimes only when the journalist has made proactive inquiries of busy clerks or court staff at the start of a hearing). Para 4.41 states that the LC's understanding from stakeholder engagement is that daily court lists indicate if there are RROs in place, however, the MLA's understanding from journalists is that this is not always the case, are not reliable and that, in any event, court lists are only available from 4pm the day before a hearing and then become unavailable.

"In days of yore, it was standard to have the reporting restriction on the door of the court or at least on the press bench. Now. that happens far less often. If you're lucky it might be flagged on the court list - but that won't tell you the detail. It's not always a straightforward process to get the orders sent by email - and especially later in the day it can be almost impossible to check if you don't already have the written copy. It's increasingly rare for journalists to be able to sit in a trial from start to finish - whether in person or via CVP. The ability to be able to check against an online database whether orders have been made would be incredibly useful... I'd add there is increasingly an issue where court lists regularly will suggest a reporting restriction is in place, possibly out of an abundance of caution. I've had two in the last fortnight, both warning of statutory reporting restrictions on identification of sex offence victims: one in a case where the victim was dead; the other in a case where there was no victim as it was an undercover police sting. Being able to check against a database would be helpful and would remove some - although not all - of the gaps in the system." (ITN reporter)

61. Given that the media are inevitably the primary intended recipients of RROs, this is a concern that requires urgent consideration. The dangers of not doing so are clear. These are issues that do not just have extremely serious consequences for the media (who may find themselves being summoned to court by the judge to explain the position, requiring them to instruct legal representation and risking further delay to the substantive proceedings), but for all court users if such reporting inadvertently jeopardises proceedings and results in trials having to be abandoned at huge expense. Uncertainty as to the existence of RROs in any given case can also lead to knock-on difficulties with the provision of information or materials to the media. The journalists report court staff declining to provide information to which they are entitled, because the staff do not know whether an RRO is in place.

62. A centralised repository of RROs (modelled on the USA's PACER system, or the National Archives' FCL system for judgments), accessible by the media and their legal advisers, would be a clear and preferred solution to this significant concern, and one on which the MLA would be keen to consult further. However, even lesser measures, such as a clear and consistent indication on court lists that a RRO has been made (even this fact, without more) would represent an improvement on the current situation. Relatedly, there is little consistency in notifying the media of variations to, or the lifting of, RROs. One journalist

observed that where reporting restrictions are indicated on court lists, they often remain on those lists even after having been lifted. The dangers of this lack of clarity have been highlighted above, and this is again a significant concern that could be alleviated by the establishment of a central and maintained repository.

C.3 INTERIM COERCIVE REMEDIES (Questions 23-28)

63. For the reasons set out in paragraphs 55-56 above, the MLA consider that interim remedies are inappropriate in cases of 'Contempt by breach of court order' where the contempt is by publication to the public at large or a section of the public or otherwise engages rights of freedom of expression under Article 10.

D. GENERAL CONTEMPT BY PUBLICATION

D.1 THE CONDUCT ELEMENT (Questions 3-8, 14-16)

64. The LC proposes that there be "*two strands*" of 'General contempt': 'General contempt by publication' and 'General contempt by conduct other than publication'. 'General contempt by publication' would expand to:

(i) publications addressed to the public at large or any section of the public that create a substantial risk of a non-trivial interference with the administration of justice (or an actual non-trivial interference); and

(ii) the publisher intends to interfere with the administration of justice in a non-trivial way; and

(iii) will apply "*when proceedings are imminent and also before proceedings are imminent*" and, following the conclusion of proceedings, to "*future proceedings*".[51]

65. Therefore, if the requirement of intent to interfere can be satisfied, it is easier to establish 'General contempt by publication' than under the strict liability rule since it is only necessary to show a substantial risk of a more than trivial interference and proceedings need only be "*imminent or before they are*

[51] paras 3.54 and 3.64 of the CP.

imminent", not active. Further, there is no equivalent of section 5 or other public interest defence to 'General contempt by publication'.

