The Law Commission

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CONTEMPT OF COURT (2): COURT REPORTING

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THE LAW COMMISSION

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THE LAW COMMISSION

CONTEMPT OF COURT (2):

COURT REPORTING

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THE LAW COMMISSION

CONTEMPT OF COURT (2): COURT REPORTING

To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

BACKGROUND

1.1 In November 2012 we published our contempt of court consultation paper ("CP").[1] In the CP we invited responses to provisional proposals spanning a number of areas of the law of contempt of court, including contempt by publication, the impact of the modern media, juror contempt and contempt in the face of the court.

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

1.3 We recently published our first report, Contempt of Court (1): Juror Misconduct and Internet Publications,[2] in which we made recommendations relating to the modern media and juror contempt aspects of our CP.

1.4 This second report deals with one particular aspect of contempt by publication, namely the issue of reporting restrictions ordering the postponement of contemporary court reporting.

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

REPORTING RESTRICTIONS: SECTION 4(2)

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

1.7 In our first report on contempt of court we looked at juror misconduct and material published via the internet, and recommended some changes to the law and procedure in this area.

[1] Contempt of Court (2012) Law Commission Consultation Paper No 209.

[2] Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340 (hereafter "Law Com 340").

1.8 This report looks at the accurate contemporary reporting of the content of legal proceedings taking place in public in criminal courts. More specifically, this report focuses on the power of the Crown Court to order that such reporting be postponed to avoid prejudice to court proceedings.

1.9 We are concerned here with all court reporting, whether broadcast (on television, radio or over the internet) or published (electronically or in print format) and whether by accredited press representatives or others such as bloggers.

THE IMPORTANCE OF THE PRINCIPLE OF OPEN JUSTICE

1.10 There is a clear public interest in the transparency of legal proceedings;[3] it is for this reason that they are generally held in courts open to the public. That public interest also means that contemporary accurate court reporting is generally immune from being classified as a contempt of court, by virtue of section 4(1) of the 1981 Act.

1.11 The important principle of open justice has been well summarised by Lord Diplock:

> As a general rule the English system of administering justice does require that it be done in public… If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.[4]

1.12 This principle also derives support from the European Convention on Human Rights and Fundamental Freedoms (ECHR). The qualified right to freedom of expression in article 10 ECHR includes the right "to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

1.13 Furthermore, the right to a fair trial provided by article 6 ECHR includes the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

1.14 Article 6 further provides that:

[3] As to the capacity of the media to enable interested members of the public to engage in meaningful public scrutiny of the courts, and regarding the surprising paucity of scholarship examining the image of the courts and the judiciary in the media, see L J Moran, "Mass-mediated 'open justice': court and judicial reports in the Press in England and Wales" (2014) 34 *Legal Studies* 143.

[4] *A-G v Leveller Magazine Ltd* [1979] AC 440 at 449 to 450.

> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

1.15 The European Court of Human Rights has itself emphasised that "the public character of court hearings constitutes a fundamental principle enshrined in paragraph (1) of article 6."[5]

1.16 Following the enactment of the Human Rights Act 1998, the House of Lords re-affirmed the centrality of the open justice principle as a matter of domestic law, particularly in the criminal context:

> A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.[6]

1.17 These sentiments recently received authoritative endorsement from the Lord Chief Justice in a high-profile case, involving the trial by court martial of a Royal Marine (who remained anonymous until his conviction) for the murder of an injured enemy insurgent in Afghanistan.[7]

1.18 In recognition of these important principles, it is only in certain exceptional circumstances that the courts of England and Wales have the power to order that court reporting be postponed. This power is provided by section 4(2) of the 1981 Act and only arises where such reporting creates a substantial risk of prejudice to the proceedings in question, or to other imminent or pending[8] legal proceedings.

1.19 This report examines the practical operation of section 4(2) postponement orders, and in particular whether current practical problems with their operation could be solved by the creation of a readily accessible online list of the orders in force in England and Wales.

5 *Hakansson v Sweden* (1991) 13 EHRR 1 at [66].

6 *Re S* [2005] 1 AC 593 at [30].

7 *R v Marines A, B, C, D, E* [2013] EWCA Crim 2367 at [83].

8 Discussed in more detail below at paras 2.24 – 2.26.

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

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

CHAPTER 2
CURRENT LAW AND PROBLEMS

INTRODUCTION

2.1 The current law and procedure in respect of orders postponing the publication of court reporting give rise to practical problems. This is, at least in part, due to the absence of a formal system for notifying the press of when a court has made such an order. This chapter briefly summarises the law and those practical problems to which it gives rise.[1]

THE CURRENT LAW

The strict liability rule

2.2 The strict liability rule[2] imposes liability for contempt on those who publish material which has the effect of creating a substantial risk of serious prejudice to active legal proceedings. As its name suggests, liability will arise irrespective of whether the publisher was aware that the publication would create such a substantial risk of serious prejudice.

2.3 Section 3 of the 1981 Act creates a defence of innocent publication for publishers or distributors, who escape liability if they do not know or have no reason to believe, having taken reasonable care, that proceedings are active at the time of publication (publishers) or that the publication contains matters creating the risk of serious prejudice (distributors).

2.4 Publication is non-exhaustively defined as including:

> any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.[3]

2.5 The strict liability rule itself is a common law rule, but it is recognised and its ambit is defined in section 2(2) of the 1981 Act:

> The strict liability rule 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.

[1] A more detailed summary of the current law can be found in the CP at paras 2.78 – 2.110.

[2] The strict liability rule was central to Chapter 2 of Law Com 340, and is discussed in more detail there. A more detailed discussion can also be found in the CP at paras 2.29 – 2.49.

[3] Contempt of Court Act 1981, s 2(1). This definition was considered in our first contempt report, Law Com 340, at paras 2.16 – 2.29. We ultimately recommended no change to the broad statutory definition.

Substantial risk of serious prejudice

2.6 In *Attorney General v MGN Ltd*,[4] Lord Justice Schiemann set out ten key principles governing the application of the strict liability rule. By way of introduction to the strict liability rule, these ten principles, and some of the discussion of them from the CP, are set out here:

Principle 1:

> Each case must be decided on its own facts.

2.7 There are no hard and fast rules about what categories of material can or cannot be published once proceedings are active. For example, the following may amount to contempt, but will not always do so: publishing the previous convictions or other bad character of a defendant; revealing that a defendant faces other charges; direct or indirect assertions of guilt or innocence; or publishing confessions or admissions.[5]

Principle 2:

> The court will look at each publication separately and test matters as at the time of publication … nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk…

2.8 Likewise, there may be contempt where the latest publication has "exacerbated or increased" the risk created by the earlier publications.[6] Whether there is a contempt is not determined by the outcome of the active proceedings: the question is what is in issue in the proceedings at the time of publication.[7] For example, in a case where identity is in issue, publication of photographs of the defendant is likely to constitute a contempt.[8]

Principle 3:

> The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication.

4 [1997] Entertainment and Media Law Reports 284.

5 See for example *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [29], [2012] All ER (D) 185 (Jul); *A-G v Associated Newspapers Ltd* [1998] Entertainment and Media Law Reports 711; *A-G v ITV Central Ltd* [2008] EWHC 1984 (Admin), [2008] All ER (D) 192 (Jul); *A-G v MGN Ltd* [2009] EWHC 1645 (Admin); *A-G v MGN Ltd* [2002] EWHC 907 (Admin); *A-G v News Group Newspapers Ltd* (1984) 6 Cr App R (S) 418; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin), [2011] 1 WLR 2097; *R v Bolam ex parte Haigh* (1949) 93 Solicitors Journal 220; *Thorpe v Waugh* [1979] CA Transcript Nos 282 and 313; and I Cram (ed), *Borrie and Lowe, The Law of Contempt* (4th ed 2010) para 5.10.

6 *A-G v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029 (Admin) at [11], [2012] All ER (D) 185 (Jul).

7 See the CP at paras 3.42 and 3.71.

8 See for example *A-G v Express Newspapers* [2004] EWHC 2859 (Admin), [2005] Entertainment and Media Law Reports 13. See also *Scottish Daily Record and Sunday Mail Ltd v Thomson* (2009) HCJAC 24.

2.9 Liability cannot be founded on the collective impact of publicity, that is to say, where different publishers cumulatively create a substantial risk of serious prejudice or impediment, but where no individual publisher, taken alone, does so.[9] This is because each individual publisher must be found to have created the substantial risk of serious prejudice. That approach conforms to orthodox criminal law doctrines on liability and ensures article 10 compliance.[10] Prejudice or impediment can be caused to either the prosecution or the defence. It has been suggested that "'prejudice'... equates to 'improperly affecting' the course of proceedings."[11]

Principle 4:

> That risk must be substantial.

2.10 The courts' interpretation of this has been simply that substantial means "not remote" or "not insubstantial" and that the risk must be practical rather than theoretical.[12]

Principle 5:

> The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but *seriously* so.

2.11 The courts have, not very helpfully, held that the term "serious" should be given its ordinary English meaning.[13]

Principle 6:

> The court will not convict of contempt unless it is *sure* that the publication has created this substantial risk of that serious effect on the course of justice.

