

Title: Juror misconduct and strict liability contempt by publication IA No: MOJ230 Lead department or agency: Ministry of Justice Other departments or agencies: Attorney General's Office Department for Culture, Media and Sport The Law Commission	Impact Assessment (IA)		
	Date: 05/02/2014		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: general.queries@justice.gsi.gov.uk			

Summary: Intervention and Options	RPC Opinion: Not Applicable
--	------------------------------------

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
£m	£m	£m	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

The consequences of juror misconduct and the availability of prejudicial material online are potentially very serious; miscarriages of justice may arise; giving rise to a risk of the acquittal of the guilty and conviction of the innocent, or may give rise to appeals or aborted trials which prolong the prosecution process and result in substantial costs. There is also a lack of clarity in the legislation for publishers on rules regarding the availability of prejudicial material online, problems which are made worse by the increasing use of the internet and social media. A recent report by the Law Commission has highlighted a number of issues with the current approach of prosecuting juror contempt and the law of strict liability contempt.

What are the policy objectives and the intended effects?

Our overall policy objective is 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. Our proposals seek to make certain types of juror misconduct a criminal offence and reform the law on contempt by publication to regularise the position of publishers of material available to the public on the internet.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing. This represents no change in the current law.

Option 1: Take forward a legislative programme which would create four new juror misconduct offences and make provision for other measures including a notice procedure for temporary removal of prejudicial material from the internet, a discretionary power for a judge to order the temporary removal of electronic communication devices and the disqualification from jury service for 10 years for a person who has been found guilty of a contempt offence.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: Month/2019						
Does implementation go beyond minimum EU requirements?				Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: N/Q

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/Q	N/Q	N/Q

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise costs.

Other key non-monetised costs by 'main affected groups'

There will be some familiarisation costs to the police, prosecuting authorities and the judiciary. It has not been possible to estimate costs to Her Majesty's Courts and Tribunals Service (HMCTS), but assuming that juror misconduct cases heard in the Divisional court (with two or more judges) are costlier than those heard in the Crown court, it is possible that costs to HMCTS may be lower.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/Q	N/Q	N/Q

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise benefits.

Other key non-monetised benefits by 'main affected groups'

There could potentially be a more efficient use of court resources, if fewer trials are stopped because of juror misconduct. The introduction of a notice procedure will reduce burdens on publishers, and bring greater clarity to publishers where they need to remove prejudicial material.

Key assumptions/sensitivities/risks

Discount rate (%)

The provisions are likely to be of widespread interest, particularly to the press following the Leveson Inquiry. Despite being heavily involved in consultation, there is potential that some of the press may take the view that any interference with their publishing rights is unacceptable. Most of the general public are potentially jurors so new offences that might apply to them are likely to be of interest. We have assumed that the numbers of cases would remain broadly similar to now.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Evidence Base (for summary sheets)

Background

1. In 2012 the Law Commission launched a review of the law of contempt of court.¹ Between November 2012 and February 2013 the Commission consulted on four areas concerning contempt - contempt by publication, the impact of new media, juror contempt and contempt in the face of the court - and in December 2013 published a report making recommendations concerning the new media and juror contempt strands.² The Government proposes to take forward recommendations from this report to create four offences of juror misconduct and implement other measures that would tackle the challenges of the new media.
2. The Commission's review was conducted against a background of legal cases and concerns that the law on contempt had not adapted appropriately to reflect modern developments, particularly in relation to the internet and media behaviour. These issues were raised in a number of speeches by the Attorney General³ and in Parliament in December 2011.⁴ In response to concerns expressed by peers, Lord McNally referred to the problems with contempt law and said the Government had referred the matter to the Law Commission. He added that the Government would 'approach any Law Commission report with a due sense of urgency'.⁵ The review thereafter was prioritised by the Law Commission.
3. This impact assessment draws on the material presented by the Law Commission during its consultation and in its report, supplementing the evidence as necessary to reflect the reform proposals that the Government is putting forward.

Problem under consideration

4. The law of contempt of court at common law allows the courts to 'act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally'. The law therefore needs to protect the right of a defendant to a fair trial and protect the public's interests in the administration of justice while also ensuring a proper balance with other rights including the right of publishers to freedom of expression and the rights of jurors. There are two main areas where we seek to reform the law – these are juror misconduct and strict liability contempt.

Juror Misconduct

5. Jurors take an oath or make an affirmation promising to give true verdicts according to the evidence presented in court – it is important, if there is to be a fair trial, that they consider only evidence which has been seen and tested by all parties in the courtroom. It is also important that the process of deliberation is protected – that it is seen to be fair and that jurors do not discuss the case with or disclose deliberations to non-jurors during or after the trial. Such discussion risks influencing deliberations, bringing in views from those who have not heard the evidence and of disclosing information which is confidential to the jury.