66. This proposal therefore has profound implications for the media which the MLA are not sure have yet been fully appreciated by the LC. Investigative journalism will routinely publish damning material about a wrongdoer and seek, expressly or impliedly, for criminal proceedings to be instigated. Such proceedings would clearly be contemplated by publishers.[52] Further, investigative and campaigning journalism often investigates the processes and operation of the judicial system.[53] The conduct element of this proposed strand of contempt is therefore committed in the ordinary course of journalism. For this reason the LC's proposal gives rise to serious concerns about the extent to which the proposed law is accessible and reasonably foreseeable, given the lack of clarity about what constitutes the conduct element and the precise nature of the fault element. The MLA are strongly concerned that it will have an inhibiting effect on freedom of expression which is out of all proportion to the conduct it is seeking to deter for the following reasons:

66.1 Firstly, the species of contempt of intentionally prejudicing proceedings serves no useful purpose. The case law establishes that proof a defendant knew that such an interference was a "*virtually certain*" consequence of their conduct will be sufficient to infer intention but in practice it is very difficult to show that prejudice is a "*virtually certain*"[54] consequence of publication if the proceedings are merely imminent. Virtual certainty of such prejudice can normally only arise where publication occurs close to trial or during trial. The strict liability rule will therefore almost always be used in relation to this form of prejudice (unless a publisher can be shown to have *desired* to prejudice proceedings). Further, an alleged contemnor cannot be deprived of the safeguards in the statutory

[52] By way of recent example, the work of journalists on The Times, The Sunday Times and Channel 4's Dispatches which brought allegations of sexual misconduct against the actor and television presenter Russell Brand to light, which led to a police inquiry.

[53] For instance, investigations into domestic violence and rape prosecutions and how they are dealt with by the courts.

[54] The meaning of "imminent" adopted in *Attorney General v News Group Newspapers* [1989] QB 110 at 135 and accepted in paras 3.36, 3.51, 3.71-3.75 of the CP.

scheme by a common law charge.[55] For this reason the form of common law contempt based on creating prejudice in the minds of jurors has for many years been accepted to be a 'dead letter' which serves no useful purpose. The MLA is not aware of any committals for this form of contempt at common law since 1991.[56]

66.2 Secondly, the other form of contempt by publication understood to fall within this category is pressuring or interfering with participants in court proceedings, such as witnesses or jurors, which is a particular mischief which warrants a more precisely defined conduct element focused on the degree of pressure that is unacceptable (although there are also criminal offences that will apply prior to commencement of proceedings[57]).

66.3 Thirdly, it is proposed, based on the old authorities relating to common law contempt, that 'General contempt by publication' can apply to proceedings which are "*imminent*" in that they are "*virtually certain to take place*" but have not yet begun. However, it is unclear how a publisher is supposed to know whether proceedings are "*imminent*" and, indeed, how "*imminent*" they have to be if they have in fact not yet been commenced. Likewise, it is unclear whether intentional contempt can apply to proceedings which are said to be "*on the cards*" but not (yet) "*virtually certain*" to happen. As the authors of Arlidge, Eady & Smith on Contempt (5th edition) have argued exposure to liability for contempt when proceedings "*may never materialise*" is not easy to reconcile with the protection of freedom of expression provided by Article 10.[58] The uncertainty about what imminence means and the uncertain scope of the law beyond imminent proceedings have long been considered unsatisfactory and incompatible with Article 10.

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[55] This is because the safeguards in the CCA 1981 were an attempt to render the interference occasioned by the common law of contempt compatible with the right to freedom of expression under Article 10.
[56] The last committal the MLA is aware of was *Attorney General v Hislop* [1991] 1 QB 514.
[57] as recognised in para 3.49 of the CP.
[58] at 5-76 (referred to in the CP at para 3.37).

66.4 Fourthly, the LC's argument that the requirement to prove intention to interfere "*constrains the scope of contempt law in such cases substantially and appropriately*" (para. 3.53) is not convincing. The fact that proceedings for common law contempt are rare does not mean that the shadow which it continues to cast does not have a chilling effect, which would be exacerbated further by the LC's proposal to establish it as a main strand of 'General contempt'.

