Reforming the New Zealand Law of Contempt of Court

An Issues/Discussion Paper

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TERMS OF REFERENCE

In November 2009, I was invited by the Attorney-General, The Hon C Finlayson, to advise on the reforms that might be necessary or desirable to the law relating to Contempt of Court, and in the first instance to produce an "issues paper" for discussion purposes. It was agreed that the remit should be a broad one, and that:

> "The paper should examine the current difficulties with the law and practice of Contempt of Court, making comparisons where appropriate with … comparable jurisdictions."

It was also agreed that the paper would not consider in any detail the matter of suppressing names and evidence, since that had recently been the subject of a Report by the Law Commission in October 2009.[1] There is an obvious overlap between the two topics, in that a failure to comply with an evidence suppression order might ultimately give rise to proceedings for contempt in addition to the specific penalties for which provision is made in the legislation authorising suppression. Another area of overlap excluded from the scope of this review is the position of journalists and the protection to be accorded to their sources from compulsory disclosure,[2] since that had been the subject of comparatively recent legislation in the Evidence Act 2006, s 68.

During the course of the preparation of this paper, two other inquiries were put in train, which may to some extent overlap with the terms of this review, both of them by the Law Commission. The first of these was a Review of Regulatory Gaps and the New Media, which was opened on 19 October 2010. The Commission also has received a reference, on 8 March 2011, to examine the law relating to the principal New Zealand courts, with a view to consolidating the various pieces of legislation relating to the courts that administer the law of contempt of court, namely the Supreme Court, the Court of Appeal the High Court and the District Court.[3] The second of these enquiries might afford the opportunities to make some minor changes to the legislation, and some suggestions are made at appropriate junctures in this paper.

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[1] Law Commission *Suppressing Names and Evidence*, (NZLC R109, 2009). An Issues Paper of the same title (NZLC IP13, 2008) had been published in December 2008. Mention should also be made here, because of potential overlaps, of the recent work of the Law Commission, *Disclosure to Court of Defendant's Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) on the disclosure of previous convictions. Both of these initiatives are part of the *Simplification of Criminal Procedure (including Name Suppression)*, a joint project between the Ministry of Justice and the Law Commission, opened 1 July 2007.

[2] This important issue is effectively dealt with in the United Kingdom by the Contempt of Court Act 1981, s 10, although the protection there afforded (in contrast to the New Zealand equivalent provision, the Evidence Act 2006, s 68) is not confined to journalists. A refusal to disclose sources by a journalist is potentially actionable as a contempt of court, since it involves a refusal to comply with a court order. For a recent decision as to the ambit of the section, see *Police v Campbell* [2010] 1 NZLR 483.

[3] See Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?* (NZLC IP21, 2011).

PREFACE

The aim of this review is to survey and raise questions about the state of New Zealand's law and practice of contempt. **In particular, it seeks to ask questions as to whether the relevant law and practice are in a satisfactory state to accomplish the objectives that the law is expected to accomplish.**

Although Parliament has enacted a good deal of law that touches upon areas formerly covered by contempt, the law of contempt of court has never been the subject of a full investigation or inquiry in New Zealand. There have been some extensive discussions in Government departments about different aspects of the law requiring reform,[4] and aspects of the law were considered in New Zealand by the Defamation Committee in 1977, when the remit of that Committee was extended to include "an examination of the law of contempt as it may concern the publication of matter relating to civil court proceedings that are imminent or pending".[5] This was clearly undertaken in the light of the decision of the House of Lords in *Attorney-General v Times Newspaper Ltd*,[6] but the committee ultimately recommended that the New Zealand law was not in any need of amendment in this respect.[7]

In a jurisdiction such as New Zealand's, it has not proved to be particularly easy to get a clear view of practice nationally. One reason for this is that the procedure appears to vary from place to place in quite significant ways. Justice McGrath in *R v Gordon-Smith*[8] examines in considerable detail the differences in practice across New Zealand. New Zealand's criminal procedure is characterised by an informality that seems strange to the European eye. There is, for example, no code of Criminal Procedure common in other jurisdictions.

I have sought to concentrate on the areas where the law is in various ways problematic. This has, however, required that I provide a sufficient amount of background information to enable people who wish to contribute to the debate sufficient material around which it will be possible to form considered judgments.

Although this is a "discussion paper" there have been places at which I have made minor suggestions for modest reforms in the law, or indicated places in which I believe that it could without controversy or the need for wide consultation be tidied up (eg in the provision of a defence of innocent dissemination for internet service providers who through no fault of their own disseminate material that turns out to be prejudicial).

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[4] In the course of writing this paper, I was provided by the Ministry of Justice with a considerable amount of historical material detailing discussions that had been held within that department, sometimes in consultation with senior members of the judiciary. For the purposes of this exercise, however, it has not proved to be necessary to refer to it in any detail.

[5] *Report of the Committee on Defamation,* December 1977 para 497.

[6] [1974] AC 273. The decision precipitated the enactment of the Contempt of Court Act 1981 in the United Kingdom, once the matter had gone to the European Court of Human Rights; *Sunday Times v United Kingdom*, Series A, No 30. (1979) 2 EHRR 245 where the United Kingdom law was found to be wanting in a variety of respects.

[7] Chap 27, Contempt of Court.

[8] [2009] 2 NZLR 725.

I am grateful to the Crown Law Office for making available to me the research assistance of Greg Robins and Andrea Walker, and to Madeleine Laracy for her informed comments on a draft. I am also pleased to acknowledge the assistance that I have received from a number of members of the judiciary who have answered my questions and read a draft of the paper, none more so than Sir Bruce Robertson, who read early successive drafts in his capacity as consultant to the project.

My alternative professional commitments have proved to be such that the preparation of this paper took longer than I would have wished, and longer than I predicted it would. I apologise that this should have occurred.

18 April 2011

1. INTRODUCTION

The purposes of the law of contempt

1.1. The expression "contempt of court" refers to a body of rules, principles, procedures and practices enabling the courts to protect the administration of justice through the use of summary processes. Originally developed through the common law, it has been supplemented historically by Parliaments over the years, including the New Zealand Parliament,[1] but the law of contempt in New Zealand is essentially still to be found in the interstices of the common law.

1.2. The principal purposes of the law are to preserve an efficient and impartial system of justice, to maintain public confidence in the administration of justice as administered by the courts, and to guarantee untrammelled access to the courts by potential litigants.

Characteristics

1.3. The most characteristic feature of the contempt jurisdiction is that it is summary; it is intended to authorise prompt intervention by judge alone when the ordinary processes are regarded as being too slow and cumbersome to protect the processes of justice.[2]

1.4. It is this feature that, in many respects, causes the most difficulty with the law of contempt in its current form, particularly when measured against some of the rights guaranteed by the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). Because the procedures are different and swifter, there is a risk that some of the safeguards (and in particular jury trial) that generally surround the application of a penal law (whose end result might be the loss of liberty) are missing or in other ways compromised.

The scope of the law of contempt

1.5. Although the result of piecemeal development is an area of law that has been described as "Protean" in character,[3] it is possible to discern an overarching coherence in all forms of contempt in the sense that they are, or involve, an interference with the administration of justice.

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[1] See for example the amendment to the Crimes Act 1961, s 9 of which now makes it plain that the inherent power of the High Court to deal with contempt of court was not impaired by the fact that the creation of criminal offences and the imposition of criminal penalties was to be governed by statute, and that the abolition of the common law did not affect the powers of the courts in this area. See further below, chapter 9. The arrangements for appeal in cases of contempt were changed by the Summary Proceedings Amendment (No 2) Act 1998, ss 25 and 55.

[2] It is worth noting in passing that the law of contempt is a peculiarly common law concept, and that other jurisdictions do not employ it. This is emphasised by JH Merryman *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, California,1969). See in particular pages 54, 56-58, 130-131.

[3] J Moskovitz, "Contempt of Injunctions, Civil and Criminal" (1943) 43 Col. LR 780, at 780.

1.6. For the purposes of this discussion paper, the law will be further analysed as referring to –

1. Publication contempts

A. Publications that interfere with the conduct of particular legal proceedings[4] and
B. Publications that undermine the judiciary through scurrilous abuse, or by allegations of bias and partiality (known as "scandalising").[5]

2. Other forms of criminal contempt

A. Contempts committed in the face of the court,[6] or
B. Other interferences with the administration of justice.[7]

3. Civil contempts

Committed by non-compliance with court orders (or undertakings) in the course of civil litigation.[8]

1.7. The first two categories are traditionally classified as being criminal in character from the outset, in that their primary purpose is to deter people from interfering with the administration of justice and to punish those who have offended against the contempt law.