¹ The Law Commission, Contempt of Court Consultation, available: <http://lawcommission.justice.gov.uk/consultations/contempt.htm>

² The Law Commission, Contempt of Court (1): Juror Misconduct and Internet Publications, http://lawcommission.justice.gov.uk/publications/contempt_of_court_juror_misconduct.htm

³ See "Contempt of Court, Why it still matters", text available: <https://www.gov.uk/government/speeches/contempt-of-court-why-it-still-matters>, "Contempt – A Balancing Act" – text available: <https://www.gov.uk/government/speeches/contempt-a-balancing-act> Speech, "Trial by Google? Juries, social media and the internet", text available:

<https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet>

⁴ See the Parliamentary Question raised by Baroness Quin, answered by Lord McNally: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111214-0001.htm#11121475000783>

⁵ Hansard, 14 Dec 2011 : Column 1275, available: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111214-0001.htm>

6. The consequences of juror misconduct are potentially very serious; miscarriages of justice may arise; it risks acquittal of the guilty and conviction of the innocent; and it may give rise to appeals or aborted trials which prolong the court process and result in substantial costs. In one recent case, a trial that had lasted several weeks had to be abandoned at a cost for prosecution and defence of over £300,000⁶ and this excludes other costs, such as to the police and Her Majesty's Courts and Tribunals Service (HMCTS). In addition, retrials mean that victims and witnesses have to give evidence again (perhaps at considerable additional distress), defendants may be remanded for longer in custody (which has costs to the justice system) and overall a substantial amount of time is wasted, including that of jurors who served during the aborted trial.
7. Misconduct by jurors is currently treated as contempt of court. The law of contempt of court allows the courts to act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice, in relation to a particular case or generally. The present procedure for dealing with jurors in contempt involves proceedings being brought by the Attorney General or the court proceeding on its own motion. Defendants are currently subject to civil instead of criminal procedures⁷ with cases being heard in the Divisional Court instead of in a criminal court (although the maximum penalty is two years imprisonment). The Divisional Court is a court which sits at the Royal Courts of Justice in London and consists of at least two judges, usually one from the High Court and one from the Court of Appeal (usually the Lord Chief Justice or the President of the Queen's Bench Division).
8. There have been four recent cases concerning juror contempt using the internet, and in each case the defendant was found to have committed contempt and received a sentence of imprisonment.⁸ The Law Commission review concluded that there were a number of problems with the use of contempt proceedings. At present, the scope of some contempt's depends on the specific form of words used by the judge when giving directions to the jury. It is preferable that all courts operate in the same way. Although this might be addressed by standardising processes, the Commission's view was that it would be better done through creating criminal offences to prosecute the misconduct. The Law Commission also noted that there are procedural advantages resulting from the creation of a criminal offence; a criminal prosecution process would allow for the use of police investigatory powers, and ensure clarity on the application of the Bail Act 1976.
9. The recent cases all involved use of the internet which provides easy and rapid access to a vast amount of information and makes it easy to communicate with others, possibly large numbers of people. A large proportion of jurors will have access to the internet (according to Ofcom, 80% of households have internet access⁹) and it is increasingly an essential part of people's lives. It would not be reasonable to prevent jurors from accessing the internet at all.

Strict Liability Contempt

10. However, there is a risk that jurors will come across seriously prejudicial information about the case they are trying without actively searching for it and this will affect their consideration of the case with the same consequences as if the juror had researched the case. Any attempt to remove or restrict such material raises obvious issues of interference with freedom of expression and there are practical difficulties in doing so.

⁶ *Attorney General v Beard* [2013] EWHC 2317 (Admin). Paragraph 39 of the judgement outlines that the cost of the defence amounted to £119,712 and the prosecution costs had been between £190,000 and £200,000. The case was abandoned due to internet research undertaken by Mr Beard who typed the names of the defendants of the case he was trying into Google.

⁷ Procedures fall under the Civil Procedure Rules Part 81.

⁸ These cases are: *Attorney General v Fraill and Sewart* [2011] EWCH 1629 (Admin), *Attorney General v Dallas* ([2012] EWHC 156 (Admin), [2012] 1 WLR 991), *Attorney General v Beard* [2013] EWHC 2317 (Admin), *Attorney General v Davey* [2013] EWHC 2317 (Admin)

⁹ For further information see: <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr13/internet-web/>

11. Changes in technology and recent cases have highlighted challenges in relation to the law of strict liability contempt. The Contempt of Court Act 1981 provides the statutory basis for strict liability contempt which holds that a publication may be in contempt of court, regardless of intent, for conduct which tends to interfere with the course of justice. 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.” Strict liability contempt can be committed only where the proceedings in question are “active” at the “time of publication,” as defined by the 1981 Act. 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. If time of publication means the “first time of publication” then that would mean that internet publications published before active proceedings are not covered by the Act. Alternatively, if publication was understood as the longer period, they would be covered.
12. 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,¹⁰ meaning that the strict liability rule applies to material published online that remains available, even where it was first published in advance of active proceedings. However this understanding is not on a statutory footing, and therefore may be subject to different subsequent interpretations. To protect the fairness of a trial we would want all seriously prejudicial information to be covered by the strict liability rule, meaning that we would want to include material published before active proceedings within the scope of the rule. To do so we need to adopt the definition of “time of publication” that has been used in recent case law. However, in defining “time of publication” as the period that the material is available for, there are concerns that this places too onerous a burden on media organisations to monitor the content of their online archives to ensure that material contained there does not relate to proceedings that have recently become ‘active’. It would be a continuous burden on publishers to monitor their historic publications and monitor all active proceedings in order to prevent them from falling innocently into contempt.