66.5 Fifthly, it will be exceptional to find that the publisher subjectively *desired* to interfere with the administration of justice; it will be typical to find that their subjective aim was otherwise, for example to promote their conception of the public interest. This means that, where 'General contempt by publication' is in question, judges must apply principles of law—those relating to specific intent where no *desire* to produce the result in question is proved, or, it may be, even alleged—which are logically extremely fragile to cardinally important questions to the media.

66.6 Sixthly, anomalously there is no public interest defence. The purpose of section 5 is to provide for a principled balance of the interests of justice and the interests of free speech[59] - but the LC's proposal in 'General Contempt by publication' (and under common law contempt) a similar balance is not vouchsafed: the only questions are, was there an interference with the administration of justice, and did the publisher intend that result. Freedom of expression is only catered for indirectly, by the fact that the publisher, by pointing to public interest issues in which he has a genuine concern, may thereby disable the prosecutor from proving the necessary intent. The court may well accept that the publisher's motive was a public interest one, as for instance to bring to the attention of the public what he sees as misconduct by some public body; but, because motive and intention are different things, this will not avail him if the court holds that

[59] In the cases which section 5 contemplates, damage to the processes of justice is to take second place to the need that open discussion of matters of true public interest should not be inhibited or prevented.

nevertheless he intended to interfere with the administration of justice. This, again, is recognised to be a disproportionate interference.

Example: In January 2024 a mother and her two children were attacked with a corrosive alkali substance on the streets of Clapham in south London. The perpetrator fled the scene. Two days after the attack, the Metropolitan Police Service issued a statement that the man the police wanted to interview in connection with the assault was an Afghan national named Abdul Shokoor Ezedi. The police further stated that a manhunt for Ezedi was underway, that he was "*dangerous*" and should not be approached. On 2 February 2024 the CPS confirmed that Ezedi had a conviction for sexual assault.[60] Reports of statements by the police and CPS clearly met the conduct threshold for 'General contempt by publication' and charges against Ezedi, once captured, may be said to have been "*imminent*". Although the media, the MPS and the CPS did not want to prejudice proceedings, they were each aware that an interference with the administration of justice was a "*virtually certain*" consequence of their publications, which under the LC's proposals would be sufficient to establish the fault element of intention. It may be said by way of defence that there was no *intention* (in the sense of *desire*) to prejudice the administration of justice and the dominant motive was to assist in Ezedi's capture yet the circumstances do not fall within the LC's proposed escape routes and the fault and conduct elements appear to be established. The ease with which the thresholds tests may be met demonstrates why the media are concerned as to the chilling effect of the LC's proposals.

67. In considering this residual area for general contempt by publication outside the strict liability rule, the MLA's position is that the guiding principles should be:

67.1 *"The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of media freedom and the need for any restriction on the freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."* [61]

67.2 The LC must have regard to the chilling effect. Given the complexity and uncertainty in this area of contempt and the penalties, a journalist without access to specialist legal advisers, and even those who are well advised or knowledgeable, are bound to err on the side of

[60] See the reports of the case [Appendix 2/document 7/pages 18-34]

[61] *McCartan, Turkington Breen (a firm) v Times Newspapers Ltd [2001] 2 AC 277*, per Lord Bingham at p290.

caution.[62] Editors will also be disinclined to invest resources in an investigation regardless of the public interest if there is a risk that publication could be in contempt or there is significant uncertainty around the potential date of publication.

67.3 Publications which create a "*substantial risk of interference with administration of justice*" (whether the bar is serious or non-trivial) sets the scope of the conduct element too widely and is too imprecise to be necessary and proportionate under Article 10. The principle of proportionality requires that any definition of the conduct element must be narrowly tailored to the conduct it seeks to deter and must go no further than is necessary to achieve that objective.

67.4 The form of common law contempt based on creating prejudice in jury deliberations, since it overlaps with the strict liability rule and 'Contempt when proceedings are active', serves no useful purpose and should be abolished.