1.8. The third category (civil contempts) is somewhat more difficult to characterise. Historically, civil contempt was regarded as being a coercive mechanism, requiring a person to comply with an order of the court. Where the failure to comply with a court order was persistent and defiant, the purpose has increasingly come to be seen as metamorphosing into a punitive process. At that stage, the proceedings become criminal in character.[9] But because of the way in which the proceedings had been initiated, the procedures were not well attuned to dealing appropriately with what was to all intents and purposes a criminal proceeding.[10]

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[4] Considered in chapter 2.

[5] See the suggestions for rethinking the use of this terminology below, para 1.43 *et seq*.

[6] Considered in chapter 5.

[7] Considered in chapter 4.

[8] Considered in chapter 6.

[9] The thinking is seen very clearly in *United Nurses of Alberta v Attorney-General for Alberta* (1992) 89 DLR (4th) 609 at 636, where McLachlin J says: "[a] person who simply breaches a court order is viewed as having committed a civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach *it becomes criminal*" (emphasis added).

[10] *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

1.9. This has caused an enormous amount of confusion, and this paper will suggest that the time has come when the way in which these matters are dealt with should be completely re-thought. To adumbrate,[11] there should be two quite distinct forms of action to replace what is now dealt with as "civil" contempt. One, essentially still civil in character, should be a "proceeding for the enforcement of a court order", and would probably best be dealt with by avoiding the terminology of "contempt".[12] The other should be a separately instituted proceeding whose purpose is clearly punitive at the outset, which should be surrounded with the safeguards appropriate to a situation where a person is at risk of imprisonment.

The distinctive features of the law of contempt

1.10. The present law and practice have a number of features that distinguish the contempt process from ordinary criminal offences.

1. Procedure

In the first place, the procedure is summary, and there is no involvement of a jury. Although certain of the procedural protections afforded to a person charged with an ordinary criminal offence are in practice observed, in cases of criminal contempt, the standard procedures are not employed. There are, for example, no preliminary hearings,[13] and there is no indictment or information alerting putative offenders of the allegations by which they are confronted.

2. The role of the judge

1.11. It is a corollary of the fact that the summary procedure does not involve the jury that the role of the judge is paramount. In the case of contempts in the face of the court, the judge in front of whom the conduct took place normally deals with the matter, in effect acting as both witness and judge.[14]

3. Sentence

1.12. Historically, the sentencing power of the superior courts was (in theory) unlimited, and could be either a finite term or (in the case of a contempt characterised above as a civil contempt) could be indeterminate, ending only when the person subject to it complied with the order of the court. As a result of the recent decision of the Supreme Court in *Solicitor-General v Siemer*,[15] the penalty in any contempt is now in practice limited to a period of three months in the first instance, with the possibility

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[11] Below at para 6.18.

[12] See below at para 6.18. And see the Australian Law Reform Commission, *Contempt* (1987), recommendation [46].

[13] Recent legislation has curtailed considerably the hearing of committal proceedings; the Summary Proceedings Amendment Act (No 2) 2008, s 12.

[14] See further below, Chapter 5.

[15] [2010] NZSC 54, [2010] 3 NZLR 767, discussed further below at para 6.12.

of subsequent periods of imprisonment for ongoing contempt upon the filing of a fresh application. In the case of a sentence of imprisonment for a failure to comply with a court order, the sentence can be brought to an end by the purging of the contempt.

The anomalous status of the law of contempt

1.13. There is the further difference, so far as New Zealand is concerned, that contempt is now the only "offence" that is not the creature of statute. When the general criminal law of New Zealand was first codified in 1893, a decision was taken as a matter of principle that the scope of the criminal law was a matter for Parliament rather than the courts, and the stance adopted was that:[16]

> "Every one who is a party to any offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent herewith and not repealed, and shall not be proceeded against at common law."

1.14. This provision effectively abolished most of the common law in its application to criminal punishment, but the opportunity was not then taken to reduce the law of contempt of court to a statutory form. The 1893 statute did not mention the law of contempt, and the question arose as to whether or not the law of contempt had been abolished by a side wind. The courts held that it had not been,[17] and some time later Parliament made it plain in the Crimes Act 1961, s 9,[18] that it supported an interpretation of the law that left a wide residual inherent jurisdiction in the High Court to punish for contempt of court. It is not entirely easy to find an explanation for this apparent anomaly, and the question arises as to whether it is appropriate in the modern context for the present situation to continue.

Concerns about the current law of contempt

1.15. Recently, there have been a number of expressions of concern about the law of contempt, both from those whose constitutional role it is to administer it, and those who are subject to its strictures and constraints. These include the Court of Appeal in *Siemer v Solicitor-General*[19] which invited the legislature to intervene in the field:

> "[116] There are a number of difficult issues relating to the nature of contempt proceedings and the application of the NZBORA to contempt proceedings which this judgment highlights. Consideration should be given to legislative reform in this area of the law as happened in the United Kingdom."

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[16] Criminal Code Act 1893, s 5. This is discussed further below at para 9.6.

[17] See below, paras 9.7 and 9.8.

[18] See below, para 9.9.

[19] [2009] NZCA 62, [2009] 2 NZLR 556.

1.16. There have also been complaints by representatives of what might be called the traditional press (print and television), who protest that the law is unduly restrictive, particularly when their position is contrasted with the laxity that appears to govern in the world of the new media – the bloggers.[20] There have also been suggestions that the procedures are not fair.[21] The troublesome distinction between civil and criminal contempts was the subject of adverse comment by the Supreme Court in *Solicitor-General v Siemer*.[22]

1.17. Whilst there are sharply conflicting views between the members of these different groups, there is at least one area where there appears to be some sort of agreement, namely that the position is unsatisfactory because the law and its applicability are uncertain in too many important respects. In an area of the law where freedom of expression is often intimately concerned, there is a danger that the law will exercise a chilling effect.

Legislative intervention?

1.18. It is a matter for discussion whether the uncertainties exposed in this paper are such that they are capable of resolution solely through the courts and judicial development. Questions arise as to whether the suggestion of the Court of Appeal in *Solicitor-General v Siemer* that the law should be the subject of legislative attention should be pursued, and whether the time has now come when the law should be clarified and uncertainties surrounding the law and the procedures should be resolved, both by being put into a statutory form,[23] and by the use of delegated legislation in the form of Practice Directions, the latter being directed to some of the procedural difficulties that attend the law of contempt.

1.19. If the answer to all of these questions is in the affirmative, the underlying question that arises is whether there should be some comprehensive attempt at reform, or whether piecemeal development is still the better way forward. In the United Kingdom,[24] the latter course was adopted. The Contempt of Court Act 1981 is in no

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[20] Cate Brett, "Pushing the Virtual Envelope – Rickards and the challenge to New Zealand's Law of Contempt" in eds Jeremy Finn and Stephen Todd, *Law, Liberty and Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2007). At the time of writing her contribution to the proceedings, Ms Brett was the editor of the *Sunday Star Times*. See also the Internet NZ Media Law Conference, (Thursday 3 December 2009); Dr David Collins QC, "Managing Contempt in an Online World". See http://internetnz.net.nz/media-releases-2009/r-v-internet-video-audio-available. Last accessed 3 March, 2011.

[21] See for example the editorial, "The Siemer saga" (2008) NZLJ 265 and M Taggart, "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZL Rev 271.

[22] [2010] NZSC 54, [2010] 3 NZLR 767, at note 19 (Elias CJ and McGrath J) where it is said that the distinction, "except where required by statute, is probably best avoided as unhelpful".

[23] Which is not to say that Parliamentary legislation is the only possible mechanism for making change. Something less, such as a code of procedure, or Practice Directions may be of assistance.

[24] Including Scotland. Most unusually, the Act was in this instance extended to that jurisdiction, which is generally speaking in matters of the criminal law a system unto itself.

sense an attempt to replace the common law with a "code".[25] It left the common law of contempt largely intact, but altered certain features of its operation, such as by clarifying when the "strict liability" rule begins and ceases to have effect. Arguably, it would be more consistent in the New Zealand context to copy the stance that was taken when the Criminal Code Act was enacted, and abolish the common law contempt jurisdiction altogether.[26]

Q1 What disadvantages would flow from the codification of the law of contempt?

The increasing impact of the New Zealand Bill of Rights Act 1990

1.20. Whilst it is probably true to say that the potential of the Bill of Rights Act[27] did not have an immediate and dramatic effect,[28] it soon became apparent that it was not possible to ignore the fact that the Act touches directly upon two of the rights that are most intimately affected by the law of contempt, namely the right to freedom of expression[29] and the right to a fair trial.[30] To this might be added the right to natural justice, which is arguably only imperfectly observed in the practices adopted to deal with contempt in the face of the Court.[31]

1.21. In *Solicitor-General v Radio New Zealand Ltd*,[32] it was held to have been a contempt for a radio reporter to question jurors several months after verdict and then transmit their comments, on the grounds that this was an unwarranted interference with the administration of justice.

1.22. Arguments were addressed to the Court that this violated the s 14 rights to freedom of expression of the broadcasters. The Court held that the interests of the defendant and the integrity of the administration of justice were just as important as the right to freedom of expression protected by the Bill of Rights Act.