Rationale for intervention

13. The conventional economic approach to government intervention, to resolve a problem, is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing interventions (for example, waste generated by misdirected rules). In both cases the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (for example, to reallocate goods and services to more needy groups in society).
14. In this case intervention is based on both efficiency and equity reasons. Legislation creating offences of juror misconduct aims to reduce the overall risk of trials being abandoned and thus avoid the costs of associated retrials; ensuring courts are used in a more efficient way. Reform also has the potential to reduce the number of appeals and, in addition, there could also be a reduced risk of miscarriages of justice arising. Legislating will ensure that the procedure for dealing with these offences will be clear and dealt with in criminal courts. Reform both of juror contempt and strict liability contempt would provide better equity by ensuring an appropriate balance between the rights of those concerned.
15. Our provisions change the law on strict liability by creating a new defence available to publishers or distributors. This will operate by means of a notice procedure (that is, an efficient process of notifying publishers or distributors that they must remove an online publication that had been available prior to active proceedings). This would reduce potential burdens on publishers, as it would remove the need to continually check online archives for prejudicial material.

Policy objectives

¹⁰ *R v Harwood* [2012] EW Misc 27 (CC)

16. Our overall policy objective is 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. We also seek to ensure that the law operates effectively in relation to new technology and social media. To do this we propose to:

- make certain types of juror misconduct a criminal offence so as to provide potential defendant jurors with the safeguards available under the Police and Criminal Evidence Act 1984 and the ordinary criminal procedure rules and to provide for full investigatory powers to ensure that cases can be brought;
- reform the law on contempt by publication to clarify the temporal scope of the strict liability rule contained in the Contempt of Court Act 1981;
- provide a new defence for publishers or distributors, by way of a notice procedure in the Contempt of Court Act 1981, by which the Attorney General can notify publishers or distributors of material that was available before active proceedings commenced, which is considered to be so seriously prejudicial that it should be removed from the internet while proceedings are active.

Main groups affected by the proposed reforms

17. The main groups affected are jurors, media and internet organisations and those who use modern media. Defendants, criminal justice practitioners and other justice practitioners including police, prosecutors, judiciary, coroners, lawyers, those administering legal aid and concerned with offender management will also be affected through their involvement in relevant proceedings and processes.

Description of options considered

Option 0: Do nothing.

Juror Contempt

18. The current law regarding juror contempt is held both in the common law and the Contempt of Court Act 1981. Section 8(1) of the Contempt of Court Act 1981 makes it a contempt for a juror to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." Since 2011, there have been two recent cases on this form of contempt.¹¹ There are also a number of other behaviours that give rise to contempt – these include trying a case not according to the juror's oath,¹² seeking extraneous information about the case¹³ (including online research) and displaying bias.¹⁴ Those found guilty of contempt are liable to up to two years imprisonment or a fine.¹⁵

19. The present procedure for dealing with jurors in contempt involves proceedings being brought by the Attorney General or the court proceeding on its own motion.¹⁶ This procedure falls under the Civil Procedure Rules part 81 and will normally be brought by the Attorney General before the Divisional Court. This is a court which sits at the Royal Courts of Justice in London and consists of at least two judges: usually one from the High Court and one from the Court of Appeal (usually the Lord Chief Justice or the President of the Queen's Bench Division). The civil rules of evidence apply, although

¹¹ *Attorney General v Fraill and Sewart* [2011] EWHC 1629 (Admin), *R v Stephen Pardon* [2012] EWHC 3402 (Admin)

¹² *Attorney General v Dallas* ([2012] EWHC 156 (Admin), [2012] 1 WLR 991)

¹³ *Attorney General v Dallas* ([2012] EWHC 156 (Admin), [2012] 1 WLR 991)

¹⁴ *Attorney General v Beard* [2013] EWHC 2317 (Admin)

¹⁵ Section 14 of the Contempt of Court Act 1981.

¹⁶ In some cases a judge will deal with contempt by a juror straight away, however when a more detailed investigation is needed, a judge will refer this to the Attorney General. For example see *Attorney General v Beard* [2013] EWHC 2317 (Admin)

the defendant is entitled to the enhanced fair trial provisions of Article 6(2)¹⁷ and 6(3)¹⁸ of the European Convention of Human Rights. The only right of appeal is to the Supreme Court.

Strict Liability Contempt

20. The current legislation governing contempt by publication is found in sections 1-7 of the Contempt of Court Act 1981. Strict liability contempt can be committed only where the “proceedings in question” are “active” at the time of publication.¹⁹ Recent case law has defined “time of publication” as including the entire time that the material is available.²⁰ As noted, there are concerns that this places too onerous a burden on media organisations to monitor the content of their online archives.
21. The court may deal with the matter on its own motion, but generally the case is referred to the Attorney General. Prejudicial information is often brought to the attention of the Attorney General by those who are prosecuting or defending a particular case. Where contempt by publication arises, the Crown Court may issue an injunction under s.45(4) of the Senior Courts Act 1981 to remove the prejudicial material, and action can then be initiated by the Attorney General for contempt proceedings. Such proceedings are brought in the Divisional Court.

