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# IBC LEGAL CONFERENCE DEFAMATION & PRIVACY 2013

## Contempt Update – The Law Commission’s Consultation Paper No.209 on Contempt of Court (Nov 2012)

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# Impetus

Described by Law Com as “*a number of high profile cases involving contempt [which] have recently highlighted the need for a review of this area of the law*” including:

- A juror who researched the defendant on the internet: *A-G v Dallas* [2012] EWHC 156 (Admin); [2012] 1 WLR 991
- The first internet contempt by publication case: *A-G v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin); [2011] 1 WLR 2097
- Chris Jefferies: *A-G v MGN Ltd & News Group Newspapers Ltd* [2011] EWHC 2074 (Admin)
- The Levi Bellfield case: *A-G v Associated Newspapers Ltd & MGN Ltd* [2012] EWHC 2029 (Admin)

# Focus of CP

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## **Four specific areas identified as in urgent need of review:**

- Contempt by publication
- The new media
- Contempts committed by jurors
- Contempt in the face of the court

# Contempt by publication

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CP raises for consultation issues in relation to:

- 1) “Active proceedings”
- 2) The substantial risk of serious prejudice or impediment test
- 3) The incidental discussion defence
- 4) Common law intentional contempt
- 5) Evidence and procedure
- 6) Sanctions

# (1) Active proceedings

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## **The present law – a reminder**

- Strict liability contempt under CCA 1981 can only be committed when proceedings are “active”
- Definition of when proceedings are “active” is set out in Sch 1
- Defence of innocent publication under s3 if publisher did not know and had no reason to believe that the proceedings are active.

# (1) Active proceedings

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## Problems and potential solutions

- Concerns around whether definition covers appropriate period
- Consistency of decision-making around the release of identities of arrestees
- Extradition cases

## (2) Substantial risk of serious prejudice or impediment

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### **The present law – a reminder**

“The strict liability rules applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced” (s2(2) CCA 1981)

## (2) Substantial risk of serious prejudice or impediment

### The present law – a reminder

#### Points to note:

- No liability for collective impact.
- Position of each individual publisher assessed separately.
- Impact assessed as at time of publication.
- May be contempt where latest publication exacerbates risk created by earlier publications by different publishers.
- Course of justice = whole process of the law. Not just the trial.
- Each publication assessed separately and at the time of publication

## (2) Substantial risk of serious prejudice or impediment

### Problems and potential solutions

- Calibration of the test:
  - .Is “substantial” (meaning not insubstantial) too low a threshold?
  - .Is “serious” too high a threshold?
- Prejudice/impede:
  - .Does the relationship between these two terms warrant clarification?
  - .Should s2(2) be split so into two provisions
  - Should the test be aligned with the test for abuse of process?

### (3) The incidental discussion defence

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

## (3) The incidental discussion defence

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CP notes that:

- The defence is interpreted liberally
- Cases involving it are relatively rare

CP asks whether it should be retained in its current form.

## (4) Common law intentional contempt

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CP notes that:

- common law contempt by publication requires proof of intention to prejudice proceedings
- that there are ambiguities about this and other aspects of the law

CP asks whether common law intentional contempt should be defined in statute.

## (5) Evidence and procedure

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### Problems and potential solutions:

- **Concerns about the A-G**, in particular re consistency of decision making as between different A-Gs: should a list of factors taken into account be published?
- **Trial process**: currently tried before the Divisional Court under CPR 81 - whether there is merit in treating publication contempt as an ordinary criminal offence
- . Inconsistency with other contempts (eg breach s4(2) or s11)
- . Should this extend to common law intentional contempt?
- . Whether procedural safeguards associated with trial on indictment would apply
- . Trial by jury?

## (5) Evidence and procedure

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### **Problems and potential solutions:**

#### **Reporting restrictions under s4(2) and s11:**

- Often difficult to ascertain whether they have been made and if so in what terms due to lack of formal notification system
- Notes that the Judicial College is in the process of developing a standard form for judges making s4(2) orders to ensure consistency
- Notes that Scotland operates an online list of s4(2) orders
- Suggests setting up a formal notifications system for s4(2) and extending it to other types of order

## (6) Sanctions

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◦ **Present position:** max 2 years imprisonment or unlimited fine, power to impose costs order in cases of serious misconduct, whether or not it constitutes contempt. No community penalties.

◦ **Issues:**

.Whether the maximum sentence is appropriate and whether community penalties should also be available

.Should there be a sentencing power to impose a fine as a percentage of turnover?

.Should there be a power to make a wasted costs order in respect of the criminal proceedings prejudiced?

# New media

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“... challenge that is posed by the new media to the existing laws on contempt of court which pre-date the internet age...”

Our primary aim is to assess whether the 1981 Act is capable of dealing effectively with rapidly-developing media technologies, particularly with regard to social media ...

We are also concerned, in so far as possible, to ‘future-proof’ the 1981 Act so that it can continue to accommodate technological developments”

# New media challenges

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“The volume of material that can now be stored, the ease with which it can be communicated and redistributed, the size of the audience that can be reached, and the global accessibility of information brings many new challenges, including for the law of contempt ...

While prejudicial information may historically have faded with the newspaper print, as well as form our collective memory, as data it is now processed, archived and is retrievable for very much longer periods of time ...

Thus far, the modern media is an issue with which the law of contempt has had little cause to grapple.... In consequence there are significant ambiguities about how the law of contempt relates to the modern media”

# Issues considered

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CP raises for consultation following questions:

- What is a publication?
- When is a publication addressed to the public at large or any section of the public?
- Who is responsible for the publication?
- When does a publication occur?
- Where does the publication take place?