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[25] It will be recalled that the United Kingdom does not have a codified criminal law. The Code drafted by Sir James Fitzjames Stephen that became the basis of much Commonwealth Criminal law (Including New Zealand's) was not adopted in that jurisdiction.

[26] An analysis is undertaken in chapter 4, examining in greater depth the scope of the common law that might have to be replaced if contempt were to be abolished. Respondents may wish to treat any response to the question posed as provisional until they have had the opportunity to consider the points made in that chapter.

[27] In the United Kingdom, it was the law of contempt that promoted a greater awareness in legal circles of the potential for the European Convention on Human Rights to have a direct impact upon the settlement of domestic disputes. The *Sunday Times* case (*Sunday Times v United Kingdom*, Series A, No 30 (1979) 2 EHRR 245) was one of the first actions successfully brought against the United Kingdom Government under the European Convention, and the result was the enactment of the Contempt of Court Act 1981.

[28] A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005); P Rishworth, G Huscroft, S Optican and R Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

[29] Section 14 is set out below at 2.8.

[30] Section 25 is set out below at 2.9. In one of the earlier decisions on this section, *R v Ellis* [1993] 3 NZLR 317, the Court took the view that the provisions of the section did not add to the rights already protected by the Court's general discretion.

[31] See below Chapter 5.

[32] [1994] 1 NZLR 48.

Section 5 of the Bill of Rights Act and the law of contempt

1.23. Having arrived at this conclusion, however, the court proceeded to address the question whether this form of contempt creates no more than the justified limitation prescribed by s 5 of the Bill of Rights Act. The effect of this provision is that it requires the courts, in setting the limits on any rights protected by the Bill of Rights Act, to identify explicitly the purposes for which these restrictions are imposed. The Act provides that:

> "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

1.24. The Court identified the relevant rights in this case as being the ones found in s 25 (a), the right to a fair and public hearing by an independent and impartial court and (c), the right to be presumed innocent until proved guilty according to law.

1.25. The Court noted there was "no direct authority in New Zealand on this issue. The Bill of Rights is a recent enactment and the jurisprudence is developing gradually and case by case". The Court then turned to some of the comparable provisions in the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms, coming to the conclusion that:

> "the objective of the law of contempt, generally and specifically in this case, is of sufficient importance to warrant the limit of freedom of expression. …They are at least as fundamental as the freedom of expression".

1.26. A similar analysis was adopted by a Full Court in *Solicitor-General v Smith*,[33] the facts of which are given below:[34]

> "We do not accept that the offence of scandalising the Court cannot be justified as a reasonable limitation upon freedom of expression...The rights guaranteed by the BORA depend on the rule of law, the upholding of which is the function of the Courts. Courts can only effectively discharge that function if they command the authority and respect of the public. A limit upon conduct which undermines that authority and respect is thus not only commensurate with the rights and freedoms contained in the BORA, but is ultimately necessary to ensure that they are upheld".

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[33] [2004] 2 NZLR 540.

[34] At 3.32. The quote appears at [133] of the Court's decision.

1.27. A more dramatic illustration of the changes to the law that can be effected by the application of the Bill of Rights Act is to be found in *Siemer v Solicitor-General*.[35] Upon application by the Solicitor-General, the appellant had been imprisoned for a period of six months by a Full Court of the High Court for a course of conduct held to have amounted to a contempt of court.[36] He argued on appeal that there had been a violation of section 24(e) of the Bill of Rights Act 1990, which provides that:

> "[e]veryone who is charged with an offence …
>
> Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months."

1.28. The argument was, therefore, that since he was liable to a penalty over 3 months, he was entitled to a trial by jury. The appeal was allowed by the Court of Appeal[37] to the extent that it was inappropriate to impose a finite term of imprisonment without the specific proviso that the period of imprisonment would come to an end when the injunction had been complied with. The imposition of a finite penalty without that proviso was punitive in purpose and this was to treat the proceedings as criminal rather than civil in nature. The proper sentence of imprisonment was therefore one of six months but accompanied by the proviso that if the appellant complied with the injunction and gave an undertaking to continue to do so, the term of imprisonment would come to an end. In this way, the Court said,

> "[t]he contemnor 'carries the keys of the prison in his own pocket'."[38]

1.29. On further appeal to the Supreme Court, it was agreed by all the members of an otherwise divided court that s 24(e) is engaged when a person is charged with contempt, whether the contempt be criminal or civil in character. Consequently, it was agreed, the law of contempt is prima facie inconsistent with the Bill of Rights Act. The majority of the Court[39] held that, since it is not possible in New Zealand to have a trial by jury on indictment for contempt, it follows that the maximum permitted penalty available to a New Zealand court is no more than three months and/or a fine.[40] The majority came to the conclusion that this could not be treated as

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[35] [2010] NZSC 54, [2010] 3 NZLR 767.

[36] *Solicitor-General v Siemer* (High Court, Auckland, CIV-2008-404-472, 8 July 2008).

[37] [2009] NZCA 62, [2009] NZLR 556.

[38] At [63].

[39] Justice Blanchard delivered the judgment for himself, Anderson and Wilson JJ. Justice McGrath delivered the judgment for himself and Elias CJ.

[40] The Court dropped a broad hint that this aspect of New Zealand's law was itself in some need of a rethink, New Zealand being out of line with most other common law countries in imposing so low a threshold for the trigger of the right to an automatic jury trial. See [21] for McGrath J, and Blanchard J at [67]. On 15 November 2010, the Attorney-General put before Parliament a report on the Criminal Procedure (Reform and Modernisation) Bill 2010 certifying that the provision increasing the jury trial threshold to a period of three years was not inconsistent with the terms of the Bill of Rights Act.

a justified exception within s 5 of the Bill of Rights Act, largely on the grounds that the penalties for contempt were potentially so serious. It took the view that, if after three months, the contemnor had still not purged the contempt, this could be dealt with by way of a fresh proceeding for contempt.

1.30. The minority agreed that the Bill of Rights Act must be approached in a purposive way, and seen in that light, the arguments for the Solicitor-General that s 24(e) did not apply were too "legalistic". The minority took the view, however, that the purposes of the summary procedure for the law of contempt warranted their being treated as a justifiable limitation within s 5.

1.31. In the words of McGrath J:[41]

> "The objective of the summary process in contempt of court proceedings is to protect that ability of the courts to exercise their constitutional role of upholding the rule of law. Effective administration of justice under our constitution requires that the orders of the court are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court order are quickly brought to account. Achieving these aims is part of the objective of the law of contempt. The purpose of the summary process, whereby that law is administered by the judges without the assistance of juries, is to put the administration of the contempt law in their hands.
>
> The law of contempt does not, of course, exist to protect the dignity of judges but to protect that public interest in the true administration of justice by an impartial court. As the effective functioning of the rule of law is essential in a democratic society, the protective purpose of the summary process is of sufficient importance as an objective to override the right to trial by jury."

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[41] At [26] and [27]. It may be noted that the majority were equally forthright on the role of juries in this area. Blanchard J says at [65] that:

> "[W]e do not believe that the jury trial for contempt would ever be appropriate, even accepting that a means exists or could be devised for summoning a jury and putting a case for contempt before it. Such a procedure would be highly undesirable because it would undermine the authority of the court by interposing a body of lay persons between the court's order and its enforcement and giving to them the task of interpreting the order. That task should be for the court alone to undertake".

Contempt of court as a "last resort"

1.32. The courts have emphasised, time and again, that the use of the summary powers of contempt should be seen as a matter of last resort[42] particularly in the context of family disputes.[43] There are generally other methods of enforcing compliance with case management rulings and orders than the sanction of contempt, such as costs orders. The courts also frequently remind themselves that the weapon is one that must be used "sparingly".[44] In the words of Lord Goddard CJ in *Parashuram Detaram Shamdasani v The King Emperor*:[45]

> "Their lordships would once again emphasise what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised."

1.33. This approach has significantly reduced the practical ambit of the law of contempt.

Overlap with the general criminal law

1.34. A great deal of conduct that was formerly treated as contempt, and is still treated as contempt in common law in the United Kingdom[46] has long also been covered by the general criminal law in New Zealand.[47] The Crimes Act 1961 contains a large number of offences generally concerned with the protection of the courts' processes and the interference with the administration of justice. There is, as a result, a considerable degree of overlap between the New Zealand common law of contempt and the statute.

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[42] *McLeod v St Aubyn* [1899] AC 549 at 561 (Lord Morris); *R v Gray* [1900] 2 QB 36 at 41; in *Attorney-General v Blomfield* (1914) 33 NZLR 545, Williams J at 561 says:

> "The summary process in all classes of contempt is a weapon to be used with the greatest caution. As to the class of contempt before us, it resembles some antique weapon which will probably do more harm to those who use it than to those against whom it is used."