Option 1: Create juror misconduct offences and make provision for other measures including a notice procedure for temporary removal of prejudicial material from the internet

New juror misconduct offences

22. Option 1 would take forward a package of legislative provisions that would create four new offences of juror misconduct:
- juror research, covering intentional seeking of information relevant to the case being tried, whether through an internet search or by other means (“research” offence);
 - sharing research with other jurors, that is the intentional disclosure of information gained through research. The offence applies to a juror who carried out the research and passes it on (“sharing” offence);
 - engaging in other conduct prohibited to jurors. Specifically, this will cover conduct (such as expressing bias) where it may reasonably be concluded that the juror intended to try the case other than on the basis of the evidence (“bias” offence);
 - disclosing the jury deliberations. This in effect replaces section 8 of the Contempt of Court Act 1981 with a statutory criminal offence (“disclosure” offence).

The offences would be created for the criminal and civil courts in the Juries Act 1974 and for Coroners’ Courts in the Coroners and Justice Act 2009.

¹⁷ Article 6(2) of the European Convention of Human Rights provides that an individual charged with a criminal offence shall be presumed innocent until proved guilty according to law.

¹⁸ Article 6(3) of the European Convention of Human Rights provides individuals with the following minimum rights: Article 6(3)(a) to be informed promptly, in a language understood and in detail, of the nature and cause of the accusation against him, Article 6(3)(b) to have adequate time and the facilities for the preparation of defence, Article 6(3)(c) to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require, Article 6(3)(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, Article 6(3)(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

¹⁹ Most criminal proceedings become active from the time an arrest warrant is issued or at the point of arrest and cease to be active when the defendant is acquitted or sentenced (see Schedule 1 of the Contempt of Court Act 1981).

²⁰ *R v Harwood* [2012] EW Misc 27 (CC)

23. The offence would be indictable only (heard in the Crown Court) and the consent of the Attorney General would be needed to prosecute. A person guilty of any of these offences would be liable, on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both). The offences will apply in England and Wales.

Other measures

24. Option 1 also makes provision for several other measures:

- creates a discretionary power for a judge to order for the temporary removal of electronic communications devices from jurors when deliberating and at other times.²¹ Appropriate enforcement arrangements will be in place;
- adds conviction for a juror misconduct offence during the last 10 years to the list of criteria for disqualification of a person from jury service in Schedule 1 of the Juries Act 1974;
- makes changes to the Contempt of Court Act 1981, including defining 'time of publication' as the time for which the publication is available to the public and reforming the defences available to reflect this;
- creates a new defence for publishers or distributors, by way of a notice procedure, by which the Attorney General can notify publishers or distributors where prejudicial material is available on the internet once active proceedings on a case have begun, with the intention that the publisher will then remove the material.

Monetised and non-monetised costs and benefits of each option (including administrative burden);

25. Option 0: If no changes are made to the law on contempt of court, we would expect similar numbers of cases. Although internet use continues to proliferate, cases are currently very rare and it is not expected that numbers would increase significantly. Cases of contempt by publication are also rare and we do not expect an increase in the number of cases.

26. Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1:

Costs

Juror Misconduct

27. The behaviour being made subject to the new criminal offences is already covered by common law contempt. The main difference would be the manner in which the misconduct was tried, and the procedures that would apply. Because of this reason, we do not expect there to be any difference in the number of cases tried. This view is supported by the Law Commission and the Attorney General's Office (AGO).

²¹ Subject to the judges discretion.

28. For the purposes of this analysis, the four offences of juror misconduct (research, sharing, disclosure and bias) are treated as interchangeable. Sentencing penalties are the same for each offence²² and we have no reason to believe that any of the offences will be considered more serious than the others or that there are any other special features.
29. The costs will fall principally on the criminal justice system and will fall on the police, prosecutors, courts, legal aid, probation and prisons. However, when compared to the current position (Option 0), costs associated with the proposed provisions (Option 1) are likely to remain at a similar level, or possibly reduce if there is any deterrent effect, as current proceedings involve most of these agencies already.
30. The volume of cases is likely to be low based on current levels. We are aware of five relevant contempt cases involving juror misconduct in the last three years.
- 2011 *Attorney General v Fraill & Sewart*²³ (Contempt under Section 8(1) of the Contempt of Court Act 1981, eight months imprisonment)
 - 2012 *Attorney General v Dallas*²⁴ (online research, served three months imprisonment²⁵)
 - 2012 *R v Stephen Pardon*²⁶ (Contempt under Section 8(1) of the Contempt of Court Act 1981, four months imprisonment)
 - 2013 *Attorney General v Beard*²⁷ Beard (online research, two months imprisonment), and *Attorney General v Davey*²⁸ (displaying bias online, two months imprisonment)

Four of the five cases involved use of the internet. Further detail of these cases is provided in Annex A.