2.12 The criminal burden and standard of proof applies.

Principle 7:

> In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial...

[9] *A-G v MGN Ltd* [1997] 1 All ER 456.

[10] *A-G v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408 at [17] to [20].

[11] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-99.

[12] *A-G v English* [1983] 1 AC 116, 141 to 142; *A-G v News Group Newspapers Plc* [1987] QB 1, 15; *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 881; *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76, 80.

[13] *A-G v English* [1983] 1 AC 116, 142.

Principle 8:

> In making an assessment of the likelihood of the publication coming to the attention of a potential juror the court will consider amongst other matters: (a) whether the publication circulates in the area from which the jurors are likely to be drawn, and (b) how many copies circulated.

2.13 Thus, relevant factors when assessing the degree of risk and gravity of the prejudice would include a newspaper's circulation in the locality of the trial, or the length of any television broadcast and its repetition. This principle obviously requires modification when considering its application to modern media, for example, the number of times an online publication is accessed will be a relevant factor.[14] The fact that no juror actually saw the material does not mean that no risk existed, although the reaction of a juror who sees a publication may be relevant.[15]

Principle 9:

> In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication, the court will consider amongst other matters: (a) the prominence of the article in the publication, and (b) the novelty of the content of the article in the context of likely readers of that publication.

2.14 The style of the publication, for example, particularly sensationalist reporting, is relevant.[16]

Principle 10:

> In making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters: (a) the length of time between publication and the likely date of the trial, (b) the focusing effect of listening over a prolonged period to evidence in a case, and (c) the likely effect of the judge's directions to a jury.

2.15 The court, therefore, has to consider the "fade factor,"[17] although a long delay between publication and trial will not preclude a finding of contempt where the case or publication is memorable.[18] A court will, however, also take into account

[14] *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Associated Newspapers Ltd* [2011] EWHC 418 (Admin).

[15] *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904.

[16] *A-G v Morgan* [1998] Entertainment and Media Law Reports 294. See also *A-G v British Broadcasting Corporation* [1997] Entertainment and Media Law Reports 76.

[17] ie the notion that material which might be expected to have a prejudicial effect on the reader will have less of an impact with the passage of time, as their memory fades and they hear other competing information on the topic. See further: C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Feb 2010) pp 5 and 41 to 42.

[18] See *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v Morgan* [1998] Entertainment and Media Law Reports 294; *A-G v MGN Ltd* [2009] EWHC 1645 (Admin).

the focus that jurors have on the evidence presented in the courtroom and the obligation on the judge to give them appropriate warnings and directions.[19]

2.16 Whilst the principles summarised by Lord Justice Schiemann relate predominantly to the risk of prejudicing or impeding criminal proceedings, many of the same issues, including the location of the proceedings, the nature of the publication, and the period of time between publication and trial, are relevant to civil proceedings.[20]

2.17 We now turn to discussion of sections 4(1) and 4(2) of the 1981 Act, which are the specific focus of this report.

Section 4(1)

2.18 Section 4(1) of the 1981 Act provides that:

> Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

2.19 Section 4(1) clearly creates a defence to a charge of contempt under the strict liability rule. It follows that such a defence need only be invoked if the publication in question creates a substantial risk of serious prejudice. If raised, orthodox principles of criminal law would suggest that the burden is on the Attorney General to show that the defence in section 4(1) is not available.[21]

2.20 In respect of the elements of the defence, there has been little judicial guidance. It has been suggested that the requirement for good faith should be interpreted as taking into account "the underlying purpose for which the section 4(1) protection is intended, namely, the entitlement of the public to be informed about current legal proceedings."[22] However, there are difficulties in respect of the requirement for "fair and accurate reporting" in that reports of only part of the proceedings may give a misleading picture of the proceedings as a whole.

2.21 Section 4(3) gives guidance as to what is "contemporaneous." For the print media, publishing will usually be considered contemporaneous if the report appears in the next edition of the publication following the hearing in question.[23] Where a section 4(2) order has been made delaying contemporaneous reporting (see below), a report will be deemed contemporaneous if published "as soon as practicable"[24] after the section 4(2) order is lifted or expires.

[19] *A-G v Unger* [1998] 1 Cr App R 308; *A-G v Guardian Newspapers Ltd* [1999] Entertainment and Media Law Reports 904. Compare *A-G v BBC* [1992] Crown Office Digest 264.

[20] In those civil cases where trial by jury is still available *A-G v News Group Newspapers Ltd* [1987] QB 1.

[21] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-278.

[22] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-294.

[23] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 4-289.

[24] Section 4(3) of the 1981 Act.

Section 4(2)

2.22 Although section 4(1) of the 1981 Act appears to provide a general exception to the strict liability rule in the case of accurate and contemporary court reporting, section 4(2) of that Act provides the court with a power to order that such reporting be postponed. Section 4(2) of the 1981 Act provides:

> In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

2.23 Because this power is limited to "any report" of the proceedings themselves, orders under this section cannot cover extra-judicial matters[25] or reports which do not mention the current proceedings.[26] Section 4(2) orders must be aimed at protecting specific proceedings and not the administration of justice in general.[27]

2.24 It will be noted that for the purposes of this section, the proceedings need only be "pending or imminent." A section 4(2) order can therefore be made to protect proceedings which "are no more than contingent at the time of the order."[28] The courts' power to delay reporting under section 4(2) thus covers a broader range of proceedings than are protected by the strict liability rule,[29] which only arises when the proceedings under threat are "active" (ie, once an arrest has been made).[30] While the exact scope of the terms "pending or imminent" is not entirely clear,[31] it seems that they must extend some time earlier than arrest.

2.25 There is, however, an important limitation on section 4(2) orders compared with the scope of the strict liability rule. The strict liability rule, and any injunction issued to restrain a breach of it, captures any material prejudicial to the proceedings in question.[32] By contrast, section 4(2) orders are limited to postponing reporting of the proceedings in which the order was issued (or part of the proceedings). They cannot extend to prohibiting the publication of any other matter, however prejudicial.

2.26 Thus, in one sense section 4(2) provides a broader power to restrict reporting than injunctions to restrain breaches of the strict liability rule, because the proceedings which are being protected by the section 4(2) order need not yet be

[25] Such as a film of an arrest: *R v Rhuddlan Justices ex parte HTV Ltd* [1986] Crim LR 329.

[26] *Allen v Grimsby Telegraph* [2011] EWHC 406 (QB), [2011] All ER (D) 30 (Mar).

[27] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 7-150 to 7-151.

[28] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-180.

[29] Whether by the threat of prosecution for breaching the rule, or by the grant of an injunction under section 45(4) of the Senior Courts Act 1981 to restrain a breach in advance.

[30] Section 2(3) of the 1981 Act.

[31] It certainly extends, by virtue of section 4(2A) of the 1981 Act, to certain retrials which are merely "a possibility" at the time the order is contemplated.

[32] Taking into account the various requirements discussed above, eg substantial risk (paras 2.2 – 2.16).

active. But the scope of the restriction that may actually be imposed is much narrower, as the order may only cover reports of the court proceedings themselves, and not any other prejudicial reporting. The distinction between section 4(2) reporting restrictions, and injunctions to prevent strict liability contempts under section 2, is illuminated by the following examples.

Example 1: Extent of the power to make section 4(2) orders

Defendant A is about to be tried for high-profile child sex offences. The trial judge is informed that another person, B, is under investigation for linked offences and is likely to be arrested and charged in the next few days. After hearing from the parties and interested media representatives, the trial judge decides to make a section 4(2) order prohibiting any contemporary reporting of A's trial until the conclusion of any proceedings against B, in order to protect the latter from prejudice.

The judge is able to do this, despite the fact that proceedings against person B are not yet active, but the section 4(2) order only postpones reporting of the content of defendant A's trial and has no effect on any other prejudicial reporting regarding B (such as speculation as to his guilt).

Example 2: Extent of the power to grant injunctions

Defendant X has been arrested and charged with offences of misconduct in public office. He is due to stand trial in the Crown Court in a month's time. His lawyers ask the judge due to preside over his trial to issue an injunction prohibiting any further reporting of the allegations against him, until the trial is over. The judge is able to grant such an injunction, since the proceedings against X are active, and the injunction can cover all prejudicial reporting, and is not limited to the reporting of court proceedings.

Defendant Y is under investigation for murder and believes his arrest is imminent. A number of lurid articles are published in the press regarding Y's allegedly violent lifestyle. Y is unable to seek injunctive relief from the criminal courts to prevent such reporting, because the proceedings against him are not yet active until he is in fact arrested.

2.27 Publication can be postponed under section 4(2) for as long as the court thinks necessary to protect the particular proceedings, although postponement cannot be indefinite.[33]

2.28 There is, essentially, a three-stage test to be satisfied before an order under section 4(2) can be made:[34]

[33] *R v Times Newspapers Ltd* [2007] EWCA Crim 1925, [2008] 1 WLR 234.