In *Ansah v Ansah* [1977] Fam 138 at 144, Ormrod LJ said that "committal orders are remedies of last resort; in family cases, they should be the very last". See also *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) (sequestration).

[43] Courts need to bear in mind that different considerations apply in family contempt cases, since the parties are subject to heightened emotional tensions and there is often a need for family members to continue to be in contact with one another: see *Hale v Tanner* [2002] FLR 883 at [25] and [29]; *Aquilina v Aquilina* [2004] EWCA Civ 504 at [10].

[44] *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225.

[45] [1945] AC 264 at 270.

[46] See in particular *Arlidge, Eady & Smith on Contempt*, (3rd ed, Sweet & Maxwell, London, 2005), Chapter 11.

[47] Conduct such as such as threatening a witness or juror. See in particular the Crimes Act 1961, s 117.

1.35. It may be doubted whether the creation of any resulting overlaps was intentional[48] and it is possible that such overlaps as exist have sometimes gone unnoticed. For example, it would appear that contempt by publication can fall within s 116 of the Crimes Act as a "conspiracy to defeat justice".[49] Similarly, if a person refuses to be sworn as a witness, the matter is covered by the Crimes Act, s 352 (or the Summary Proceedings Act 1957, s 39) even though it would undoubtedly be covered by contempt at common law.[50] Failure of a witness to attend is dealt with by ss 351 and s 38 of the two Acts respectively, again misconduct that is still dealt with as contempt in some jurisdictions.

1.36. The statutory offences are for the main part contained in the Part 6 of the Crimes Act headed as "Crimes Affecting the Administration of Justice". They include Perjury,[51] False Oaths,[52] False Statements or declarations,[53] Fabricating Evidence,[54] Conspiring to bring false accusations,[55] Conspiring to defeat justice[56] and Corrupting juries and witnesses.[57] Forgery[58] is treated in the Crimes Act as being a species of offence against property, but it would include the forging of a court document, which is a contempt at common law.

1.37. It is perhaps important to point out that the cross-headings by which these offences are labelled are in places quite misleading, and do not always capture anything like the breadth of the offence they purport to describe. The offence in s 117(d) in particular penalises a person who "wilfully attempts in any other way to obstruct, prevent, pervert or defeat the administration of justice".

1.38. Proceedings for all of these offences would require a prosecution on indictment, and it may be thought that this is often the more appropriate course of action in the New Zealand context. If somebody has done something more serious (by threatening or seeking to bribe a witness, for example it is better that the response is under the general criminal law[59] than through proceedings for contempt.

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[48] UK Report, *Offences Relating to Interference with the Course of Justice*, Law Com. No 96, 1979, HC 213 recommended that some of the types of conduct currently covered by contempt should be put in to a statutory form as interference with the administration of justice.

[49] *R v Joliffe* (1791) 4 TR 285 and *R v Tibbits and Windust* [1902] 1 KB 77 are both examples of this.

[50] See *Beckett v Attorney-General* [1989] 2 NZLR 233.

[51] Crimes Act 1961, s 108.

[52] Crimes Act 1961, s 110.

[53] Crimes Act 1961, s 111.

[54] Crimes Act 1961, s 113.

[55] Crimes Act 1961, s 115.

[56] Crimes Act 1961, s 116.

[57] Crimes Act 1961, s 117.

[58] Crimes Act 1961, s 264.

[59] In this case by prosecution under the Crimes Act 1961, s 117.

Relevant offences elsewhere in the statute book

1.39. It is entirely possible that there are other offences in the statute book that would once have been the province of the law of contempt. It is an offence under the Juries Act 1981, s 32 to fail to appear when summoned. There is perhaps a particular issue where there has been a breach of a suppression order made under ss 139 and 140 of the Criminal Justice Act 1985, as occurred in *Police v Slater*.[60] The decision whether or not to bring proceedings under those provisions rests with the Police rather than the law officers (being the Attorney-General and Solicitor-General). It is open to the Solicitor-General to proceed by way of contempt should the view be taken that the conduct is sufficiently serious and contumacious, and the penalty inadequate. There has been a suggestion that the penalties for the statutory offences are not sufficiently severe,[61] and the abolition of the common law of contempt would make a full review more urgent.

Possible approaches to reform of the law of contempt

1.40. Even though the practical ambit of the law of contempt has been considerably reduced by the creation of more targeted criminal offences, the common law of contempt that has been in practice supplanted still continues to exist. A major threshold question arises as to whether or not the time has come when the law of contempt is any longer fit for purpose such that the common law should in effect be abolished, as was recommended in Australia,[62] or whether the particular problems in the law of contempt should be closely identified and dealt with specifically, as occurred in the United Kingdom.[63] In the latter jurisdiction, the common law survived more or less unscathed, but with statutory solutions to the problems considered by the Phillimore Committee overlaying the surviving common law.

1.41. Both of these approaches have advantages and drawbacks. A danger of the targeted approach is that a response that is essentially a reaction to problems of the moment may leave the law in a static state as the rest of the legal world changes around it. An example is the rule that proceedings become "active" for the purposes of the law of civil contempt in the United Kingdom when they are "set down for trial",[64] a procedure that has long been discontinued.

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[60] [2011] DCR 6.

[61] By a Full Court in *Solicitor-General v Fairfax New Zealand Ltd & Panckhurst* (High Court, Wellington, CIV-2008-485-705, 10 October 2008). A degree of concern was expressed that no proceedings had been brought under the statutory offences when the evidence of guilt was so clear. The Criminal Procedure (Reform and Modernisation) Bill before Parliament at the time of writing makes proposals for an increase in the available penalties.

[62] Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987).

[63] See the Phillimore Report, *Report of the Committee on Contempt of* Court (1974) Cmnd 5794, which essentially adopted this approach.

[64] Contempt of Court Act 1981, s 2(4) and sch 1, 13 (a).

1.42. On the other hand a fresh, broad brush approach to reform can sometimes give rise to problems not anticipated by the proponents of change. There is the added difficulty that, if the common law of contempt were to be abolished as part of that reform, it is possible that in the future, some interferences with the administration will go unpunished because they are not caught by the new statutorily based law. This was a concern of those who were responsible for the drafting and implementation of the Criminal Code Act 1893 who proceeded nonetheless. The abolition of the common law of contempt, though a major change to the legal system, is of minor significance by comparison.

Four general criticisms of the law of contempt

1. The language of the law of contempt

1.43. Lawyers generally are aware that the language of "contempt" is somewhat misleading,[65] in the sense that the commission of an act of criminal contempt does not necessarily involve the element of disdain (for the legal process) that the language of "contempt" suggests. This sometimes makes public discussion and debate about contempt law problematic. It is necessary to preface any discussion of this area of the law by explaining that the gist of the law of contempt is that it seeks to preserve the integrity of the administration of justice. As Baragwanath J pointed out, contempt was for lawyers "a familiar term of art. But it is as well to offer the translation of 'wrongful interference with justice', which is what it means." [66]

1.44. Problems arise with the branch of contempt known as "scandalising" the court, which is in truth very often a form of defamation of a member of the judiciary in relation to his or her exercise of the judicial function, typically by suggestions of judicial bias or partiality.[67] Whether or not anybody is actually "scandalised" as a result of what is said or written forms no part of the law, and it seems odd that it should continue to be discussed in such archaic language.[68] Even if the substance of the protection should be preserved,[69] some thought needs to be given as to whether this somewhat archaic language might now be abandoned.

1.45. Another area where the language of the law appears anachronistic is in the description of jurisdiction in terms of "superior" courts (which have an inherent jurisdiction) and "inferior" courts (which have no such jurisdiction). Even if, as

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[65] See for example Salmon LJ in *Morris v Crown Office* [1970] 2 QB 114, 129: "The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading".

[66] In *Progressive Enterprises Ltd v North Shore City Council* [2006] 2 NZLR 262 at [1].

[67] As in, for example, *Attorney-General v Blundell* [1942] NZLR 287, where the President of the New Zealand Labour Party was held guilty of contempt when he expressed the view that "he had never known the Supreme Court to give a decision in the favour of the workers where it could possibly avoid it".

[68] "A little quaint" was the term used by Wild J in *Solicitor-General v Smith* at [4].

[69] Discussed below in Chapter 3.

Professor BD Inglis has pointed out, the terminology is not pejorative,[70] non lawyers might reasonably ask why, since it appears to be pejorative, it continues to be employed. As Lord Woolf noted in *Manchester City Council v McCann*,[71] the term "inferior" seems less and less apt with each passing year.

1.46. Another target for reformers might be found in the use of the Latin term *sub judice,* which refers to the point of time at which proceedings are protected by the law of contempt. The word "active" was preferred by the United Kingdom parliament in the Contempt of Court Act 1981, and it does appear to capture very accurately the essence of the law, in readily understandable language.