31. In cases where a jury irregularity²⁹ occurs and is drawn to the attention of the trial judge, the judge will first consider whether the juror needs to be isolated from the rest of the jury. The judge will then consult with the prosecuting and defending parties, and invite submissions to establish the facts of what has occurred. The judge has numerous options – for example where a jury irregularity occurs, dependant on the facts of the case the trial may continue, the juror may be discharged or the full jury may be discharged. Where the contempt is very minor, it may be dealt with by the judge.³⁰ Where it is not appropriate for the behaviour to be dealt with by the trial judge, it will be dealt with by the Attorney General.
32. In this case, an investigation by the police may be appropriate to clarify the factual position and gather evidence. When the investigation is complete, the police will report to the Attorney General through the allocated AGO lawyer. If it appears that a contempt may have been committed, the Attorney General will consent to a prosecution and hand the file to the Crown Prosecution Service (CPS), or he may choose to prosecute the case himself.
33. It was noted by the Law Commission that it is unclear whether legal aid is available for contempt cases,³¹ however with this option legal aid will be available as the offence will be indictable only.
34. Currently, cases of juror contempt are heard in the Divisional Court, with at least two judges. The new criminal offences would be indictable only, meaning they would be heard in the Crown Court, with only one judge and a jury. We do not have information on the costs per sitting day in the Divisional Court, but based on the assumption that the judicial costs for at least two High Court

²² A person guilty of any of these offences is liable, on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both). The offences will apply in England and Wales.

²³ [2011] EWCH 1629 (Admin)

²⁴ [2012] EWHC 156 (Admin), [2012] 1 WLR 991

²⁵ [2012] EWHC 156 (Admin), [2012] 1 WLR 991, paragraphs 47 & 48

²⁶ [2012] EWHC 3402 (Admin)

²⁷ [2013] EWHC 2317 (Admin)

²⁸ [2013] EWHC 2317 (Admin)

²⁹ Please see: Jury Irregularities in the Crown Court: a Protocol issued by the President of the Queen's Bench Division, available http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/jury_irregularities_protocol.pdf. A jury irregularity is anything that may prevent a juror, or the whole jury, from remaining faithful to their oath or affirmation as jurors to 'faithfully try the defendant and give a true verdict according to the evidence'.

³⁰ Section 2 of Part 62 of the Criminal Procedure Rules

³¹ "Criminal proceedings" for which legal aid is available are defined under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This definition covers only contempts committed in the face of the court (s 14(g)), and although "other proceedings... may be prescribed", other types of contempts do not appear to have been so prescribed.

judges would be higher than the cost per sitting day for a Crown Court judge (and jury), then it is possible that the costs per case may in fact be lower (as also indicated by the Law Commission). For example, the average judicial cost per sitting day in the Crown Court is £1,000 in 2013/2014 prices,³² and this includes just one judge, instead of two judges.

35. Data provided by the AGO regarding the five cases previously mentioned, suggests that the average cost to the Attorney General to prosecute a juror contempt case is £16,300. However, this figure represents the costs of counsel's legal fees, and does not include court costs. Under this option, the Attorney General would still decide whether to prosecute a juror, and either the CPS or the Attorney General would prosecute in court. If more cases were prosecuted by the CPS than by the Attorney General, it is possible that prosecuting costs could be lower,³³ but continuing work on this will be carried out during the passage of the bill.
36. As the maximum penalty for the new offences would be the same as the existing ones, we assume that the average custodial sentence length would not change. In this case, there would be no additional costs for prison and probation.
37. There would also be familiarisation costs for the police, prosecuting authorities³⁴ and the judiciary.

Removal of electronic communication devices

38. HMCTS policy and local court practice, as ordered by judges, is to prohibit electronic communication devices already during deliberations, but this is not consistently applied in courts.³⁵ With the introduction of discretionary legal powers, we would therefore expect very little impact in terms of additional costs as arrangements will be enforced by existing court security officers, appropriate facilities are generally available and compliance levels of individual jurors are assumed to be high.

Disqualification

39. Given the relatively few cases expected, we estimate the impact from disqualification of jurors for 10 years will be minimal³⁶, though for the juror concerned it underlines the seriousness of their conduct. Increasing the number of disqualifications from jury service would not result in a change of the number of jurors supplied to court, as the latter is dependent on the rules on juror eligibility.³⁷

Strict Liability Contempt

40. The notice procedure reduces the potential burden on publishers though there are some overheads on the Attorney General's Office from administration of the procedure, which have not been quantified. The notice procedure would allow the Attorney General to put a publisher on notice that relevant proceedings have become "active", and the Attorney General would locate or be notified of the relevant publication which should be removed. If after such notice, the publisher did not remove the material, following a hearing the judge would have the power to order the temporary removal as under the current law if he or she was of the view that the strict liability test was met in the circumstances.