(1) Is there a substantial risk of prejudice to the administration of justice in the current or other pending or imminent proceedings?

(2) If so, is the order necessary to eliminate that risk, including considering possible alternative measures?

(3) If so, in light of the competing public interests at stake, ought the court to make the order and if so, in what terms?

2.29 This structured approach was recently approved by the Divisional Court, in an appeal relating to reporting restrictions imposed in the Royal Marines case.[35]

> **Example 3**: The current system for section 4(2) orders
>
> D, a celebrity, is on trial for an offence of fraud. He committed an offence of violence in his youth. At trial, in the absence of the jury, an application is made by the prosecution to adduce that fact in evidence. This application is heard in open court with the defendant and the public present but the jury absent. The judge decides that the previous offence is not relevant and therefore that the jury should not hear about it. The judge imposes a section 4(2) order to the effect that until the end of the present trial no report shall be made of D having this previous conviction. This is, exceptionally, necessary to prevent a substantial risk of prejudice, given the high profile nature of the trial, and the correspondingly high probability that the case will be widely reported in a way which might come to the attention of the jury.
>
> The order is made on paper and stuck to the court door.

Is there a substantial risk of prejudice to the administration of justice?

2.30 Substantial, as in the context of the strict liability rule considered above, means not insubstantial.[36] In considering the risk, the factors the court should bear in mind include:[37]

(1) the jury's ability to follow the directions of the trial judge;

[34] *MGN Pension Trustees Ltd v Bank of America National Trust and Savings Association* [1995] 2 All ER 355. The same approach was adopted in *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 and in *R (Telegraph Group Plc) v Sherwood* [2001] EWCA Crim 1075, [2001] 1 WLR 1983.

[35] *R v Marines A, B, C, D, E* [2013] EWCA Crim 2367 at [86] and [87]. (Elements of the case were considered by both the Court Martial Appeal Court and the Divisional Court for jurisdictional reasons.)

[36] "'Substantial' as a qualification of 'risk' does not have the meaning of 'weighty' but rather means 'not insubstantial' or 'not minimal'": Sir John Donaldson MR in *A-G v News Group Newspapers Ltd* [1987] QB 1, 15.

[37] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-213 and following.

(2) the "fade factor" (even material which might exert a prejudicial effect on the reader at the time has less impact upon them later, once time has passed and they have heard other competing information on the topic); [38] and

(3) the "drama of the trial" (what research is available suggests 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).[39]

2.31 The court should also assume for these purposes that press coverage will be fair and accurate.[40]

2.32 The risk has to be assessed at the time that the order is sought[41] and the relevant risk is to the administration of justice not to other matters such as fears about community hostility towards witnesses.[42] The test under section 4(2) does not require *serious* prejudice unlike that under section 2(2).[43]

Is the order necessary to eliminate that risk, including considering possible alternative measures?

2.33 The order must be necessary for avoiding the risk. This requirement was considered by Lindsay J in *MGN Pension Trustees.*[44] Lindsay J was attracted by the approach taken to the necessity requirement in the context of article 10 of the ECHR,[45] which involves a threefold analysis. First, there must be no other way of avoiding the prejudice; second, an order must be likely to avoid the prejudice; and third, any order must be no wider than needed to avoid the risk.

2.34 If a judge concludes that there is a substantial risk of prejudice, he or she should not go on immediately to consider how it should be avoided. Rather the judge should consider:

> …whether in the light of the competing public interests … it [is] necessary for avoiding that risk to make the order, whether in his discretion he should make it and, if so, with all or only some of the restrictions sought.[46]

[38] See further: C Thomas, Are Juries Fair? (Ministry of Justice Research Series 1/10, Feb 2010) pp 5 and 41 to 42.

[39] For instance New Zealand Law Commission Report No 69, *Juries in Criminal Trials* (2001), and M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trial in New South Wales* (2001) (joint research project by the University of New South Wales and the Law & Justice Foundation of New South Wales).

[40] *Re B* [2006] EWCA Crim 2692, [2007] EMLR 5 at [25].

[41] *R v George* [2002] EWCA Crim 1923, [2003] Criminal Law Review 282 at [23].

[42] *Re MGN* [2011] EWCA Crim 100, [2011] 1 Cr App R 31 at [18] to [23].

[43] See discussion above at paras 2.6 – 2.15.

[44] [1995] 2 All ER 355.

[45] See above at para 1.12.

[46] *R v Central Criminal Court ex parte The Telegraph plc* [1993] 1 WLR 980, 986, by Lord Taylor CJ.

In light of the competing public interests at stake, ought the court to make the order and if so, in what terms?

2.35 This final stage involves the court in a value judgment, which requires striking the balance between the right to a fair trial and the open justice principle.[47]

2.36 It is not clear that the courts have always considered this third stage to be an independent requirement. In the *Ex parte Telegraph* case[48] Lord Taylor CJ observed:

> It is noteworthy that whether the element of discretion is to be regarded as part of the 'necessity' test or as a third requirement, the courts as a matter of practice have tended to merge the requirement of necessity and the exercise of discretion.

2.37 It has also been suggested that in striking the balance between freedom of speech and the right to a fair trial, the latter right takes priority.[49] As pointed out by Arlidge, Eady and Smith,[50] this would appear to leave little room for the operation of a separate value judgment. They suggest that the better view[51] is therefore that there is a distinct third stage in the analysis involving an explicit value-judgment:

> Even if there is no other way of eliminating the risk than by making an order, it does not follow that an order must be made. There is still the further question whether a degree of risk might be tolerable in the light of other conflicting public considerations. It is at this stage that the judicial discretion comes into play, and only at that stage that it is appropriate for the judge to take into account the "competing public interests," as contemplated by the Court of Appeal in *Ex parte The Telegraph plc*.[52] One of those competing interests will be freedom of communication, and the judge should therefore take into account at that stage the question whether such a restriction is "necessary" in the broader sense contemplated by art 10(2).[53]

The current procedure for section 4(2) orders

2.38 The procedure to be followed in respect of section 4(2) and similar orders in criminal cases is detailed in the Criminal Procedure Rules, Part 16.[54] The courts must not make an order unless the parties and anyone directly affected is

47 *R v Central Criminal Court ex parte The Telegraph plc* [1993] 1 WLR 980.

48 [1993] 1 WLR 980 at 984.

49 *R v B* [2006] EWCA Crim 2692, [2007] EMLR 5 at [23] (noting this assertion but not resolving the issue).

50 *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-243.

51 And the view more consistent with the authority, for example *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190.

52 *R v Central Criminal Court ex parte The Telegraph plc* [1993] 1 WLR 980, 986 (reference in original).

53 *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-240.

54 Available at http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-proc-rules-2013-part-16.pdf (last accessed 30 January 2014).

present, or has had the opportunity to attend or make representations.[55] Applications may be heard by the court sitting in private,[56] so as not to defeat the purpose of the potential order.

2.39 The relevant practice direction[57] sets out in greater detail how the court is to approach the imposition of discretionary reporting restrictions such as section 4(2) orders.[58] These include that the general principle of open justice must be borne in mind; that the court must be satisfied no lesser measure, such as clearing the gallery, would suffice; that the order's terms be proportionate having regard to article 10 ECHR; and that no order should be made without giving parties to the proceedings and other interested parties, including the media, an opportunity to make representations, and allowing 24 hours for applications from interested parties not in court.[59]

2.40 The practice direction requires the order to be in precise terms.[60] It must be in writing and state the power under which it is made, its precise scope and purpose, the time it will cease to have effect (if appropriate), and whether the existence of the order may itself be reported.[61] Copies should be provided to any person known to have an interest in reporting the proceedings and to any members of the media who regularly report from the court.[62] Court staff should be prepared to answer enquiries.[63] The rules and practice direction are now supplemented by a standard form issued by the Judicial College (reproduced in Appendix B and discussed in more detail below at paragraph 5.21). This takes the form of a template order and is published as an appendix to the Crown Court Bench Book Companion, along with templates for the various other discretionary reporting restrictions. The practice direction states that these template orders "should generally be used."[64]

2.41 The making of a section 4(2) order in the Crown Court can be appealed under section 159 of the Criminal Justice Act 1988, which was enacted to ensure compliance with the ECHR.[65]Note that this cannot be used to appeal against orders made in a magistrates' court. Section 159 gives "person(s) aggrieved",

[55] Criminal Procedure Rules, 16.2(3).

[56] Criminal Procedure Rules, 16.2(2)(a).

[57] Criminal Practice Direction 16B. The direction is reproduced in its entirety at Appendix D.

[58] Ie restrictions other than those automatically imposed by operation of law (such as anonymity of sexual offence victims). Other discretionary orders, to which the direction applies, include those under s 39 Children and Young Persons Act 1933 (details likely to lead to identification of a child), and s 58 Criminal Procedure and Investigations Act 1996 (derogatory assertions in pleas in mitigation). The Judicial College has also produced template orders for these.

[59] Criminal Practice Direction 16.B.4 (a) to (f).

[60] Criminal Practice Direction 16.B.4 (g).