2. Inaccessibility of the law of contempt

1.47. One of the practical difficulties that can arise in the field of contempt is that the law is rather obscure and inaccessible, and yet the area is one in which a contempt problem can arise rather suddenly, in a situation where prompt action is required. There is no single, authoritative, up-to-date statement of the law to which practitioners in a hurry are able to have access. The primary sources of the New Zealand law of contempt are to be found scattered throughout the case law and statutes, but there is very little available in the way of secondary and explanatory literature.[72]

1.48. The only general exegesis of the law in this area is to be found in the section on contempt in the *Encyclopaedia of New Zealand Laws* which is a very helpful starting point, but it is a bit dated in parts.[73] *Adams on Criminal Law* (as its title implies) covers the Criminal law, but it is not concerned with civil contempts and Burrows and Cheer's book on *Media Law*[74] deals primarily with the law as it affects the media. A leading text book on Family Law has a section on contempt of court,[75] which can loom large in that particular area. Contempt of court is an area in which the procedure by which alleged contempts are pursued is of particular importance, and

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[70] B D Inglis, *New Zealand Family Law in the 21st Century* (Brookers, 2007) 147, n 117.

[71] [1999] QB 1214, at 1223-1224.

[72] An increasingly important source of law in New Zealand is to be found in the work of university students, such as: Amy Elvidge, "Trying Times: The Right to a Fair Trial in the Changing Media Environment" (LLB Hons dissertation, University of Otago, October 2008); M Dearing, "Why the Offence of 'Scandalising the Court' should be clarified and applied consistently or abolished" (LLM paper at VUW, 2008); Katherine Venning, "Counsel Comment" (2008) 1(3) NZLSJ 517; and Emma Langlands, "Media Prejudice and Jury Challenge" (2010) 2(3) NZLSJ 377.

[73] It is unlikely, for example, that the proposition that "the rule" articulated in *Hadkinson v Hadkinson* [1952] P 285 "that a party in contempt against whom an order for committal has been made cannot be heard or take proceedings in the same cause until the contempt has been purged" (para 104) would survive a challenge under ss 25 and 27 (the right to a fair trial and the right to natural justice respectively) of the Bill of Rights Act. See further below, para. 6.6.

[74] Burrows and Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Melbourne, 2010) See also Steven Price, *Media Minefield* (New Zealand Journalist Training Organisation, Wellington, 2007) at 209 and 221.

[75] B D Inglis, *New Zealand Family Law in the 21st Century* (Brookers, 2007) 146.

there has been a series of recent books[76] that shed valuable light on the law and practice in that area.

1.49. There is far more material published in the United Kingdom.[77] These works are helpful on the state of the common law, which may be of application in the New Zealand context, but they are not necessarily alive to (never mind being able to address) the nuances that arise in the New Zealand jurisdiction, and the statutory contexts are rather different.

3. Uncertainty / Lack of clarity in the law

1.50. There are a number of areas in which the law of contempt is unclear. For example, what is the liability of editors for the publication of material in outputs for which they are responsible, but of whose content they are unaware?[78] What is the mental element (the *mens* rea) for contempt, and is it the same across the different types of contempt?[79] Is the species of contempt that arises from "prejudgment" still extant in New Zealand law?[80] When does the *sub judice*[81] period begin and end?[82] What is the role of the public interest in this area?[83]

1.51. A further example is the disagreement at the highest judicial level about the application of s 24(e) of the Bill of Rights Act (right to trial by jury to any defendant facing a possible sentence of imprisonment of three months or more). These are significant questions, and it is something of a reproach to the law that it is quite so uncertain.

4. The modern media and the law of contempt

1.52. Another criticism of the current law, particularly as it affects the media, is that it was formulated and developed around different forms of communication than those current at the second decade of the twenty first century. The written word of newspapers and journals, supplemented by radio and television broadcasting, is no

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[76] See the series of manuals, LexisNexis, M Casey, C Corry, J Faire, SA Fitzgerald, P McCabe and G Taylor, *New Zealand Procedure Manual: High Court* (2010); P Whiteside and A Willy, *District Courts* (2010); C Corry, *Appellate Courts* (2010).

[77] *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005) plus second supplement (2009); ed I Cram, *Borrie and Lowe, The Law of Contempt* (4th ed, LexisNexis, London, 2010) (there has been a complete change of authorship since previous editions) and CJ Miller, *Contempt of Court* (3rd ed., Oxford University Press, Oxford, 2000). Other valuable sources of the common law are to be found in law reform proposals, such as Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987); Law Reform Commission of Western Australia *Report on the Review of the Law of Contempt* (P93-R, 2003); Law Reform Commission of Canada *Contempt of Court* (Report 17, 1982) and Law Reform Commission of Canada *Contempt of Court* (Working Paper 20, 1977).

[78] See below para 2.76.

[79] See below para 2.71.

[80] See below para 2.106.

[81] See the section on the language of contempt at para 1.46.

[82] See below para 2.78.

[83] Discussed below para 2.119.

longer the influential mechanism for the transmission of breaking news. It has been argued that the various modes of communication that are now available through the internet[84] have rendered much of the law of contempt out of date, if not actually obsolete. The technology in this area is developing at an enormously rapid pace, with iPads, for example, now making mobile internet connectivity a reality.

1.53. Even if one does not accept that the mode of communication affects the substance of the matter – it can be said that a posting on a "blog" or YouTube is really in many ways no different from an article in a daily newspaper – there are issues here that should not be avoided. Communication can be more or less instantaneous, there is no editorial input, and those who use the web may pay no attention to the requirements of responsible journalism.

1.54. There are two schools of thought on the way in which the law should react to the new media. There is one school that seems to take the line that, in seeking to exercise influence over the blogoshpere in a way that preserves the integrity of criminal trials, the law is attempting to do the impossible.[85] It is argued that the internet cannot be controlled and that it will always be possible to circumvent any limits that the law seeks to impose.

1.55. Another way of looking at the matter is that, since the ways of avoiding prejudice to the fairness of trials devised in the light of the older forms of media are no longer really effective to prevent the publication of potentially prejudicial material, something must be done to control the internet, such as requiring any problematic material be taken down (if possible) until a forthcoming trial has been completed.

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[84] See further below at para 2.53 *et seq*.

[85] The submissions of counsel for the defendant in *Police v Slater* [2011] DCR 6 are developed along these lines.

2. INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE BY PUBLICATION

Introduction

2.1. There are many ways in which publications might fall foul of the law of contempt, but the essence in each case is that the matter published in some way interferes with the administration of justice. There are different variants of this sort of contempt.

2.2. The one that causes the most concern to prospective publishers is the law that imposes liability for the publication of material alleged to be prejudicial to the fairness of a criminal trial. That will be the principal subject matter of this chapter. Another arises where a publication puts improper pressure on one of the parties to litigation, or seeks to do so.[1]

2.3. A further possible ground of liability in this context is the so-called "prejudgment" test,[2] the objection here being that if a person couches comment upon a forthcoming trial in a way that asserts views as to the desirability or otherwise of a particular outcome, it might provoke the proponents of the other side to enter the public arena with a different view. The danger is that this might give rise to trial by media, as opposed to trial by properly constituted courts, on the basis of properly tested evidence.

2.4. Finally, there is a species of contempt known as "scandalising" which involves the wrongful undermining of public confidence in the administration of justice.[3]

The publication of prejudicial material – free press and fair trial[4]

1. The mischiefs of prejudicial publicity

2.5. The fundamental objection to the publication of prejudicial material is that a person has a right to be tried according to the evidence properly placed before a court, and on that evidence alone. That evidence can be tested in examination and cross-examination of the witnesses, and is seen by all members of the jury.

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[1] See below para 2.111.

[2] *Attorney-General v Times Newspapers Ltd* [1974] AC 273. The decision precipitated the change of the law in the UK by the Contempt of Court Act 1981, once the matter had gone to the European Court of Human Rights; *Sunday Times v United Kingdom*, Series A, No 30; (1979) 2 EHRR 245. The reference to the "UK" rather than "England and Wales" is constitutionally correct since, unusually, the Contempt of Court Act 1981 applies both south and north of the border.

[3] Considered below para 2.106.

[4] See ATH Smith, "Free Press and Fair Trial – Challenges and Change" in eds J Beatson and Y Cripps, *Freedom of Information and Freedom of Speech* (2000) 123 and ATH Smith "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 HKLJ 593. J McGrath QC, "Contempt and the Media: Constitutional Safeguard or State Censorship?" [1998] NZL Rev 371.

2.6. In addition, the common law has certain exclusionary rules of evidence (such as previous convictions,[5] prior guilty plea[6] and publishing a photograph where identification might be an issue[7]) that are designed to protect the integrity of the trial process. That integrity is compromised if extraneous material is introduced into the process, as it potentially is when prejudicial commentary is made available to the members of the public who will eventually constitute the jury.