³² HMCTS Annual Report and Accounts 2012-13, available at <http://www.justice.gov.uk/downloads/publications/corporate-reports/hmcts/2013/hmcts-annual-report-2012-13.pdf> 2012/13 costs were updated to 2013/14 in line with the GDP deflator available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266322/GDP_Deflators_Autumn_Statement_December_2013_up_date_v2.xls

³³ For example, the weighted average CPS cost for a Crown Court case, including pre-charge decision costs but excluding advocacy, is £1,220. In addition average CPS advocacy costs for a Crown court case across all case outcome types of the offence type "Offences against public justice and similar offences" are estimated at £650 giving a total CPS cost of £1,870. The current CPS costs (excluding advocacy) of £1,220 are based on Activity Based Costings (ABC), the primary purpose of which is resource distribution. The key limitation of the ABC model is that it is built purely on staff time and excludes accommodation and other ancillary costs (e.g. those associated with complex cases and witness care). It also relies on several assumptions. This could mean there is a risk that costs are underestimated. For further information about how CPS ABC costs are calculated please see the following CPS guidance (CPS, 2012): http://www.cps.gov.uk/publications/finance/abc_guide.pdf. Note that the CPS costs are subject to change pending further work to provide more robust costs estimates.

³⁴ Including the Crown Prosecution Service.

³⁵ Law Commission, Consultation Paper No 209, Contempt of Court, Consultation Paper, Paragraph 4.9, available http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf

³⁶ In addition, MoJ internal analysis suggests that the proportion of registered voters in England and Wales aged 18-75 who would be summoned for jury service on two or more occasions over a ten year period would be very low, approximately 4%.

³⁷ For example, those who have been in prison for the last 10 years are not eligible for jury service, <https://www.gov.uk/jury-service/overview>

41. Four strict liability cases of contempt by publication have been brought by the AGO since 2009.³⁸ Only one of these cases was an internet case³⁹ – the papers involved removed the article within hours.
- 2011 *HM Attorney General v Associated Newspapers Ltd & Anor* [2012] EWHC 2029 (Admin) (found guilty of contempt under Section 2 Contempt of Court Act 1981, financial penalty)
 - 2011 *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin) (found guilty of contempt under Section 2 Contempt of Court Act 1981, financial penalty)
 - 2012 *HM Attorney General v The Times Newspapers Ltd* [2012] EWHC 3195 (Admin) (found not guilty under Section 2 Contempt of Court Act 1981)
 - 2013 *Attorney-General v (1) MGN Limited (2) News Group Newspapers Ltd* [2011] EWHC 2074 (Admin) (found guilty of contempt under Section 2 Contempt of Court Act 1981, financial penalty)

Further detail of these cases is provided in Annex B.

42. The volume of cases going forward is likely to be low based on current levels.
43. The AGO are aware of only two potential cases where the notice procedure would have been appropriate during the last two years. Had the notice procedure been available they would not expect the cases to end in prosecutions as they would expect the mainstream media to comply with the notices (as they do now with advisory notices which the AGO sometimes issue when proceedings are active). Even if the press disagree with a notice, based on experience, the AGO would expect that publishers would be likely to comply in order to avoid any possibility of prosecution for contempt. Whilst it is possible that individual tweeters etc may be more likely to refuse to comply, the AGO view it as unlikely that they will meet the test for a notice in the first place, as they would have to have enough followers for their tweets to create a substantial risk of serious prejudice.
44. The changes being made will have minimal cost implications since cases are expected to be rare and would be administered by the AGO. Data from the AGO regarding the four cases previously mentioned, suggests that the average cost to the Attorney General to prosecute a strict liability case is £43,000. However, this figure represents the costs of counsel's legal fees, and does not include court costs. In some cases, those found guilty of strict liability contempt have been ordered to pay costs to the Attorney General to cover his services.⁴⁰
45. Where a contempt does arise it would be handled in the normal way, through a court order to remove the prejudicial material (at minimal cost since it would be done as part of existing proceedings) and action by the Attorney General by proceedings for contempt.

Benefits

46. The creation of the new criminal offences means that it will not be necessary to rely on consistency between judges when giving directions to jurors. The offence will be applied consistently in courts everywhere. Jurors will be notified prior to the trial about their obligations as a juror, including guidance on conduct.
47. There could potentially be a more efficient use of court resources, if fewer trials have to be stopped or appealed because of juror misconduct. In terms of the number of potential cases of juror misconduct, despite the increasing use of the internet and social media, there may be a reduction in the number of cases, due to clearer guidelines and a deterrence effect of new criminal offences. In addition, the effect of strict liability contempt could help reduce the availability of relevant material.

³⁸ These cases are: *Attorney-General v (1) MGN Limited (2) News Group Newspapers Ltd* [2011] EWHC 2074 (Admin), *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin), *HM Attorney General v Associated Newspapers Ltd & Anor* [2012] EWHC 2029 (Admin) and *HM Attorney General v The Times Newspapers Ltd* [2012] EWHC 3195 (Admin)

³⁹ *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin)

⁴⁰ In the case of *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin) it was held that alongside a financial penalty, the two newspapers were liable to pay the Attorney Generals costs of £28,117

Caution is needed in terms of the deterrence effect, as the evidence on deterrence is mixed, and at best weak.

