

Criminal Justice & Courts Bill

Contempt of Court (clauses 51, 52 and 54-62)

Introduction

1. The Law Commission launched a review of the law of contempt of court in 2012. Following a consultation¹ on four areas of contempt, the Commission published a report in December 2013 which made recommendations on two of the strands - strict liability contempt by publication and juror contempt. Further reports on contempt by publication and contempt in the face of the court are expected during 2014.
2. These clauses take forward recommendations from the Commission's first report by creating criminal offences for juror misconduct, reforming the law on contempt by publication and introducing related measures. The clauses address parliamentary concerns and modernise the law on contempt, while seeking to ensure that the law and criminal procedures strike a balance between the public interest in the administration of justice, the defendant's right to a fair trial, the rights of publishers to freedom of expression and the rights of jurors.
3. The clauses also apply to jurors serving at a coroner's inquest.

What is the current position?

4. The law of contempt of court allows the courts to act to prevent or punish conduct which tends to impede, prejudice or insult the administration of justice, in relation to a particular case or generally. During 2011 there were a number of cases involving the law of contempt which raised concerns that the current law did not reflect modern developments, particularly in relation to technology, the internet and media behaviour. The issue was raised in Parliament and by the Attorney General. The Government consequently referred the matter to the Law Commission to examine the law of contempt.

What are the proposed changes?

Juror misconduct

5. The clauses create four new offences of juror misconduct. These will reduce the risk of miscarriages of justice arising and modernise the way we deal with juror misconduct. The introduction of these offences will also reduce the overall risk of trials being abandoned and thus avoid the costs of associated appeals and retrials, ensuring courts are used in a more efficient way.

Research by jurors

6. Clause 56 creates a criminal offence which prohibits a member of a jury researching information relevant to the case they are trying. Jurors take an oath or make an affirmation promising to give true verdicts according to the evidence

¹ The Law Commission consulted extensively with a range of judicial and legal practitioners, academics, government departments, public bodies, police organisations, non-governmental organisations, interest groups, the media and members of the public.

presented in court. If there is to be a fair trial it is necessary that they consider only evidence which has been seen and tested by all parties in the courtroom. There have been recent cases where jurors have taken it upon themselves to research the case they are trying, despite a judge's direction to the contrary. Such behaviour has been held to be a contempt of court.

7. Research can be undertaken in different ways, for example by asking questions, searching the internet, or by asking another person to seek the information. Information which may be relevant to the case includes, for example, information about a person involved in events relevant to the case, the judge dealing with the issue, or any other person involved in the trial, whether as a lawyer, a witness or otherwise.

Sharing research with other jurors

8. Clause 57 makes it an offence for a member of a jury intentionally to disclose information to another member of the jury, where the member of the jury carried out research in the process of obtaining the information, and the information has not been provided by the court.
9. Jurors must judge a case solely on the evidence presented in court. The problems created in terms of the fair trial of a defendant, where a juror researches the case, are exacerbated if that research is passed on to other jurors who may then use it as evidence in their deliberations.

Jurors engaging in other prohibited conduct

10. Clause 58 makes it an offence for a member of a jury, trying an issue before a court, intentionally to engage in conduct from which it may be reasonably concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the proceedings on the issue.

Disclosing jury deliberations

11. Clause 59 makes it an offence for a person intentionally to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court, or to solicit or obtain such information.
12. However, there will be occasions when disclosure may be in the interests of justice because there has been an irregularity such as an alleged offence of juror misconduct. This clause therefore allows exceptions so that a juror with real concerns about the fairness of the deliberation process can make disclosure to the trial judge during the trial, or to other specified persons post trial, including the Court of Appeal or a member of a police force. These concerns may need further investigation and ultimately lead to proceedings. The clause therefore sets out broader exceptions to ensure that investigators and prosecutors can receive disclosure from the court and jurors during this process.

Jurors and electronic communication devices

13. Clause 54 creates a discretionary power for a judge to order a juror to surrender their electronic communications device for a period of time while on jury service.

The order must be necessary or expedient in the interests of justice, and be a proportionate means of safeguarding those interests.

Jurors and electronic communication devices: powers of search

14. Where an order has been made for a juror to surrender their electronic communications device, it is important that it can be enforced. Clause 55 therefore sets out that a court security officer must, if ordered to do so by a judge, search a member of the jury in order to determine whether the juror has failed to surrender a device in accordance with the order. If the search reveals a device, the officer must ask the juror to surrender the device. If the juror refuses to do so, the officer may seize it.

Disqualification from jury service

15. Clause 62 adds conviction for a juror misconduct offence to the list of criteria for disqualification of a person from jury service. The period of disqualification would be for ten years. It is right that someone who has been found guilty of an offence should be banned for a period of time from serving as a juror.

Strict Liability Contempt

16. The Contempt of Court Act 1981 provides the statutory basis for strict liability contempt, which holds that a person may be in contempt of court, regardless of intent, for conduct in relation to a publication which tends to interfere with the course of justice, where proceedings are active at the “time of publication”. The term “time of publication” is ambiguous – it can be interpreted either as meaning the “first time of publication” or publication can be understood as the whole period that the material is available for.

17. To protect the fairness of a trial, all seriously prejudicial information should be covered by the strict liability rule, meaning that material published before active proceedings but which is still available to the public should be included within the scope of the rule. Clauses 51 and 52 reform the law on strict liability contempt as contained in the Contempt of Court Act 1981, and make explicit the definition of “time of publication” that has been used in recent case law.² They do so by applying the strict liability rule to publications that are available to the public during active proceedings.

18. However, to prevent too onerous a burden being placed on media organisations to monitor all their online content, the clauses provide a new defence for publishers or distributors. This defence will be available where a publisher or distributor has made material available to the public before active proceedings, and the material remains available at a time when active proceedings commence. However, the defence will no longer be available to a publisher or distributor if the Attorney General notifies them of the existence of such material, which is considered to be so seriously prejudicial that it should be removed from the internet while proceedings are active. If the publisher or distributor doesn't remove the material on receipt of such notification, it is likely that an application

² *R v Harwood* [2012] EW Misc 27 (CC). Recent case law has defined “time of publication” as the entire period during which the material is available on a website from the moment of its first appearance through to when it was withdrawn.

for an injunction for removal of the material will be made, and contempt proceedings brought against the publisher or distributor.

Contempt and the Common Law

Clause 62 also makes clear that creation of the new offences, as detailed, does not affect what constitutes contempt of court at common law. The common law of contempt of court is therefore unaffected by these new provisions.