[61] Criminal Practice Direction 16.B.4 (h) and (i).

[62] Criminal Practice Direction 16.B.6.

[63] Criminal Practice Direction 16.B.7.

[64] Criminal Practice Direction 16.B.5.

[65] Following *Hodgson v UK* App No 11553/85 (Commission decision). See C Walker, I Cram and D Brogarth, "The Reporting of Crown Court Proceedings and the Contempt of Court Act 1981" (1992) 55 *Modern Law Review* 647, 653 to 654.

including the media, the right to appeal,[66] although the media may not be able to recover its costs even if successful.[67]

2.42 In practice the use of this right of appeal is likely to be limited. Where a representative of the media objects to the making of an order or its proposed terms, their principal remedy will be to make representations to the Crown Court judge who is considering making the order, before any order is made. The rules and practice direction mandate the courts to hear representations from the press when considering making a section 4(2) order, and the balance of modern authority is firmly in favour of allowing and inviting such representations.[68] The standard form also expressly draws the court's attention to the possibility of hearing from aggrieved publishers and reviewing any order shortly after it is made.

2.43 The Court of Appeal can "confirm, reverse or vary the order complained of" and, therefore, can consider the matter afresh.[69] The appeal procedure is covered by Part 69 of the Criminal Procedure Rules. The decision of the magistrates to make or to refuse to make an order can be challenged through judicial review.[70] The refusal of the Crown Court to make a section 4(2) order is challengeable only in limited circumstances.[71]

Breach of a section 4(2) order

2.44 Breach of a section 4(2) order automatically amounts to contempt, regardless of whether there is a substantial risk of serious prejudice flowing from the material that is published.[72] The necessary mental element for breach of an order is unclear however. It has been suggested that knowledge of the order should be required, but it is not clear whether, in addition to knowledge of the order, it is necessary to intend to prejudice the administration of justice. The latter appears to be the preferred approach.[73]

[66] See for example *Re Crook* [1992] 2 All ER 687, (1991) 23 Cr App R 17 and *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-304.

[67] *Steele Ford and Newton v CPS (No 2)* [1994] 1 AC 22, [1993] 2 WLR 934; *News Group Newspapers Ltd* [2002] Entertainment and Media Law Reports 9 (Court of Appeal).

[68] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 7-286 – 7-295.

[69] *R v Central Criminal Court ex parte The Telegraph Plc* [1993] 1 WLR 980, [1993] 2 All ER 971; *B* [2006] EWCA Crim 2692, [2007] Entertainment and Media Law Reports 5; *R v Beck ex parte Daily Telegraph plc* [1993] 2 All ER 177, 180.

[70] *R v Felixstowe Justices ex parte Leigh* [1987] QB 582, [1987] 2 WLR 380; *R v Clerkenwell Justices ex parte Trachtenbers* [1993] Criminal Law Review 222.

[71] *R v Saunders* [1990] Criminal Law Review 597; *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 7-296 – 7-299.

[72] *R v Horsham Justices ex parte Farquharson* [1982] QB 762, [1982] 2 WLR 430; *A-G v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874, 884 to 885. This seems to have been the basis on which the clause was debated in Parliament: see Appendix A to the CP.

[73] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 7-257 and 7-262.

2.45 More fundamentally, it is uncertain whether recklessness as to the existence of the order is sufficient to ground liability. If it is, then a failure to make checks may be enough to establish a contempt, if from that failure the court can infer recklessness.[74] In *AG v Leveller Magazine Ltd*[75] Lord Edmund Davies warned that:

> …it is incumbent upon [people controlling or concerned with powerful organs of publicity] to ascertain what had happened in court. They have the means of doing this, and they cannot be heard to complain that they were ignorant of what had taken place.[76]

2.46 Whether in fact potential publishers have the means reasonably to ascertain what has happened in court in connection with the existence of such orders, and the views of our consultees on this topic, is dealt with below (at paragraphs 2.50 to 2.54). Providing such a means is indeed the main aim of our recommendations in this report.

2.47 Similar sentiments can be detected in the relevant criminal practice direction:

> A copy of the order should be provided to any person known to have an interest in reporting the proceedings and to any local or national media who regularly report proceedings in the court. Court staff should be prepared to answer any enquiry about a specific case; but it is and will remain the responsibility of anyone reporting a case to ensure that no breach of any order occurs and the onus rests on such person to make enquiry in case of doubt.[77]

2.48 Although there is contradictory authority tending to suggest that breach of a section 4(2) order must be deliberate to attract liability,[78] there is sufficient ambiguity in the law that it is not possible to rule out liability where a publisher is merely reckless as to the existence of an order.

2.49 This lack of clarity is unfortunate given that the purpose of section 4(2) was to ensure "that editors should know so far as possible exactly where they stand."[79] It also has implications for compliance with article 7 of the ECHR.[80] In part this uncertainty may flow from a lack of reported cases in which instances of breach of a section 4(2) order have been considered (as opposed to authorities dealing with appeals against the making of orders).

[74] *Arlidge, Eady and Smith on Contempt* (4th ed 2011) paras 7-246 – 7-261.

[75] [1979] AC 440, 466. Other opinions in the same case appear to point in the opposite direction, namely towards the suggestion that a breach must be deliberate: *Arlidge, Eady and Smith on Contempt* (4th ed 2011) para 7-253.

[76] This judgment clearly lacks application to 'citizen journalists', to which our policy equally applies: see below at para 5.8.

[77] Criminal Practice Direction 16.B.6 and 16.B.7

[78] For example *Re F (Orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *A-G v Leveller Magazine Ltd* [1979] AC 440, judgment of Lord Scarman.

[79] *Hansard* (HL), 9 Dec 1980, vol 415, cols 660, 661 and 664 (by the Lord Chancellor, Lord Hailsham).

[80] Article 7 contains a prohibition on punishment without law, which has been interpreted to include guarantees of minimum legal certainty, especially in the context of the criminal law.

PROBLEMS WITH THE CURRENT SYSTEM

2.50 The principal concern expressed by consultees from the media in response to our CP was the difficulty they currently experience in finding out whether an order is in place in a given case. This is obviously undesirable both in legal and practical terms. A range of non-media consultees expressed similar concerns.[81]

2.51 Uncertainty about the existence of a section 4(2) order increases the risk that it will be breached simply because a publisher is not aware of it. This clearly creates a potential for prejudice to the course of justice, which can lead in extreme cases to abandoned trials. The latter will entail a great deal of wasted expenditure, as well as the considerable expense of any resulting contempt proceedings against the offending publisher in the Divisional Court.

2.52 The prospect of a publisher facing contempt proceedings for a report which was made in ignorance of the existence of a section 4(2) order, in circumstances where the existence of the order was not easily discoverable, is clearly unattractive, and raises obvious concerns in terms of fairness and legal certainty.

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

2.54 The lack of clarity surrounding the required mental element for a contempt committed by breaching a section 4(2) order is unfortunate. Section 4(2) orders are designed to prevent exceptional cases of prejudicial court reporting, by communicating to the publisher that such reporting needs to be postponed to protect the proceedings. This aim only justifies punishing a breach of the order if it is done with knowledge of the order's existence.

[81] The responses to the CP are analysed in more detail in Chapter 3.

CHAPTER 3
PROVISIONAL PROPOSAL AND CONSULTATION PAPER RESPONSES

INTRODUCTION

3.1 Many media organisations have told us that they struggle to obtain information about whether an order has been made, and if so, what its terms are, because there is no formal system for notifying the media of their existence.[1]

3.2 We note that this position may give rise to a lack of compliance with article 7 of the ECHR if the media are unable to regulate their conduct because they cannot find out what their legal obligations are.[2]

PROVISIONAL PROPOSAL

3.3 Our provisional proposal in the CP was therefore that an online list of section 4(2) orders in force should be created, to assist potential publishers in discovering the existence of an order.

3.4 At the time the CP was written the Judicial College was in the process of developing a standard form for judges making section 4(2) orders. This standard form has now been finalised and is in use.[3] This should increase consistency in the courts' use of section 4(2) orders, and the terms and information which they contain, but does not meet the principal concern regarding the way in which this information (and the fact of the order being in existence) is conveyed to the media and other interested parties.

3.5 In advance of the publication of our CP, several of our consultees expressed concerns that, at present, courts on occasion fail to address themselves to the need to draft section 4(2) orders with precision, or fail to give sufficient weight to the narrow circumstances in which an order can lawfully be made (discussed above at paragraphs 2.22 to 2.37). We consider that an additional benefit of a widely-advertised scheme such as that proposed in the CP would be the opportunity to draw the courts' attention to the standard form, which if consistently followed should lead to orders which are tightly drafted and take account of the relevant legal principles.

3.6 An online list of section 4(2) orders made in criminal cases is currently in operation in Scotland.[4] The operation of that system is summarised in the CP[5] and a similar model is discussed in more detail below (in Chapters 4 and 5).