67.5 Conduct intended to interfere with participants in court proceedings, such as deterring a witness from giving evidence or otherwise interfering with their evidence falls within general contempt and there should be a more specific, focused proposal in respect of this aspect of conduct by publication.[63]

67.6 Setting the bar at "*non-trivial*" interference does not reflect current law (**Questions 4-5**). To qualify as a contempt, the interference (actual or risked) must be a "*serious*" one: see *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23; [2014] AC 1246 at [39] (Lord Toulson JSC) applied in *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 at [22]-[27].

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[62] The complexity and uncertainty in this area of contempt means that legal advice is invariably likely to be very cautious.

[63] The Phillimore Committee expressed agreement with the views of Lord Cross of Chelsea in Attorney General v Times Newspapers [1974] AC273 at 325 and doubted "*whether it is easy to draw a distinction between public and private pressure upon litigants. The difference is only one of degree*": para 61.

67.7 Liability for intentional publication contempts should begin when the relevant proceedings are pending. It is to be noted that in section 4(2) when the court is given the power to limit the publication of reports of proceedings the test needed is "pending or imminent".

67.8 The fault element should be no lower than specific intent (**Question 11**).[64]

67.9 Conduct connected with journalistic material is not limited to the act of publication. Other newsgathering acts (such as press photographers/camera operators taking photographs/footage outside court and journalists approaching witnesses) engage rights protected by Article 10. Rather than create a class for 'General contempt by publication', the MLA considers that there should be a qualification to the types of general contempt where the acts complained of relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material)[65] and a separate fault element and procedure will apply.

67.10 Any codification of common law contempt must be compatible with Article 10 by providing protections at least equivalent to those provided for in the CCA 1981.

67.11 The consent of the Attorney General should be required before proceedings can be commenced against the media (as is the position in respect of proceedings under the strict liability rule) and should be dealt with by the High Court.[66]

68. The MLA agree that any statutory provision setting out what constitutes general contempt should be accompanied by a non-exhaustive list of examples of conduct that is capable of constituting general contempt (**Question 16**).

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[64] see paragraph 69 below.
[65] See s12(4) Human Rights Act 1998.
[66] see paragraph 74 above.

D.2 THE FAULT ELEMENT

69. The MLA agree that the requirement to prove intent must be retained. The statutory purpose behind the CCA 1981 was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of expression. Such a shift was forced upon the United Kingdom by the decision of the European Court in *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, and was in any event foreshadowed by the recommendations of the Phillimore Committee. A proposal that, where the strict liability rule does not apply (because, for example, the publication does not create a substantial risk that the course of justice would be seriously impeded or prejudiced, but only some less serious interference), the publisher might nevertheless be liable if they were reckless, would certainly not be consistent with Article 10.

D.3 AUDIO RECORDERS

70. The MLA note that the LC has not reconsidered the use of audio recorders in court. Allowing journalists to record audio in court for note-taking purposes would assist in the accuracy of court reporting and encourage more court reporting as it would be an easier exercise to undertake. Reporters believe that news coverage would be more accurate and comprehensive, and thus public understanding improved, if the media were permitted to make recordings for non-publication purposes. There could of course be exceptions where there is good reason, for example the oral evidence of particular witnesses. The view amongst reporters is that it is very difficult to take fully accurate, comprehensive shorthand or handwritten notes, especially where proceedings involve complex legal or factual matters. The Phillimore Committee in 1974 recommended that the media should be given permission to use recorders and recordings with the leave of the judge as a substitute for notes for the purpose of compiling court reports of proceedings.[67] In view of the fact that live text based reporting and remote observation is now permitted in certain cases the MLA consider that the use of audio recorders and audio recordings should be permitted on a case-by-

[67] para 43, Report of the Phillimore Committee (fn 19 above).

case basis to individuals (such as accredited media and legal bloggers) who have first identified themselves to the court.[68]

"It is very important that this be allowed by recognised members of the press; this helps avoid the spread of misinformation, it upholds the principles of open-justice and it allows for the nuance of and context detailed decision making to be explained in-the-round." (Guardian reporter)