2. The introduction of the Bill of Rights Act

2.7. The problem in this area is perceived by most common law jurisdictions[8] as giving rise to a need to "balance" the conflicting rights to freedom of expression on the one hand, and the right to a fair trial on the other. In the New Zealand context, those rights were articulated by the legislature for the first time in the Bill of Rights Act as follows:

2.8. Section 14 provides that:

> "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

2.9. Section 25 provides that:

> "*Minimum standards of criminal procedure*
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial court:
>
> …
>
> (c) The right to be presumed innocent until proved guilty according to law."

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[5] This topic has been the subject of a recent Law Commission discussion document, *The Disclosure to Court of Defendant's Previous Convictions, Similar Offending and Bad Character: Issues Paper 4* (NZLC IP04, November 2007) and *Disclosure to Court of Defendant's Previous Convictions, Similar Offending and Bad Character* (NZLC R103, June 2008).

[6] As in *R v Smail* [2009] NZCA 143.

[7] *Attorney-General v Tonks* [1934] NZLR 141; *Attorney-General v Noonan* [1956] NZLR 1021 (a rare case where prejudice to the prosecution case, rather than the defence, was alleged).

[8] The position in Canada is slightly different, as discussed below para 2.17.

3. The test for liability in New Zealand

2.10. The core element of the modern test for liability appears to have been articulated clearly for the first time in New Zealand[9] in the scandalising case of *Solicitor-General v Radio Avon Ltd*[10] where it was stated that:[11]

> " … there must be a real risk as opposed to a remote possibility that the actions complained of would undermine public confidence in the administration of justice".

2.11. In cases of the publication of material prejudicial to the fairness of forthcoming legal proceedings, the formulation is slightly modified, and the test for whether or not a contempt has been committed is:[12]

> "To establish contempt, it must be shown that the actions of a particular respondent caused a real risk of interference with the administration of justice".

2.12. In each case, the question is whether what has been done creates a "real risk". The risk must be assessed having regard to the tendency of the publication at the time of publication, irrespective of its actual effect.[13] This is not a particularly easy test to administer in the sense that it must be carried out in the light of hindsight. The judge applying the test will usually already know the outcome of the trial at the time the decision has to be made. Particularly if the accused has been acquitted, it might be thought, there must be a temptation to say that no harm has been done, and no contempt committed.

4. Gisborne Herald Co Ltd v Solicitor-General

2.13. The leading New Zealand case in the area remains the *Gisborne Herald Co Ltd v Solicitor-General*[14] which was an appeal by the *Gisborne Herald* against a finding of the Full Court of the High Court (Eichelbaum CJ and McGechan J) that the newspaper, along with two other newspapers, was in contempt of Court. A Gisborne constable had been attacked and severely wounded. Mr Gillies, who had previous convictions for violence and was on bail facing trial on various charges in Napier, was charged in

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[9] On this point, the only authority cited was *Attorney-General v Times Newspapers Ltd* [1974] AC 273.

[10] [1978] 1 NZLR 225.

[11] At 234.

[12] *Solicitor-General v Wellington Newspapers* [1995] 1 NZLR 45, 47 per Eichelbaum J.

[13] See *Attorney-General v English* [1983] AC 116 at 141; *Attorney-General v Guardian Newspapers Ltd* [1992] 1 WLR 874 at 885; *Attorney-General v MGN Ltd* [1997] 1 All ER 456 at 461.

[14] [1995] 3 NZLR 563 (CA); (1996) 13 CRNZ 244; (1996) 2 HRNZ 142. Decision of a Full Court of Appeal (Cooke P, Richardson, Casey, Hardie Boys and McKay JJ).

Gisborne with the attack on the constable there. The *Gisborne Herald* published an article which referred to Mr Gillies' previous convictions and other offending.

2.14. The Solicitor-General brought proceedings for contempt of court against the paper (and others), alleging interference with the administration of justice. The application alleged contempt by the *Gisborne Herald* in respect of the trial in Napier, as well as the continuing proceedings in Gisborne relating to the Gisborne constable. The Court of Appeal upheld the contempt finding in respect of the Gisborne case but on the facts overturned the contempt finding in relation to the Napier trial.

2.15. The High Court had concluded that three newspapers were guilty of contempt for their publications in this matter.[15] *Hawkes Bay Herald Tribune Ltd* was fined $20,000; *Wellington Newspapers Ltd* was fined $15,000; and the *Gisborne Herald Co Ltd* was fined $7500. Further, the papers were jointly and severally liable for a total costs payment of $25,000.

2.16. In the Court of Appeal, Richardson J explained the method of applying the "real risk" test as follows:[16]

> "… whether a publication is a contempt turns on whether it creates a real risk that the trial is likely to be prejudiced. Both the content of the publication and the circumstances in which it is published are important. One important consideration is the likely delay between publication and trial. That impact may in turn be affected by the timing of the original publication, the audience reached, and the likely nature, impact and duration of its influence.
>
> ...
>
> Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial Court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the Courts invokes both these values. It calls for free expression of information and opinions as to the performance of those public responsibilities. It also calls for determination of disputes by Courts which are free from bias and which make their decisions solely on the evidence judicially brought before them. Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act 1990.
> ...

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[15] *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45; (1994) 12 CRNZ 394. The penalty judgment was delivered at a later point and is reported as *Solicitor-General v Wellington Newspapers Ltd (No 2)* [1995] 1 NZLR 60.

[16] At 569, 571 and 574-575.

> So far as possible both values should be accommodated. But in some cases publications for which free expression rights are claimed may affect the right to a fair trial. In those cases the impact of any intrusion, its proportionality to any benefits achieved under free expression values, and any measures reasonably available to prevent or minimise the risks occasioned by the intrusion and so simultaneously ensuring protection of both free expression and fair trial rights, should all be assessed.
>
> ...
>
> "The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial."

5. The Canadian approach

2.17. In holding that freedom of expression must sometimes be curtailed, the New Zealand Court departed significantly (and explicitly) from the decision of the landmark Supreme Court of Canada case of *Dagenais v Canadian Broadcasting Corp*,[17] where Lamer CJ referred to what he called the "clash model" of competing rights that characterised the common law. The common law viewed the interests and rights at stake here as being a clash between on the one hand the defendant's right to a fair trial, and on the other the right to freedom of expression that was being asserted by the press. The common law was seen as being historically strongly in favour of the fair trial rights taking precedence over the rights to freedom of speech. In the event of a clash, it was the right to freedom of expression that had to give way.

2.18. The Canadian Supreme Court rejected that model. The Canadian Charter incorporated both rights, it is true, but did not give one or the other presumptive priority. So the task of the court was to see how best to reconcile the two rights in such a way as to maximise the freedoms of each contesting party.

2.19. Instead of restricting the freedom of the press, the reconciliation could be achieved by taking such steps[18] as postponing the trial until the prejudice has passed, changing the venue or (as is done in the United States) polling the jury to ascertain whether jurors were capable of coming to the task of trying an accused with an open mind. The decision exposes most starkly the challenge for the common law, but in *Gisborne Herald*, the Court of Appeal said that it did not see any need to depart from the long held stance of the common law, even in the light of the Bill of Rights Act.

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[17] (1994) 120 DLR (4th) 12. The decision concerened an injunction to prohibit the broadcasting of a television programme that might possibly prejudice a forthcoming trial.

[18] These steps are considered below at para 2.28 *et seq*.

6. The position in the United States of America

2.20. The protection of freedom of expression as opposed to the right to a fair trial is approached entirely differently in that jurisdiction than it is in most other common law jurisdictions. In the United States of America, the practice is not to control the press in any way in the face of a forthcoming trial, because that is what the First Amendment is seen to require. Instead it is sought to secure a fair trial through a sometimes prolonged jury vetting process, which involves questioning of all potential jurors to ascertain whether potential jurors are able to approach the task with an open mind.[19]

2.21. It is impossible in the course of a paper of this scope to do justice to the complexities of the issues involved. Suffice it to say, perhaps, that it is clear there are differences of view about the efficacy of these different approaches.[20] Considerable disquiet has been expressed from an English perspective as to whether the American approach is a satisfactory state of affairs.[21] The classic stance of the common law is to the effect that individual jurors should not be asked questions unless there is some cause to believe that juror might not approach the task in an unbiased manner.[22]

The constitutional significance of the right to a fair trial

2.22. In common law countries, the right to a fair trial is a basic given, if not a constitutional absolute.[23] We are familiar with the general idea that rights are not absolutes – they nearly all require some sort of qualification. Freedom of speech, for example, stops short when the speech is defamatory of another, or when it incites others to violence. But the right to a fair trial must come close to being an absolute one.[24]

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[19] A great deal has been written about the art of selecting jurors. See for example JC Lieberman and BD Sales, *Scientific Jury Selection* (American Psychological Association, Washington DC, 2007).

[20] J A Brandwood, "You say 'Fair Trial' and I say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials" [2000] 75 NYU Law Rev 1412.