1 See also CP 209, from para 2.100.

2 As pointed out by Arlidge, Eady and Smith at para 7-268 of *Arlidge, Eady and Smith on Contempt* (4th ed 2011).

3 The form is discussed above at para 2.40 and at para 5.21 below, and reproduced in full at Appendix B.

4 See http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders (last visited 28 January 2014). A screenshot of the list is included at Appendix C.

5 At paragraph 2.102.

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

RESPONSE OF CONSULTEES

3.8 The response of consultees to our proposal that a similar online list be introduced in England and Wales was overwhelmingly positive. This was true of practitioners, the judiciary, the police, representatives of the media and academics alike.

3.9 Examples included the BBC, who commented that:

> …a prompt and user-friendly notification scheme is absolutely essential. Despite the best efforts of some court staff, the current 'system' is ad hoc, inconsistent from court to court, and often lacks clarity.

3.10 The Coroners' Society stated that the scheme could "alleviate the problem many coroners would face in giving notice to the press as required by the relevant Practice Direction," given the limited resources of coroners' courts compared with larger Crown Court centres.

3.11 Trinity Mirror Plc's views were representative of consultees from the media. They said:

> A statutory scheme should be created which requires a) that all such orders be reduced to writing at the first opportunity in a form which is consistent with, and demonstrates that the order is made in accordance with, the power granted under section 4(2); and b) that such orders are made available on a website where they can be accessed readily by any entity likely to be affected.

3.12 A few consultees expressed practical reservations. For instance, the Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts) said "we strongly agree that a scheme for notifying publishers about the existence of section 4(2) orders should be created", but went on to say that:

> We envisage difficulties in maintaining such a service and have concerns in respect of reliability; for example, the service would have to be nationwide, and it would rely on individual courts ensuring that any such orders were notified. There would be significant resource implications but, without the area being addressed competently and professionally, there are ECHR Article 6, 8 and 10 issues that are being treated too laxly and inconsistently.

3.13 In a similar vein, the Justices' Clerks Society said:

> The Society recognises the benefits of setting up a scheme whereby publishers could check whether orders made under section 4(2) have been made. The Society is not sure that the creation of such a

> process would be as simple and inexpensive as the Commission suggests.

3.14 As a final example of these sentiments, the CPS said:

> The system may work well in Scotland, but the website shows that there are few orders made, a maximum of 7 in one month. We are not aware of the number of section 4(2) orders made in England and Wales, but suspect that it is significantly more, and this may lead to a delay in uploading the information onto the website, creating the risk of a journalist checking the site and, finding no order, publishing a matter than breaches the order … The resources of such a scheme should be assessed and balanced against any benefits.

3.15 Some stakeholders expressed concerns that this system has the potential to undermine the nature of the section 4(2) orders, by disclosing the facts they are supposed to suppress for the duration of the trial. However, we concluded in the CP that such concerns failed to take into account the limited purpose of a section 4(2) order. That purpose is to prevent prejudice to current or future legal proceedings by ensuring the jury in those proceedings is not prejudiced by knowledge of the matters which are the subject of the section 4(2) order.

3.16 The purpose of the section 4(2) order is safeguarded by the online list system we propose (full details of which are set out in Chapter 5). The jury will be absent from court when the order is made. The information which is published on the online list will be less than what would be heard by a member of the public listening from the public gallery during the legal argument and when the order is made. Such an observer would have heard the content of the order itself (this already occurs, and it is not suggested that it risks prejudice to the proceedings). The names of cases in which section 4(2) orders have been made are also often reported on the court list and posted in the court building.

3.17 By contrast, our proposal was that the online list would show only the name of the case, the fact that an order is in existence, and the expiry date if any.

3.18 Any juror considering viewing the online list as part of researching their case online would be aware that such conduct would be a clear contempt of court.[6]

3.19 In the highly unlikely event that a foolhardy juror did access the proposed online list, the information they would see would be limited to the name of the case, and would tell them no more than that a reporting restriction of some sort was in place. It is already the case that they may discover this information, owing to the frequent practice of displaying the names of cases in which orders have been made in the court building.

[6] And a criminal offence under the proposals we made in Chapter 3 of our first report on contempt of court, Law Com 340.

3.20 There was also strong support from some of our consultees for increasing the scope of the proposed online list to cover other types of reporting restrictions.[7] We address this issue in our final recommendations below (paragraphs 5.41 and 5.43).

3.21 Since the provisional recommendation seemed to us to be desirable, and had the strong support of consultees subject only to some practical reservations, we conducted a pilot of how the scheme might work in practice in England and Wales. We describe the pilot and set out the conclusions we draw from it in Chapter 4 before setting out our final recommendations in Chapter 5.

[7] Most common suggestions included those under section 39 of the Children and Young Persons Act 1933 (prohibiting the publication of names or other identifying details of child parties or witnesses to legal proceedings) and section 11 of the Contempt of Court Act 1981 (prohibiting the publication of names or other matters which have been withheld from the public by a court during proceedings before it).

CHAPTER 4
THE PILOT

INTRODUCTION

4.1 In this chapter we describe the pilot scheme we conducted in an effort to estimate the administrative burden and cost that would be involved in an online database of section 4(2) orders similar to the one used in Scotland. We then go on to describe the results of that pilot, and the conclusions we draw from it.

4.2 Given that the main reservations expressed by consultees regarding our proposal were practical in nature, the purpose of the pilot scheme was to test the extent to which such practical concerns were well-founded. In essence, our conclusions are that the number of orders made nationally is relatively low, and that such a scheme imposes minimal administrative burdens, with correspondingly low cost implications.

THE PILOT – METHODOLOGY

4.3 The purpose of the pilot scheme was to predict the cost of an online system for recording and communicating section 4(2) reporting restrictions (similar to that employed in Scotland) in respect of England and Wales. In order to do that, we needed to know:

(1) How many orders are made;

(2) How long it takes to upload the information in an order to a website, database or spreadsheet; and

(3) How much time is spent maintaining the website.

4.4 To that end, we asked a sample of courts to email to us all their section 4(2) orders in a given period.

4.5 The Law Commission sought advice from statisticians in the Ministry of Justice on how best to design the survey to ensure the results were meaningful. We were advised that seven Crown Court centres with a range of sizes and caseloads would provide a good range for a valuable survey, and that a survey period of two months would be appropriate.

4.6 It was agreed that courts would be ranked by the criterion of "total Crown Court cases received", as this would give the best indication of the number of proceedings a given court dealt with (which includes both trials and sentences).

4.7 The caseload data for each quarter were added together to give the figure for each court for the whole of 2012, and then all of the 84 Crown Court centres in England and Wales were ranked in order of number of cases received.

4.8 It was agreed that the sample should include the Central Criminal Court at the Old Bailey and Southwark Crown Court. This is because many of the country's most serious and high-profile cases are heard at the Old Bailey, while Southwark hears most serious or complex fraud cases. We therefore expected those courts to produce the most section 4(2) orders and that their inclusion would show us the worst case scenario, enabling us to work out the likely upper limit of the number of orders and hence the likely upper limit for the financial and administrative implications of the scheme.

4.9 This meant that we had to choose five of the remaining 82 Crown Court centres at random (for more detail on the selection methodology, see Appendix A). The courts at Bolton, Bournemouth, Portsmouth, Salisbury and Woolwich were selected.

4.10 The selected courts were asked to fill in the Judicial College standard form[1] in respect of each section 4(2) order made during the two-month pilot period, and to forward a copy to the Law Commission, making a note of the time taken to do so.

4.11 We created a spreadsheet and copied the terms of each order into it. This spreadsheet was similar to what would be published online if the recommendation is adopted and the scheme goes live. It included a record of the date of the order, the issuing court, and the date the order expired (if any). The pilot ran from 24 June 2013 for two months.

RESULTS OF THE PILOT

4.12 19 orders were made across all of the participating courts during the pilot period.

4.13 Of these, 11 orders were made at the Central Criminal Court, one was made at Southwark (with another earlier order remaining in force during the pilot period), three were made at Bolton, two were made at Bournemouth and two were made at Portsmouth. No orders were made at Salisbury or Woolwich during the pilot period.

Administrative burden of compiling the list

4.14 The time it took to enter these orders onto the spreadsheet varied between one and two minutes per order.

4.15 The experience of those involved with the creation and running of the Scottish system informed us that the webpage (an addition to the Scottish Court Service website) took four hours to set up, and thereafter roughly two hours per week to run.

Administrative burden on courts

4.16 The time taken for court staff to compile and send the information to the Law Commission varied rather more widely.

4.17 For six of the orders made at the Central Criminal Court and the order made at Southwark it was noted that no additional time was taken to compile the

[1] Discussed above at para 2.40 and paras 3.4 and 3.5, below at para 5.21, and reproduced in full as Appendix B.

information to send to the Law Commission. This was because the Judicial College standard form, which was what we had requested them to provide us, was already completed as a matter of course by those court staff, in order to record the salient facts about the order.

4.18 For the remaining 12 orders made during the pilot, times given by court staff for the compiling of the information for the standard form ranged from a couple of minutes to half an hour per order.