"It is increasingly uncommon for journalists to learn shorthand. While all reporters are required to be adept at detailed note taking, modern tools mean they are more likely to invest in devices such as laptops and phones rather than costly courses in shorthand. Banning of recording adds to the already considerable barriers to entry for reporting in general, and in particular reporting on the justice system. The ongoing refusal to allow journalists to record thereby increasingly inhibits the public interest over time. It makes court reporting more of an 'enclave' in an age where there are increasingly few local court-experienced reporters and local media is struggling to survive. Lowering this barrier to entry would allow non-specialist journalists, second career journalists and those with demonstrable and legitimate interests in proceedings (specialist bloggers, informed citizen journalists) to keep a fulsome record to support their reporting." (Guardian reporter)

The MLA ask that consideration be given by the LC to a relaxation of this provision to allow audio recording for the purposes of note-taking (with a corresponding prohibition on publication to the public at large or to a section of the public) with a possible pilot scheme to consider the practicalities.

D.4 FAMILY PROCEEDINGS

71. Any codification of the law of general contempt by publication aimed at clarifying the law and improving consistency, coherence and effectiveness should examine contempt liability under s12 of the Administration of Justice Act 1960. As stated above, it is one of the most unsatisfactory and unduly complex aspects of the law of contempt. The very recent reporting of the family proceedings antecedent to the tragic murder of 10-year-old Sara Sharif demonstrates how acute the problem is. In this case the judge (Williams J), in releasing the family court judgments in the wake of the convictions for murder

[68] Similar directions could be given as those which apply to persons seeking to observe hearings remotely, which routinely require individuals to first identify themselves to the court.

of her father and stepmother, made an order prohibiting the reporting of the identity of the family court judge who had made those decisions and certain professionals and experts in the case. This was in spite of the fact that:

(i) it has been long accepted that the role of the judge is one that beyond any doubt requires public accountability and openness (*R v Felixstowe Justices ex p Leigh* [1987] QB 582, 595 (DC); *Derbyshire County Council & Ors v Marsden* [2023] EWHC 1892 (Fam), [29];

(ii) publication the identity of the judge and witnesses is not prohibited under s12 AJA 1960 and was not withheld at the time of the family court proceedings. There had been no restriction for years on family members, their associates and their lawyers sharing the identity of the judge and the names of the witness involved.

(iii) as was recognised by Lieven J in *Tickle v Herefordshire CC* [2022] EWHC 1017 (Fam): "*Social workers are employees of a public authority conducting a very important function that has enormous implications on the lives of others. As such, they necessarily carry some public accountability and the principles of open justice can only be departed from with considerable caution*". In every high-profile family case, witnesses and experts are open to being commented on and criticised in the media. These are not situations where the type of vilification and harassment of clinical staff, which has become not infrequent in fraught children's medical cases. Therefore any interference in the social workers Article 8 rights is not of the level considered in the case of *Abbasi v Newcastle upon Tyne NHS Hospital* [2023] 3 WLR 575[69], and is no different to any individual who may be commented upon or criticised in a public broadcast.

E. CONTEMPT PROTECTION AND POWERS (Questions 41-49)

72. The MLA agree that:

[69] currently on appeal to the Supreme Court.

(i) The powers of protected inferior courts, tribunals and other bodies to deal with contempt themselves should not be extended to include 'General contempt by publication' and 'Contempt by publication when proceedings are active' (**Question 48**). It should also not be extended to include to 'Contempt by breach of a court order' where the breach is by publication and thereby engaging Article 10.

(ii) The protected inferior courts, tribunals and other bodies should have the power only to refer such contempts by publication to the High Court (as opposed to another superior court of record such as the UT or the EAT) as the High Court has particular expertise in dealing with the Article 10 ECHR rights that are engaged in contempt by publication (**Question 48**).

(iii) The powers of the superior courts should be expanded to include a power to refer conduct that apparently constitutes a contempt to the High Court given its expertise in dealing with contempt matters and the Article 10 ECHR rights that are engaged in contempt by publication (**Question 47**).