[21] G Phillipson, "Trial by Media: The Betrayal of the First Amendment's Purpose (2008) 71 Law and Contempt.Probs.15.

[22] See for example *R v Saunders* [1995] 3 NZLR 545 and *R v Stone* [2001] EWCA Crim 297, [2001] Crim LR 465.

[23] D Mathias, "The Accused's Right to a Fair Trial: Absolute or Limitable?" [2005] NZL Rev 217.

[24] Baragwanath J in *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 says at [2] that : "the right to a fair trial trumps all else". And see Thomas J in *R v Burns (Travis)* [2002] 1 NZLR 387, at 404:

> "But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from, not balanced against. There is no room in a civilised society to conclude that 'on balance', an accused should be compelled to face an unfair trial".

See also the decision of the Supreme Court in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300, where it is stated that the right to a fair trial is "absolute".

2.23. It would be an abdication of the obligation to ensure that every criminal trial is fair were a system to acknowledge that a trial may have been unfair, but to assert that this outcome was somehow unavoidable, because the rights of the press to freedom of expression or the public interest required it. At times in the United Kingdom, judges are reported as coming close to adopting that position, as in the case of *R v Rosemary West*.[25] That was the case of a husband (Fred) and wife charged with being murderers of several young women and girls who had been sexually abused, killed and then buried in the house and grounds. Before the trial Fred committed suicide in prison, and the press then regarded themselves as being free to give details of his confessions and the quite appalling levels of depravity to which he had sunk. The coverage made it very plain that there could be no doubt about his guilt and that her denials of any involvement must by implication have been untrue. In the words of the title of a book about the case published subsequently, the inevitable inference from what Fred had done was that "she must have known".

2.24. She appealed against her conviction on the grounds that the trial could not have been fair, and Lord Taylor CJ said this:[26]

> "The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd."

2.25. That is a mischaracterisation of what had occurred in that case and what its implications for the future might be. It was not the allegations themselves that caused the difficulty, but rather the detailed way in which they were reported by the press that caused the prejudice. Notwithstanding the enormous public interest in the case, there was no need for the press to have acted as it did, going in to such detail of the case against the husband in advance of her trial. It was a situation in which a judge should have been asked to grant a suppression order, and should have made one.

2.26. Lord Taylor's remarks do nothing to reassure that the trial was fair. Indeed, what he appears to be saying is that she must remain convicted even if the trial was not fair. If the press cannot be trusted to exercise voluntary self-restraint, it is necessary to find some other way of protecting the legal integrity of the trial, and that is likely to be by postponing the publication of material that has a tendency to interfere.

2.27. Section 25(c) establishes that the right to a fair trial includes the deeply embedded[27] understanding that there is a presumption of innocence operating in favour of the defendant in criminal cases.

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[25] [1996] 2 Cr App R 374 at 386. See also *R v Abu Hamza* [2006] EWCA 2918, [2007] QB 659, the radical Muslim cleric who wore a black eye-patch and had a hook in place of a hand. There had been unremitting press campaigns against him in the red top press.

[26] At 386.

Minimising the risk of prejudice without restricting free speech

2.28. In the *Dagenais* decision, the Canadian Chief Justice suggested a number of steps that may be taken to mitigate or avoid the effects of prejudice on a particular trial. A number of these are already regularly taken within New Zealand.

2.29. In *Gisborne Herald*, the Court pointed out that the measures all suffered from their own shortcomings:[28]

> "Third, and again in the absence of any adequate empirical data, we are not presently persuaded that the alternative measures suggested by Lamer CJC in Dagenais should be treated as an adequate protection in this country against the intrusion of potentially prejudicial material into the public domain. Resort to any of those measures has not been common in New Zealand. Change of venue applications are infrequent and usually follow sensationalised localised publicity of a particular crime. Venue changes are inconvenient for witnesses and many of those others directly involved. They are expensive. Further, we have always taken the view that there is a particular public interest in trying cases in the community where the alleged crime occurred. Next, challenges for cause are rare. And for the reasons indicated in the contemporaneous judgment of this Court in *R v Sanders* [1995] 3 NZLR 545, cross-examination of prospective jurors about their views and beliefs is generally undesirable. Sequestration of jurors for the duration of trials has not been a practice in New Zealand. Clearly it would add to the pressures on jurors and affect their ordinary lives. Adjournment of trials as a means of reducing potential prejudice occasioned by pretrial publicity runs up against the right to be tried without undue delay (s 25(b))."

2.30. Some fifteen years after those observations were uttered, it is perhaps time to revisit them in the light of the changed conditions. There is a range of options available to the trial judge, and they are not necessarily dealt with here in the order in which they would be considered by a trial judge. It is quite likely that, if an application for a change of venue is dismissed, it will because the judge takes the view that the other measures will be adequate to counter any risk of prejudice.[29] An application for one or more might also be accompanied by an application to stay the prosecution entirely, or for a discharge under s 347 of the Crimes Act 1961.

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[27] It is to be found, for example, in Article 6(2) of the European Convention on Human Rights in the following terms: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[28] At 575.

[29] As in *R v Skelton* (High Court, Hamilton, CRI 2006-019-6530, 9 July 2008). The refusal to change the venue was upheld by the Court of Appeal in *R v S* [2008] NZCA 382.

1. Change of venue[30]

2.31. Applications for change of venue are quite common in New Zealand in cases where the subject of the charge has aroused considerable public local notoriety. In *Gisborne Herald Co Ltd v Solicitor-General*,[31] it was said that change of venue applications are "infrequent", but in *R v Coghill*,[32] it is said that they are "the standard remedy for alleged local jury prejudice". Since there was a considerable overlap in the membership of the Court, and judgment was delivered on the same day in each case, it is clear that the two propositions can stand together. In *Coghill* itself, an application was made but not pursued, and the Court said an appellant would rarely be allowed to raise such a claim of prejudicial publicity after conviction.

2.32. An application is generally made at the behest of a defendant, but it can sometimes be done on the initiative of the Crown or with its consent.[33] The basis upon which a change of venue might be permitted was considered in *R v Foreman*,[34] where it was stated that:[35]

> "The starting point is that s 5(5) of the Juries Act 1981 recognises the principle that 'so far as practicable' a jury should be drawn from a community in which the alleged offence occurred. The reason for this fundamental principle is the long-standing notion that one should be tried by a jury of one's 'peers'. It also better enables persons from the particular area to attend and hear for themselves a case in which they may have a particular interest."

2.33. The person seeking a change of venue has to show why such a course is desirable, and it is clear that the burden of establishing that there is a "real risk" of prejudice rests upon the party seeking the change. In *R v Johnson*,[36] the Court noted:

> "The parties seeking a change of venue must show a real risk that a fair and impartial trial may not be possible at the place at which the person has been committed to trial. The enquiry is whether there is a real risk that the jury will be tainted by the prejudice of one or more jurors, and whether this risk cannot be eliminated by appropriate processes."

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[30] See generally *Adams on Criminal Law* (Robertson) CA322.03.

[31] [1995] 3 NZLR 563.

[32] [1995] 3 NZLR 651.

[33] *R v Middleton* (Court of Appeal, CA218/00, 26 September 2000). See also *R v Weatherston (No 2)* (High Court, Dunedin, CRI 2008-012-137, 17 February 2009), where it was said by the judge that concerns on the part of the prosecutor about securing a fair trial had "reached the point where those concerns have now translated into support for this application", at [10].

[34] [2008] NZCA 55.

[35] At [10].

[36] (Court of Appeal, CA60/04, 29 March 2004) at [16].

2.34. In the very high profile case of *R v Bain,*[37] Panckhurst J identified the approach that should be taken to a consideration of the factors that establish that a fair trial might not be possible. He said:[38]

> "In order to address this question a broad evaluative assessment is required extending to the nature of the crimes, the identities of the victims, the breadth and impact of the police investigation and the size of the community, amongst others. Factors directly relevant to the attainment of a fair trial are also pertinent, including the size of the pool from which jurors will be drawn, the obligation of disclosure which insures that persons involved in the investigation can be identified, the safeguards which attend jury selection and the ability of the trial judge to direct a jury in emphatic terms."

2.35. The Court of Appeal in *R v Foreman* emphasised that these applications are "strongly context specific", and it is difficult to draw comparisons. Nevertheless, in *R v Leason, Murnane and Land*,[39] the judge drew some analogies between the case before him (the so called "Waihopai" spy base case) and the prosecution of Clayton Weatherston, and granted the application for a change of venue from Blenheim to Wellington. The other "appropriate procedures" would not be enough to counter the difficulties posed by the views of the community; that is, it "may result in at least one or two jurors having a less than fair and balanced view of the case and in particular the proposed defences".

2.36. This might be contrasted with the decision in *R v Crowley*,[40] in which an Otago University student who was being prosecuted for a drunken assault was unsuccessful in a change of venue application on the grounds that there had been considerable adverse publicity about student misbehaviour. The applicant was unable to point to any specific issue of prejudice to himself other than that he was a student at Otago University.