4.19 However, in this connection it is notable that several of the responses recording longer times to compile the information were accompanied by explanations. These explanations included that:

> It took me longer than normal as I wasn't used to using this different form. The wording was quite different and I wanted to make sure it was correct. Hopefully it will only take me 5 or 10 minutes next time!

4.20 In a similar vein, another member of court staff explained that "The order took some time to prepare as probably it was our first time using the template."

4.21 In terms of time spent actually sending the information to the Law Commission during our pilot, the invariable response from the Central Criminal Court staff was that there was no additional administrative burden whatsoever. This was because the orders made at that court were already emailed to the court's internal press office, which allowed the Law Commission simply to be copied into that existing correspondence.

4.22 Other court staff generally failed to respond specifically to the question of the time taken to send the information to the Law Commission, as distinct from the time filling out the form (with one other response stating it took "literally 45 seconds"). It may be reasonable to assume that this is because the time it takes to email an electronic form, once completed, will always be negligible.

CONCLUSION FROM PILOT RESULTS

4.23 Were a civil servant to stand in the place of the Law Commission in the scheme piloted, we envisage that it would work in exactly the same way.

4.24 The only difference would be that the information recorded would be uploaded onto the internet after being entered, rather than being entered onto an offline database.

4.25 Our pilot shows that if such a scheme were implemented, the administrative burden on the public body responsible for the list would be modest. It would be in the region of a minute or two per order received.

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

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

4.28 As discussed in more detail below (at paragraphs 5.28 to 5.34) many section 4(2) orders are made to expire not on a specific date, but on the conclusion of court proceedings. Keeping the list up to date would therefore necessitate a regular check of court listing systems to find out whether relevant proceedings have concluded, and the order therefore expired.

4.29 Although the cost of this monitoring function for the removal of expired orders was not something we were able to test during the pilot, we do not believe that it would affect our conclusion that the administrative burden of the scheme is small, as long as the scheme administrator had ready access to electronic court systems.

4.30 The additional work for court staff caused by the proposed scheme would also be small. Courts are now instructed[2] to fill out the Judicial College standard form whenever a section 4(2) order is made. The only additional burden upon the courts is therefore to send this standard form by email to the administrator of the online list. The Central Criminal Court already emails a similar form in each case to its internal press office.

4.31 Although responses to the pilot did not generally directly address this question, it is reasonable to assume that the time taken to email an electronic form to a central email address will be negligible. Given that even the Central Criminal Court does not make more than a couple of section 4(2) orders per week, the additional burden on court staff will be very small and widely spread.

[2] By Criminal Practice Direction 16.B.5, discussed above at para 2.40.

CHAPTER 5
OUR FINAL RECOMMENDATION – AN ONLINE LIST OF SECTION 4(2) ORDERS

THE BASIC RECOMMENDATION

5.1 The existing problems with the law identified above in Chapter 2[1] would be solved, at least in large part, by the introduction of an online list of section 4(2) orders in force.

5.2 Potential publishers would have a single easily identifiable point of information for the existence of section 4(2) orders. If no order was listed in respect of a case, and in the absence of actual knowledge on the part of the potential publisher,[2] they would generally be entitled to publish accurate reports of those proceedings without a risk of being found in contempt (see the discussion above at paragraphs 2.44 to 2.46 regarding the necessary mental element for liability).

5.3 Equally, if an order appeared on the list, potential publishers would receive fair warning not to publish reports of the proceedings which contravened the order. If a publisher did breach the order, they could not tenably claim that they had no knowledge, or reasonable means of acquiring knowledge, of the order.[3]

5.4 For all of these reasons, **we recommend the adoption of a publicly available online list of existing section 4(2) orders in force in England and Wales, similar to that currently in place in Scotland**.

5.5 To this end, we further **recommend an addition to the standard form** (reproduced at Appendix B below) **to make clear that where an order includes a prohibition on reporting the existence of the order or its terms, this does not apply to the order's publication on the official online database** (just as, under the current practice, it would not apply to the act of posting a copy of the order in the court building).

CONFIDENTIALITY CONCERNS AND ACCESS TO THE TERMS OF ORDERS

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

[1] At paras 2.44 to 2.54.

[2] For example as a result of their actual presence in court at the making of the order.

[3] The system for the appearance of cases on the list is set out in detail below in Chapter 5, where we describe our pilot scheme.

[4] See above at paras 3.15 to 3.17.

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

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

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

5.10 We considered whether, in addition to giving access to the fact an order was in place, the online list could carry details of the terms of section 4(2) orders, to give potential publishers more guidance. On further discussion with key stakeholders, however, concern was expressed that this would push the balance too far in favour of disclosure, at the expense of protecting the sensitive information that section 4(2) orders are designed to restrain.

5.11 Although the content of section 4(2) orders can be discovered by those sitting in the public gallery at court, we agree that making this information available to a potentially limitless audience via a public webpage does increase the chance of exactly the prejudice that such orders are designed to prevent. This is because, on occasion, the terms of the order itself (eg "not to publish any material relating to the previous conviction of the defendant for violence") will refer to the very prejudicial information about which reporting is being restricted.

5.12 For the same reason, whilst we note above (at paragraphs 3.16 to 3.19) that the risk and consequences of a juror accessing the list of cases in which orders have been made are low, the consequences of a juror doing so if the list were also to contain the terms of section 4(2) orders would be more detrimental.

5.13 On the other hand, it is notable that the Scottish system, in addition to the online list of orders in force, involves the circulation of the terms of orders themselves to a limited mailing list of media organisations. Following further discussion with key stakeholders, it became clear that this proactive distribution of the terms of section 4(2) orders[5] would assist the media in establishing their legal obligations. It would also help to avoid difficulties when an urgent query arises out of office hours, when court officials are unavailable.

[5] Which is already occasionally undertaken on an *ad hoc* basis by the Judicial Communications Office in certain high profile cases in England and Wales.

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

5.15 We consider that charging for this extended service is justifiable, since those potential publishers who did not wish to pay would still have access to the basic list free of charge and would be able to enquire as to the details of any orders in which they were interested in the usual way, by contacting the relevant court. This would provide potential publishers with a cheap, easy and safe method of avoiding contempt liability. For those who wanted to pay for the convenience of electronic access to the terms of the order itself without the need to enquire with the court (and also possibly the option of an automated email alert when new orders were made) the restricted list would provide that option.

5.16 In addition to keeping costs to the public purse down, charging for access to the extended list would have the further advantage of ensuring that users of this extended service were traceable. Paying for access using a bank transfer, debit or credit card would enable users' identities to be verified and linked to a UK postal billing address (either an individual's home address, or a media organisation's business address). This would enable users of this restricted list to be traced, in the rare case that the content of an order were re-published more widely, in breach of the order, and consideration was given to committing that user for contempt of court.

5.17 Although the administrative burden of setting up an electronic payment and validation mechanism for the extended list would be greater than the negligible burden of the simple public list (as per our pilot scheme) this additional cost would be borne by the extended list's users through their subscription fees.

5.18 By restricting access to the terms of the order in this way, the small chance of a juror stumbling upon the information on the internet accidentally is removed. We consider that the prospect of a juror paying to subscribe to the extended service just in order to conduct prohibited research, in clear breach of their oath and judicial directions, is too remote to be of major concern.

5.19 Finally on this issue, **we recommend that where there are reporting restrictions in place relating to the names of parties to the proceedings (including those whose purpose is to protect other individuals who might be identified if the names of the parties were known) the online list will identify cases by number, with a suitably anonymised case name, as is currently the practice with public court lists**.

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

> **Example 4**: The system under our final recommendation
>
> D, a well known celebrity, is on trial for fraud. He had committed an offence of violence in his youth. At trial, in the absence of the jury, an application is made by the prosecution to adduce that fact in evidence. This application is heard in open court with the defendant and the public present but the jury absent. The judge decides that the previous offence is not relevant and therefore that the jury should not hear about it. The judge imposes a section 4(2) order to the effect that until the end of the present trial no report shall be made of D having this previous conviction. This is, exceptionally, necessary to prevent a substantial risk of prejudice, given the high profile nature of the trial, and the correspondingly high probability that the case will be widely reported in a way which might come to the attention of the jury.
>
> The order is recorded electronically by the court clerk using the existing Judicial College standard form. This electronic form is then emailed to an administrator who places the case name on the online list. The Daily Moon newspaper is interested in reporting on D's case. A journalist from the Daily Moon accesses the online list, sees the case name on the list, and is directed to obtain more details about the restriction in place either by logging in using the Daily Moon's subscription, or by telephoning the court in question.

COMPATIBILITY WITH EXISTING GUIDANCE

5.21 Best practice, endorsed by the latest Criminal Practice Directions, is now for all courts to use the standard form issued by the Judicial College for recording section 4(2) orders.[6] This form directs the court's attention to all of the following issues, and requires a written note of them to be made:

> (1) The court having heard from the prosecution and defence advocates regarding the making of the order;
>
> (2) The court having directed, where appropriate, that any person directly affected by this order be entitled to apply to vary or discharge it within 24 hours;

[6] As we discussed above at para 2.40 and paras 3.4 to 3.5. The form is reproduced at Appendix B.