48. The Law Commission suggests that it will also bring clarity regarding the applicable investigative process, and allows for procedural benefits including applying the rights and powers under the Police and Evidence Act 1984, the Bail Act 1976, the usual rules of evidence and prosecution, criminal disclosure obligations on the prosecution and the application of the criminal legal aid regime.
49. Assuming that cases heard in the Divisional Court are more costly than those heard in the Crown Court, it is possible that costs to HMCTS may be lower.
50. The introduction of a notice procedure will also bring greater clarity to publishers where they need to remove prejudicial material. The notice procedure will also ensure that the law does not place too onerous a burden on media organisations to monitor the content of their online archives.

Risks and assumptions

51. The main assumptions and risks are summarised below.

Assumption	Risk
We assume the number of contempt cases tried will not change.	<ul style="list-style-type: none"> It is possible that availability of an offence could lead to more prosecutions. Jurors may be more willing to report cases where they suspect misconduct and prosecutors may be more willing to prosecute since the normal criminal process is available,⁴¹ with more certainty on rights. However, this may be offset by jurors being more reluctant to engage in misconduct which could reduce the number of cases and the consequent costs and disbenefits of abandoned trials or miscarriages of justice.
We assume that the judicial costs for at least two High court judges would be higher than the cost per sitting day for a Crown Court judge (and jury).	<ul style="list-style-type: none"> It is unlikely that the cost of two judges would be higher than one judge and a jury.
We assume that if more cases were prosecuted by the CPS than by the Attorney General, then prosecuting costs could be lower.	<ul style="list-style-type: none"> The current CPS costs (excluding advocacy) of £1,220 are based on Activity Based Costings (ABC), the primary purpose of which is resource distribution. The key limitation of the ABC model is that it is built purely on staff time and excludes accommodation and other ancillary costs (e.g. those associated with complex cases and witness care). It also relies on several assumptions. This could mean there is a risk that costs are underestimated. For further information about how CPS ABC costs are calculated please see the following CPS guidance (CPS, 2012): http://www.cps.gov.uk/publications/fin

⁴¹ The Law Commission has assessed that the procedural benefits include applying the rights and powers under the Police and Evidence Act 1984, the Bail Act 1976, the usual rules of evidence and prosecution, criminal disclosure obligations on the prosecution and the application of the criminal legal aid regime.

	ance/abc_guide.pdf. Note that the CPS costs are subject to change pending further work to provide more robust costs estimates.
We assume that the Average Custodial Sentence Length (ACSL) given for the new offences will be the same as for the current offences.	<ul style="list-style-type: none"> • There is a risk that the ACSL given could be longer or shorter. This would have an impact on prison and probation costs.
We assume that the volume of cases for strict liability cases of contempt by publication will be low based on current levels.	<ul style="list-style-type: none"> • We expect reduced risks by clarifying and rationalising the law, particularly in relation to publication on the internet.

Direct costs and benefits to business calculations

52. We do not expect there to be additional costs to business from Option 1 and potentially there could be a cost reduction since the need to monitor internet site content to stay within the law is removed. The Attorney General's Office will provide a filter against vexatious requests for removal of alleged prejudicial material and this is likely to reduce the possibility of action in the courts and hence costs for the parties involved.

Wider impacts

53. These changes are likely to be of interest to press and media organisations, the legal profession and to the public, many of whom are possible future jurors.

Summary and preferred option with description of implementation plan

54. Our preferred option is Option 1. The Government believes that intervention is needed based on the Law Commission's recommendations to modernise our approach to contempt of court.
55. Option 1 will take forward a legislative programme which would create four new juror misconduct offences and make provision for other measures including a notice procedure for temporary removal of prejudicial material published before proceedings became active, a discretionary power for a judge to order the temporary removal of electronic communication devices and the disqualification from jury service for 10 years of a person who has been found guilty of a contempt offence.
56. The creation of the new criminal offences will modernise the way we deal with juror misconduct. The introduction of a notice procedure will also bring greater clarity to publishers where they need to remove prejudicial material and will also ensure that the law does not place too onerous a burden on media organisations to monitor the content of their online archives. There are not expected to be significant costs, and there could be savings, resulting from the introduction of these provisions. Further work assessing the costs and benefits will continue to be done during the passage of the Bill.
57. Overall, we believe that intervention is necessary to ensure that the law strikes 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. The consequences of juror misconduct are potentially very serious; miscarriages of justice may arise, risking acquittal of the guilty and conviction of the innocent, or may give rise to appeals or aborted trials which prolong the trial process and result in substantial costs.

Annex A

Juror Misconduct – Case Overview

*Attorney General v Fraill and Sewart*⁴²

The juror, Fraill, was found guilty of contempt of court as she communicated with one of the defendants through the internet and conducted an online discussion on Facebook about the case when the jury deliberations were ongoing. This conduct contravened the provisions of section 8(1) of the Contempt of Court Act 1981. She was also guilty of contempt of court for conducting research on the internet into the defendants, for the purpose of obtaining further information of possible relevance to the issues at trial.