# Publication

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- **Form of publication:**

- .No difficulty including internet communications as publications under definition in Act (“speech, writing, programme included in a cable programme service or other communication in whatever form”, s.2(1), 1981 Act)

- .‘Communication in whatever form’ is so wide that it seems on its own to cover comprehensively the new media

- **Act of publication:**

- .Relevant conduct is that of ‘publication’ but what the act of publication involves is not explained under the Act

- .Problematic when considering who can be liable for a publication

# Addressed to public at large or section of the public

- Strictly liability rule only applies only to publications “addressed to the public at large or any section of the public” (s.2(1), 1981 Act); cf. private communications
- No definitive rule or standard that can determine this, but likely relevant standards: size of group, nature and function of group, means of control over access to group, specific publication and context in which publication was made
- Not just one person (e.g. email), but held sufficient in context of public order offence if made generally accessible to all (e.g. on website) even though evidence only established one police officer downloaded it (Sheppard)
- Impact of privacy settings on social networking sites which can restrict access if utilised (e.g. Twitter and Facebook)?
- Leave to develop on a case-by-case basis?

# Who is responsible for a publication?

- Term 'publisher' not defined in 1981 Act; 'publish' to be construed in accordance with meaning of 'publication' in s.2(1)
- New media involves numerous intermediaries e.g. internet access providers, internet platform providers (e.g. Facebook), domain name registrars and registries, search engines
- New media means much greater likelihood of 1981 Act applying in relation to communications by individual citizens (e.g. websites, blogs, Tweets etc.)
- Little difficulty in classifying users as 'publishers'; engaged in conduct that forms central plank of definition of publication e.g. placing material on webpage or tweeting message

# Intermediaries

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- More difficult question relates to which intermediaries are publishers
- Contempt requires intention to publish – mere intention to publish the material in general, or that particular material?
- Potential s.3(1) defence for publisher who has “no reason to suspect that relevant proceedings are active” or s.3(2) defence for distributor “if at time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so”
- Defences under Electronic Commerce Directive/Regulation for ‘mere conduits’, ‘caching’, ‘hosting’
- Cf. CDPA 1988, s.97, injunctions against service providers with actual knowledge of use of service for infringements

# Time of publication

- Strict liability rules applies if proceedings active “at the time of publication” (s.2(3), 1981 Act)
- Single publication or continuing publication? New media makes this issue more critical because of storage, retrieval etc, and potentially serious burdens on media to monitor
- Caselaw to date suggests continuing publication (Beggs, Harwood) but Defamation Bill proposes single publication
- CP proposes single publication rule but with additional contempt where publisher, or person with “sufficient control” over publication, fails to comply with court order requiring publisher for a specific duration “to take such steps as are reasonably possible to ensure that the publication should not be available” to the public (cf. power currently exercised by judges under s.45(4) Senior Courts Act 1981)

# Place of publication

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- Criminal law territorial, particular problems for new media contempts
- Inconsistent approach of courts to whether a publication has occurred within the jurisdiction
- CP asks:
  - Does absence of definition of place of publication create problems in practice? If so, what form should that definition take? For example:
    - necessary that publication was produced within E&W?
    - necessary that publication targeted at section of public in E&W?
    - sufficient that prejudicial material is accessed in E&W even if written, created, uploaded and hosted aboard?

# Judicial response to CP

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“The internet has also given rise to a practice reason why the courts should hesitate before invoking the law of contempt of court against publishers. Persons who can in practice communicate with the public at large are no longer confined to those who have the use of expensive printing presses or broadcasting facilities. Anyone can do it, including those who are outside the jurisdiction of the court, or whose limited means puts them out of reach of financial sanctions.

The court ought not to grant injunctions requiring persons to do an act abroad when they are not personally subject to the jurisdiction of the court. .... So if injunctions are sought to restrain publications, they are likely to be available and effective against the UK based established print media and TV broadcasters (most of the time), and unavailable or ineffective against many individuals in the UK, and almost all persons abroad”

# Judicial response to CP

- “Some reservations” about suggested new contempt power, as cases are likely to be rare
- Injunctions in context of strict liability contempt granted only if acts are going to be carried out and would create a substantial risk that course of justice would be seriously impeded or prejudiced
- Court is generally unlikely to be satisfied of this test unless first considered whether risk could satisfactorily be overcome by some less restrictive means than interference with freedom of expression e.g. questioning prospective jurors
- Injunctions can be very costly, time consuming and uncertain as to outcome and difficult to envisage how procedure could work fairly given financial constraints on parties in Crown Court

# Judicial response to CP

- An application for an injunction may not eliminate risk in cases where the website is outside the jurisdiction and is lawfully entitled to ignore the order, or in cases where the person concerned refuses to comply with the order even when obliged by law to do so
- “A party who applies for an order requiring removal of publication from archive takes risk that individuals (e.g. bloggers) may seek to oppose the making of the order, or to frustrate its purpose. They may find that the application for the order leads to more publicity rather than less, and to expensive and time consuming satellite litigation in the Crown Court and interlocutory appeals. Some defendants may welcome the time and costs that such applications may involve as a means of obstructing or delaying the trial.”

# CPS interim guidelines on social media cases

- 19/12/2012, interim guidelines with immediate effect, reviewed at end of consultation period and final guidelines published
- Prosecution test: (a) sufficient evidence to provide a realistic prospect of conviction; and (b) whether a prosecution is required in the public interest
- Assessment of content of communication via social media: (a) credible threats of violence; (b) specifically targeting an individual or individuals; (c) breach of a court order or contempt; (d) grossly offensive, indecent, obscene or false
- All cases under (c) “should be immediately referred to the AG, and “as a general approach ... should be prosecuted robustly”
- Court orders can apply to those communicating via social media in the same way as they apply to others.

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# Thank you

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