73. The MLA agree that a list of the bodies that are considered "courts" for the purposes of contempt would be helpful but suggests that, in furtherance of the LC's aim to ensure that this very significant area of law operates as a principled, comprehensible, and fair regime for all, a comprehensive list should be drawn up (**Question 42**).

F. THE ATTORNEY GENERAL'S ROLE

74. The MLA are in favour of retaining the current position that proceedings under the strict liability rule ('Contempt by publication when proceedings are active') can only be instituted by or with the consent of the Attorney General and that the Attorney General should retain the power to bring contempt proceedings in the public interest as the appropriate public officer to represent the public interest in the administration of justice (**Question 50**). It is an important safeguard to (i) prevent vexatious litigation; (ii) ensure there is a "*strong prima*

facie case"; (iii) ensure it is in the public interest to bring proceedings and that the media are not exposed to costly litigation, which would have a chilling effect on journalism; and (iv) maintain consistency in the administration of the law.

75. By way of increasing transparency and accountability, the CP raises the possibility of developing published guidance by the Attorney General's Office enumerating the factors which will be taken into account when deciding whether to bring proceedings, including the information that is typically gathered and relied upon, and indicative timescales (**Question 55**). The MLA agree that this would be helpful in encourage consistency in decision-making and provide much needed clarity as to the scope of the public interest defences and the factors relevant to the public interest, providing publishers with greater certainty as to when it would apply. Greater clarity on the process, and how the law takes account of modern conditions, is preferable to unsolicited ad hoc guidance.[70] The MLA also supports the proposal that the Attorney General should publish category-based data relating to the exercise of their contempt of court functions and the categories set out in **Question 64** appear appropriate. (**Questions 63-64**).

76. The MLA does not see force in the argument that the decision of the Attorney General should be susceptible to judicial review (**Question 53**). The MLA envisage that in respect of contempts by publication there will be numerous applications by persons or bodies who have requested that the Attorney General brings proceedings for strict liability contempt and by persons or bodies purporting to act in the public interest, which will be expensive and time-consuming to deal with by the Attorney General, the Administrative Court and the media.

77. If the LC is persuaded that the concern in respect of the Attorney General's exclusive power is inappropriate (and the MLA is not persuaded that it is), the MLA favour the sequential approach in **Question 51**, whereby an applicant

[70] For example, the recent advisory in relation to Russell Brand investigation referred to in fn 36 above and para 3.42 of the CP.

would be required to first seek consent of the Attorney General and, if consent is refused, then may seek permission from the court.

78. With regard to **Question 60** the MLA does not consider that the Attorney General's Office is the appropriate body to receive such powers, which could undermine the confidentiality of journalistic sources. The Investigatory Powers Act 2016 does not currently give the Attorney General's Office or the police the power to obtain this information where they are investigating cases relating to contempt and should not be expanded to enable the Attorney General or the police to exercise this power. [71] If, notwithstanding these concerns, the powers were to be expanded to include those investigating contempt, they should be exercisable only by the police and should include protections for journalists' sources.

G. PROCEDURE

79. The MLA agrees that (in addition to the existing permission requirements under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017) that permission to make a contempt application should be required in all courts, tribunals and other bodies where the application relates to breach by publication.

H. SANCTIONS

Contempt by publication while proceedings are active

80. Where contempt under the strict liability rule is concerned, it is invidious that a journalist or editor could be sent to prison for contempt: there cannot be many (if any) other jobs where an individual can end up in prison as a result of doing something which does not necessarily involve malice or dishonesty.

Overall (including General contempt by publication)

[71] s60(A) of the Investigatory Powers Act 2016

81. The fact that it is proposed that the two-year maximum sentence for contempt should remain (**Question 100**) for 'General contempt by publication' underlines the MLA's submission that this proposed class of contempt, as currently formulated is too broad, and must be recast to ensure that this strand of contempt is narrowly tailored to the conduct it seeks to deter and goes no further than necessary to achieve that objective.

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19 December 2024

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Enclosed:

Appendix 1 (List of current corporate members of the MLA)

Appendix 2 (Various materials referred to in the Response)