(3) The identity of the proceedings which are the subject of the postponement order, and whether the prohibition is purely prospective or also retrospective[7];

(4) Whether the fact of the order having been made is also subject to the reporting restriction;

(5) When the order will cease to have effect, either on a specified date, or on the conclusion of specified proceedings;

(6) The persons on whom the order will be served, including parties to the proceedings, interested media parties, and the trial judge in any linked proceedings which the order is designed to protect; and

(7) The fact that the specific purpose of making the order is to avoid a substantial risk of prejudice to proceedings, including specifying those proceedings which are being protected, and particularising the risk of prejudice which is being avoided.

5.22 Recording of this information is thus already necessary, whether or not an online database of orders is created. The only additional burden of the scheme would be emailing the information, which is already recorded electronically, to the administrator of the online list, and then the uploading of the information onto the internet.

5.23 Although we make no formal recommendation on this topic, we thought consideration could be given to amending the mechanism by which the standard form is communicated by courts to the central administrator. If the standard form for section 4(2) orders (reproduced in its current form in Appendix B) were uploaded onto HMCTS computer systems in a way which allowed data to be entered directly into the central database without the need for transmission by email, this would do away even with the need for the minimal administrative burden of emailing each order. In that case, court clerks could input the terms of court orders directly onto the central database, and the administrator of the online lists could simply paste that information directly from the database into the relevant online lists (either the case name, court and expiry date only for the public list, or the details of the terms of the order itself for the extended list).

5.24 An online database of orders is also already allowed for by the provisions of the existing Criminal Procedure Rules, which provide at rule 16.8(2) that when a court makes or varies a reporting restriction:

The court officer must—

(a) record the court's reasons for the decision; and

(b) as soon as reasonably practicable, arrange for notice of the decision to be (i) displayed somewhere prominent in the vicinity of the courtroom, and (ii) communicated to reporters by such other arrangements as the Lord Chancellor directs.

[7] In the sense of extending to future reporting of matters aired in court before the order was made.

MAINTENANCE OF THE ONLINE LIST

5.25 As the results of our pilot show, the additional administrative burden of administering the basic public list should be small. If our further recommendation for an extended list for validated users was followed, then the additional cost of this would be covered through subscription fees.

5.26 The body responsible for administering the list[8] will require comprehensive access to systems and records regarding case progress through the criminal courts. This is important because one function of the administrator of the list will be the removal of cases once an order ceases to be in force.

5.27 For some orders this task will be straightforward, as the order will bear an expiry date on its face. The use of express expiry dates should be encouraged by the standard form we have just described.[9]

5.28 However, the expiry date of some orders will be contingent upon another event, most commonly the conclusion of a set of current or pending legal proceedings (either the case to which the reporting restriction itself applies, or another related case). This will require access to case progress data, currently in the possession of Her Majesty's Courts and Tribunals Service (HMCTS) in order to know when those proceedings have concluded, and hence when the case to which the order relates can be removed from the list.

5.29 In respect of those orders whose expiry depends on the conclusion of current or pending legal proceedings, checks on the progress of the relevant case should be made frequently, to see whether the order has expired.

5.30 For the avoidance of doubt, it should be stated that if a case remains on the list after an order has expired (which should be the only reason for an incorrect entry, as there is no reason to believe cases will be placed on the list erroneously in the first place), this will not create liability for contempt where no liability would otherwise exist. Liability is only possible where the underlying order is still in force, and errors in the accurate maintenance of the online list can never itself give rise to contempt liability.

[8] Any one of a number of public bodies or private contractors could be tasked with administering this database. This is an operational matter and outside the scope of this report's recommendations.

[9] At para 5.21. Also discussed above at para 2.40 and paras 3.4 to 3.5, and reproduced at Appendix B.

5.31 We recognise that there is an argument that there may be a chilling effect in cases where the administrator fails to promptly remove an order that is in force until the end of proceedings, leading a potential publisher to believe erroneously that the order is still in force and to delay or cancel a report. However, we envisage that the list will prominently inform users that they should contact the relevant court or the administrator to confirm the details of an order. Any chilling effect will only arise where the potential publisher fails to do so. In cases in which the public interest requires that the subject matter of the restriction be reported promptly upon the termination of proceedings,[10] the publisher would be aware of this in advance and would be likely to monitor the status of those other proceedings carefully.

5.32 For those orders which expire on a particular date, this date would appear on the face of the list, and no risk of a chilling effect would occur.

5.33 Whilst there is inevitably some prospect of delays in the removal of cases from the online list, there is no reason to believe cases will be placed on the list erroneously in the first place. Therefore, there is no reason to think that the introduction of the list will create any additional delays to contemporary reporting of cases as they occur (the only reason for such delay will continue to be the existence of a court order, when the high threshold for the making of such an order is satisfied).

5.34 For these reasons we are satisfied that the online list proposed creates no risk of creating liability for contempt where such liability would not otherwise exist, nor does it create any substantial risk of discouraging contemporary reporting of cases not covered by postponement orders.

LEGAL CERTAINTY

5.35 In our discussion of the problems with current law above (at paragraphs 2.50 to 2.54) we pointed out that there is uncertainty about the mental element required for establishing liability for breach of a section 4(2) order. Whilst our practical recommendation cannot resolve this uncertainty, it does improve the fairness of the position.

5.36 If liability for breach of a section 4(2) order requires actual knowledge of that order, then the online list will provide very useful evidence in any contemplated contempt proceedings. If an order was on the online list (the existence of which had been widely publicised) at the time the publication was made, this would often provide evidence from which knowledge could be inferred. Furthermore, we expect that in many cases it would be possible to provide forensic electronic evidence to show that a suspected contemnor had in fact accessed the list. Combined with records of what orders were on the list at the time it was accessed, this would be strong proof of actual knowledge.[11]

[10] For example, if the fact the defendant had previously been arrested or convicted was covered by an order, and this detail would considerably increase the news interest of their acquittal or conviction in the instant case.

[11] It is possible that such evidence would not be available if the user had been using an account under false details.

5.37 On the other hand, if liability can be established by mere reckless failure to take steps to gain knowledge of an order, then the presence of the order on the online list at the time of publication would be likely to be determinative.

5.38 The list would also provide valuable protection to publishers. If an order was not present on the online list at the time of publication, then in the absence of actual knowledge on the part of a publisher (eg because they were in court at the time the order was made) then it would seem very unlikely that recklessness could be established against them. Were our recommendations implemented, we anticipate that a person who has checked that a case did not appear on the online list before reporting on it would have done enough to avoid liability for contempt in most circumstances. Again, the database's electronic records would be valuable evidence of whether the person accessed the list and what orders were on it at the time.

5.39 The small number of orders made,[12] and the minimal administrative burden involved in keeping the list up to date, means that the prospect of a failure to update the list leading to a prejudicial report is small.

5.40 **We recommend that for those orders whose expiry is contingent upon another event, reasonably frequent checks are undertaken by the administrator of the list to ensure that expired orders are removed from the list.**

FUTURE DEVELOPMENT

5.41 We noted above (at paragraph 3.8 and following) that there was strong support from some of our consultees for increasing the scope of the proposed online list to cover other types of reporting restrictions.

5.42 Since our pilot (discussed in Chapter 4) was limited to testing the likely resource implications of section 4(2) orders only, and given the practical concerns expressed by other consultees, our recommendation is to limit the online list, in the first instance, to section 4(2) orders.

5.43 If, as we anticipate, the system works well when limited to section 4(2) orders, then this can be treated as a pilot scheme in itself for a more ambitious system for publicising all reporting restrictions.

[12] Our pilot scheme discussed in Chapter 4 revealed 19 were made over two months across the seven Crown Courts we surveyed (there are 84 Crown Courts in total): see para 4.12 and following. Eleven of the 19 were by the Central Criminal Court in London.

5.44 From discussions with representatives of HMCTS we understand that publication of court reporting restrictions is an issue which is currently under consideration as part of wider plans to replace Court Service IT systems. Under the planned replacement, which HMCTS intends to roll out across the courts of England and Wales in the medium term, data, including information regarding all reporting restrictions, would be automatically available for interested parties when such information is first recorded on case management systems. An automated system of this kind would be extremely welcome, and would clearly be more comprehensive and efficient in various respects than the limited system discussed in this report, which is dependent on a person uploading the information about the order that has been emailed from the court centre.

5.45 For the reasons set out above, and in light of the reassuring results of our pilot scheme, we consider that this system of uploading material for publicising section 4(2) orders remains a valuable interim measure in the short term. Such a system could be set up very quickly, and would provide a valuable resource for prospective publishers in discovering their legal obligations. In the longer term, the system proposed here could represent an important stepping stone towards a more comprehensive system for the publication of all court reporting restrictions, which would clearly be a desirable final outcome.

CHAPTER 6
LIST OF OUR RECOMMENDATIONS

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

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

6.3 We recommend limiting the information displayed on the publicly available online list to the name of the case in which the order has been made, and the date on which the order expires (or if the order expires on the conclusion of another case, rather than on a fixed date, then a record of this fact, and the name of the linked case).