*Attorney General v Dallas*⁴³

The juror, Dallas, was found guilty of contempt of court as she conducted internet research about the case she was trying and thereafter disclosed the results of that research to her fellow jurors. The judgement set out four elements which were used to establish the contempt in cases where there had been deliberate disobedience to a judge's direction or order: 1) the juror knew that the judge had directed that the jury should not do a certain act, 2) the juror appreciated that that was an order, 3) the juror deliberately disobeyed the order, and 4) by doing so the juror risked prejudicing the due administration of justice.

*R v Stephen Pardon*⁴⁴

The juror, Pardon, approached one of the defendants of the case he was trying and discussed the jury's deliberations with him. The jury was unable to reach a verdict and was discharged. The juror was found guilty under Section 8(1) of the Contempt of Court Act 1981, as it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

*Attorney General v Beard*⁴⁵

The juror, Beard, undertook internet research on the case he was trying by typing the names of the defendants into Google. The Court concluded that Beard's use of the internet to find out information about the case was "an act which created a real risk of interference with the administration of justice" and which "was specifically intended by him to interfere with the administration of justice".

*Attorney General v Davey*⁴⁶

The juror, Davey, posted a status on Facebook about the case he was trying. The Court concluded that Davey had intentionally committed an act which created a real risk of interference with the administration of justice. He was found to have deliberately disregarded the duties he had undertaken as a juror to act fairly towards the defendant and to decide the case on the evidence. He had also discussed the case with people other than his fellow jurors, when he had known that this was something he was not meant to do.

⁴² *Attorney General v Fraill and Sewart* [2011] EWCH 1629 (Admin)

⁴³ *Attorney General v Dallas* ([2012] EWHC 156 (Admin), [2012] 1 WLR 991)

⁴⁴ *R v Stephen Pardon* [2012] EWHC 3402 (Admin)

⁴⁵ *Attorney General v Beard* [2013] EWHC 2317 (Admin)

⁴⁶ *Attorney General v Davey* [2013] EWHC 2317 (Admin)

Annex B

Strict Liability – Case Overview

*Attorney-General v (1) MGN Limited (2) News Group Newspapers Ltd*⁴⁷

Two newspapers were charged with contempt after publishing stories about Christopher Jeffries, who was initially arrested on suspicion of murder, but was released from custody after another individual admitted the murder and was charged. One article conveyed the impression that Mr Jeffries was linked to two additional crimes of paedophilia and an unresolved murder. Another article suggested that Mr Jeffries spied on his tenants in their bedrooms and elsewhere and had previously stalked an individual. It was held that all publications constituted contempt under s2(2) of the Contempt of Court Act 1981 as they created a substantial risk that the course of justice would be seriously impeded or prejudiced. Both papers were ordered to pay a financial penalty.

*HM Attorney General v Associated Newspapers Ltd & Anor*⁴⁸

Two newspapers were charged with contempt after publishing articles following the conviction of Levi Bellfield for one count of murder and kidnapping. The articles published outlined this conviction, and background information about the defendant which had not been put to the jury. At this time, a separate charge of kidnapping was still to be determined by the jury. It was held that the published material was highly prejudicial, and it created a real risk that the jury would have thought the additional information was relevant to the remaining count. The two newspapers were both found guilty under s2(2) Contempt Court Act 1981.

*HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd*⁴⁹

This was the first time a UK court considered whether an online publication by two national newspapers was in contempt of court under s2(2) Contempt Court Act 1981. Ryan Ward was being prosecuted for murder. On the evening of jury deliberations, two newspapers published articles about Ward, accompanied by a picture of Ward holding a pistol in his right hand with his index finger on the trigger whilst he indicated firing a hand gun with his left hand. It was held that there was a substantial risk that the empanelled jurors might see the photograph, and there was therefore a substantial risk of serious prejudice, namely that the jury would have had to be discharged, had they seen the photo. Both parties were therefore found guilty of contempt under s2(2) Contempt Court Act 1981.

*HM Attorney General v The Times Newspapers Ltd*⁵⁰

A newspaper was charged with contempt after publishing an article about Nicole Edgington two days after she was charged with murder and attempted murder. The story detailed a previous conviction for murder and her detention at a secure hospital. The newspaper argued that the article could not have created a substantial risk of serious prejudice to the forthcoming trial as expert medical practitioners would inevitably refer to the previous killing. The court concluded that, on the facts of this particular case, the risk of serious prejudice to the course of justice was not proven to the criminal standard of proof. Therefore the newspaper was not found guilty of contempt under s(2)(2) Contempt Court Act 1981

⁴⁷ *Attorney-General v (1) MGN Limited (2) News Group Newspapers Ltd* [2011] EWHC 2074 (Admin)

⁴⁸ *HM Attorney General v Associated Newspapers Ltd & Anor* [2012] EWHC 2029 (Admin)

⁴⁹ *HM Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin)

⁵⁰ *HM Attorney General v The Times Newspapers Ltd* [2012] EWHC 3195 (Admin)