6.4 We recommend that the publicly accessible list of orders be supplemented by an additional restricted database which would contain the terms of section 4(2) orders themselves.

6.5 We recommend that where there are reporting restrictions in place relating to the names of parties to the proceedings, the online list will identify cases by number, with a suitably anonymised case name.

6.6 We recommend that for those orders whose expiry is contingent upon another event, reasonably frequent checks are undertaken by the administrator of the list to ensure that expired orders are removed from the list.

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
14 March 2014

APPENDIX A
THE PILOT METHODOLOGY

A.1 On advice we settled upon the following methodology for choosing the sample courts.

A.2 We removed the Central Criminal Court and Southwark from our list as we were selecting them anyway. We listed the remaining 82 Crown Courts in order of caseload.

A.3 Our sampling fraction was therefore 16.4 (82 divided by 5), so we picked a random number (with one decimal place) between 1.0 and 16.4.

A.4 This was our first court. We then added 16.4 to get our second court, and another 16.4 to get our third court, etc.

A.5 We used the first two digits (the whole number) to dictate which court in the list to take, rather than rounding it to the nearest whole number.

A.6 For example, if our random starting point had been 11.3, then the next four numbers would be 27.7, 44.1, 60.5 and 76.9. Thus, we would have picked the 11th, 27th, 44th, 60th and 76th Crown Courts in the list.

A.7 The random number was 3.5 (chosen by picking numbers from a hat). Using this random number, and the method set out above, Salisbury, Bournemouth, Portsmouth, Bolton and Woolwich were selected.

APPENDIX B
JUDICIAL COLLEGE STANDARD FORM FOR SECTION 4(2) ORDERS

Order under s.4(2) Contempt of Court Act 1981

In the Crown Court at ……...

Regina v …….

Before [His] [Her] Honour Judge ……..

sitting at…….……. on ……..…….

Upon hearing the advocates for the prosecution and for the defendant/s [and a representative of the media]

[And upon the court giving permission to any person directly affected by this order to apply to vary or discharge it within {24} hours of being notified of it]

The court makes an order under section 4(2) of the Contempt of Court Act 1981 as follows:

(1) The publication of any [further] report of [the proceedings] [the following part of the proceedings, namely….] shall be postponed.

(2) [The publication of any report of the making of this order or its terms shall be postponed.]

(3) This order shall cease to have effect [at.… on….] [after the return of the last verdict in the proceedings] [after the return of the last verdict in proceedings on indictment T……..]

(4) The court shall serve a copy of this order as soon as practicable on:

(a) all parties to the proceedings;

(b) A [and B] as representative(s) of the local [and national] media;

(c) [C, being a person known to have had an interest in the proceedings.]

(5) [The court shall send a copy of this order to……and to the trial judge in the case of indictment(s) T……. for consideration of any necessary extension, variation or discharge of this order.]

The specific purpose of making this order is to avoid a substantial risk of prejudice to the administration of justice [in the proceedings] [in

proceedings on indictment T…….], namely that [reports of the evidence given in the proceedings will prejudice the fair trial of proceedings on indictment T…….] [or otherwise state the substantial risk].

…….

Judge

……..

Date

APPENDIX C
SCREEN SHOT OF PART OF THE SCOTTISH LIST OF SECTION 4(2) ORDERS

Contempt of Court Orders

Notices of urgent and other important matters to be brought to the attention of the public and the legal profession will be published on this page. Please click on the relevant link below to view these notices.

Members of the press should note that among the items to be published will be Orders made by courts imposing restrictions on the reporting of court proceedings. These will include Orders made under section 46(1) of the Children and Young Persons (Scotland) Act 1937 and section 4(2) of the Contempt of Court Act 1981.

▼ Orders made under section 4(2) of the Contempt of Court Act 1981.

Orders, postponing publication of reports of proceedings, apply in the following cases. The terms of the order can be obtained by contacting the following:-

If the entry relates to an order made in the High Court of Justiciary, to Justiciary Office in Edinburgh - Tel: 0131 240 6905; Fax: 0131 240 6915.

If the entry relates to an order made in the Court of Session, to the General Department, Court of Session, Edinburgh - Tel: 0131 240 6741; Fax: 0131-240 6746.

If the entry relates to an order made in the Sheriff Court, to the Sheriff Clerk

HMA v John Docherty, High Court of Justiciary, Edinburgh, 24 February 2014

HMA v Martin Hughes and Stacy McAllister, High Court of Justiciary, Edinburgh, 13 February 2014

PF v Andrew McCartney, Sheriff Court, Stirling, 3 February 2014

HMA v Barry William Mearns, High Court of Justiciary, Glasgow, 3 February 2014

HMA v Timothy Morgan and Ahmed Ali, High Court of Justiciary, Glasgow, 4 October 2014

HMA v Christopher O'Shea, Daniel Samuel O'Shea, Lee O'Shea, High Court of Justiciary, Paisley, 28 January 2014

HMA v Barry Hunter, High Court of Justiciary, Paisley, 23 January 2014

PF v Ciaran Wallace, Sheriff Court, Airdrie, 17 January 2014

HMA v Thomas Young, High Court of Justiciary, Edinburgh, 14 January 2014

HMA v Robert Steven Beauly, George Dempster, Linzi Claire Briggs, High Court of Justiciary, Glasgow, 10 January 2014

PF v Ray Anthony Macmillan Chisholm, Sheriff Court, Fort William, 10 January 2014

HMA v Eric McNeil and Kerryann Easton, Court of Session, Edinburgh 7 January 2014

HMA v Anton Duffy, Martin Hughes, Stacey McAllister, 23 December 2013, High Court of Justiciary, Edinburgh

APPENDIX D
EXTRACT: CRIMINAL PRACTICE DIRECTIONS

PART 16 (REPORTING, ETC. RESTRICTIONS)

DIRECTION 16B[1]

16B.1 Open justice is an essential principle in the criminal courts but the principle is subject to some statutory restrictions. These restrictions are either automatic or discretionary. Guidance is provided in the joint publication of the Judicial College, the Newspaper Society, the Society of Editors and Times Newspapers Limited entitled 'Reporting Restrictions in the Criminal Courts'. The current version is the second edition dated October 2009 and is available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/crown_court_reporting_restrictions_021009.pdf (Note that the HMCTS protocol referred to in the guidance has since been updated.)

16B.2 Where a restriction is automatic no order can or should be made in relation to matters falling within the relevant provisions. However, the court may, if it considers it appropriate to do so, give a reminder of the existence of the automatic restriction. The court may also discuss the scope of the restriction and any particular risks in the specific case in open court with representatives of the press present. Such judicial observations cannot constitute an order binding on the editor or the reporter although it is anticipated that a responsible editor would consider them carefully before deciding what should be published. It remains the responsibility of those reporting a case to ensure that restrictions are not breached.

16B.3 Before exercising its discretion to impose a restriction the court must follow precisely the statutory provisions under which the order is to be made, paying particular regard to what has to be established, by whom and to what standard.

16B.4 Without prejudice to the above paragraph,

(a) The court must have regard to Parts 16 and 29 of the Criminal Procedure Rules.

(b) The court must keep in mind the fact that every order is a departure from the general principle that proceedings shall be open and freely reported.

(c) Before making any order the court must be satisfied that the purpose of the proposed order cannot be achieved by some lesser measure eg the grant of special measures, screens or the clearing of

[1] This extract is taken from the Criminal Practice Directions as published on the Judiciary website, available at: http://www.judiciary.gov.uk/JCO%2fDocuments%2fPractice+Directions%2fConsolidated-criminal%2fcriminal-practice-directions-2013.pdf (last accessed 30 January 2014).

the public gallery (usually subject to a representative/s of the media remaining).

(d) The terms of the order must be proportionate so as to comply with article 10 ECHR (freedom of expression).

(e) No order should be made without giving other parties to the proceedings and any other interested party, including any representative of the media, an opportunity to make representations.

(f) Any order should provide for any interested party who has not been present or represented at the time of the making of the order to have permission to apply within a limited period eg 24 hours.

(g) The wording of the order is the responsibility of the judge or bench making the order: it must be in precise terms and, if practicable, agreed with the advocates.

(h) The order must be in writing and must state:

(i) the power under which it is made;

(ii) its precise scope and purpose; and

(iii) the time at which it shall cease to have effect, if appropriate.

(i) The order must specify, in every case, whether or not the making or terms of the order may be reported or whether this itself is prohibited. Such a report could cause the very mischief which the order was intended to prevent.

16B.5 A series of template orders have been prepared by the Judicial College and are available as an appendix to the Crown Court Bench Book Companion; these template orders should generally be used.

16B.6 A copy of the order should be provided to any person known to have an interest in reporting the proceedings and to any local or national media who regularly report proceedings in the court.

16B.7 Court staff should be prepared to answer any enquiry about a specific case; but it is and will remain the responsibility of anyone reporting a case to ensure that no breach of any order occurs and the onus rests on such person to make enquiry in case of doubt.

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