2.37. In *R v* Smail,[41] where the principles underlying this area of the law are canvassed, Young P makes the point at [30] that if the source of the potential prejudice is information on the internet, any change of venue would not really alleviate the risk.

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[37] (High Court, Christchurch, CRI 2007-412-000014, 7 May 2008).

[38] At [7].

[39] (District Court, Blenheim, CRI 2008-006-000932, 8 July 2008).

[40] [2010] DCR 506.

[41] [2009] NZCA 549.

2. Jury vetting and the use of a voir dire

2.38. The notion of "jury vetting" conjures up visions of the initial stages of some highly publicised American proceedings,[42] in which the empanelling of the jury is a process that can take weeks and even months. The common law stance is to be found in cases such as *R v Saunders*,[43] the general effect of which is that individual jurors should not be questioned unless there is good reason to believe that they may be partial or in some way compromised in their ability to hear the case according to the evidence.

2.39. It is at least arguable, however, that there is in New Zealand a modified or diluted form of jury vetting, at least in cases where potential jurors were likely to be associated with the *dramatis personae*. In *R v Johnson*, for example, the Court of Appeal indicated that:

> "… it may be appropriate for the panel to be addressed by the Judge before they are brought into Court. They should be provided with a list of the victims and the witnesses and asked to consider whether there are any reasons which would affect their ability to consider the matter objectively and impartially… Those members of the panel who do raise relevant matters of concern would then be excused by the Judge before the empanelling itself commences".

2.40. This approach was adopted in *R v Skelton,* where Priestley J says that in the course of the empanelling process, potential jurors should be asked to identify themselves as being friends of the parties to the proceedings, people who have encouraged one or other of the parties through such means as telephone calls or other communications or:[44]

> "People who have clear recollections of the alleged events and strong views flowing from those recollections which would make it difficult for them to sit on a jury with an open mind."

They would then be excused from jury duty. Only if even those steps would not negate the prospect of prejudice would an application for change of venue be likely to succeed.[45]

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[42] The OJ Simpson case is probably the best known example of this. See Michael Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) Am Jo Comp Law 109.

[43] [1995] 3 NZLR 545.

[44] At [118].

[45] See also *R v Smail* [2009] NZCA 549, where Young P suggests that there are ways in which juries can be selectively empanelled so that the risk of prejudice is minimised.

2.41. Sir Nicholas Phillips (as he then was) described the procedure that he adopted in a comparably sensitive case in the United Kingdom:[46]

> " . . . I adopted a course that was without precedent. I settled, with the help of counsel, a questionnaire designed to identify those potential jurors who might be prejudiced as the result of the media coverage. Each member of the panel from which the jury would be selected was required to complete this questionnaire. The potential jurors were kept out of court when the selection ballot took place. As each juror was selected I considered his or her questionnaire with counsel and then questioned the juror to explore any possibility of prejudice suggested by the questionnaire. In the light of the answers I received, and with the express or tacit approval of counsel, I excused from serving close on 50% of those selected."

3. Strong judicial direction

2.42. Traditionally, the courts have said that they lay great store by the ability of a jury to cast out of their minds any prejudicial material that they may have encountered by the giving of a strong judicial direction, if necessary at the beginning of the trial and in the summing up.[47] In *R v Smail*, Young P says that jurors who have been in court listening to the evidence unfold:[48]

> "… will recognise that this is of far greater probative value than tittle-tattle from third parties or snippets of information taken from the media or the internet. As well, jurors will readily understand how unfair it would be to take into account extraneous information. A simple explanation as to the reason for the direction to ignore any extraneous information is easily grasped by jurors and makes it all the more likely that the direction will be complied with".

2.43. Confidence in a trial judge's ability to minimise the impact of pre-trial publicity by specially tailored and suitably strong directions to the jury was reaffirmed in *R v Rickards*.[49] This was against the background of massive publicity in demonstrations, leaflets and billboards directed at the past records of alleged rapists awaiting trial (two of whom were at the time serving prison sentences for rape) and the supposed inadequacies of the justice system to protect the interests of rape victims. Much of this was replicated on the internet in ways which the Court acknowledged that it was

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[46] "Challenge for Cause" (1996) 26 VUWLR 479 at 483. The case in question was the prosecution in *R v Maxwell* (unreported), 1995. Quite apart from the problem of adverse publicity, the collapse of the Maxwell group of companies was on a large scale, and there was a real possibility that potential jurors (or their relatives) might have had some indirect financial involvement in the case.

[47] *R v Kray* (1969) 53 Cr App R 412.

[48] At [34].

[49] (High Court, Auckland, CRI 2005-063-1122, 25 May 2006).

powerless to control. Notwithstanding that, the judge declined the application to stay the proceedings, taking the view that appropriate action at the time of empanelling and jury direction subsequently would permit the trial to proceed in a manner that was fair. The defendant was acquitted.

4. Postponement of proceedings

2.44. In *Solicitor-General v W&H Specialist Publications Ltd*,[50] proceedings were postponed for a period of four months, and the defendant was ultimately acquitted. In addition to the observation of Richardson J that this is at variance with the right to be tried expeditiously under s 25(b) - there are other difficulties when this course is taken. In particular, there is a risk that witnesses will not be available or will have their memories of events dimmed by the passing of time. It could be argued that if a trial judge takes the view it has become necessary to postpone a trial because somebody has created a risk of prejudice, there must be a presumption that a contempt has been committed.

2.45. The trial judge had taken the view that, for the purposes of holding the trial, there was a "real risk" that a degree of prejudice had been created. But when the Full Court examined an application to treat the creation of that risk as being punishable as contempt, and with the knowledge that the defendant had been acquitted, it held that there had not been a real risk created in the circumstances. Accordingly there had been no contempt. There is perhaps an element here of the courts speaking with two voices.[51]

2.46. If there were any such presumption, it would be rebuttable. It may be that it becomes necessary to postpone a trial on the grounds of possible taint to the process for which nobody can be blamed in any way. In *R v Smail*, there was an application to be tried by a different jury, after the first one to have been empanelled had been allowed to leave the court without having been warned not to conduct their own research. An application for change of venue was disallowed by the judge. That ruling was not overturned on appeal, but the appeal was allowed to the extent that it was ordered that the trial should be held by another sitting of the court (and a different jury), which was necessarily to be at a later date.

5. Sequestration of jurors

2.47. Sequestering jurors involves at some point in the trial holding the jurors together at a single residential location so that they do not see any prejudicial coverage of the trial itself, or are not exposed to the possibility of contamination from some other possible source (such as through discussion with a family member). This would be against the whole trend in recent New Zealand law, where the practice has been to allow jurors as much freedom to go about their ordinary lives as is compatible with

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[50] [2003] 3 NZLR 12; [2003] NZAR 118.

[51] Simon Brown LJ used this expression in *R v Unger* [1998] 1 Cr App R 308, EMLR 280.

jury service. It seems unlikely that there would be any enthusiasm for that process to be thrown into reverse.

Q2 Should the right to fair trial take priority over all other protected rights?

Q3 Are the measures employed by the courts adequate to ensure trials are conducted fairly?

The appropriateness of the "real risk" test

2.48. If the New Zealand law of contempt were to be put into a statutory form, the question arises as to the whether the common law test of "real risk" should be adopted by the legislature. In favour of doing so would be the fact that it seems to be reasonably well understood, and not to have been the source of great deal of difficulty in practice.

2.49. An alternative possibility is that the test to be adopted could be borrowed from the United Kingdom legislation, the Contempt of Court Act 1981, s 2(2) of which provides that:

> "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".

2.50. Considerable care needs to be taken with the formulation of the appropriate test. The initial draft of the Contempt of Court Bill did not contain the word "substantial". An amendment to the Bill that some such qualification should be added was pressed by Lord Elwyn Jones, and Lord Hailsham, who was responsible for the conduct of the Bill through the House of Lords said, "…if it makes no difference, and if persons of such eminence support it and want it, why not give in? – and so I am doing."[52]

2.51. The addition of the one word "substantial" helps to set the bar very high for the party making the contempt application,[53] especially when one looks at the way in which the statute was interpreted in *Attorney-General v MGN*.[54] This was the first decision of the courts in the United Kingdom that undertook an extensive analysis of the language of the Act. It is worth setting out in full the conclusions of Schiemann LJ.[55]

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[52] *Hansard, HL*, Vol 417 (5th series) Col 143.

[53] See Law Commission, Report 109, *Simplification of Criminal Procedure (Including Name Suppression) Suppressing Names and Evidence)* (2008) para 2.20: "requiring a high or extreme risk of prejudice to a fair trial sets the bar too high."

[54] [1997] 1 All ER 456.

[55] At 460-461.

"1. Each case must be decided on its own facts[56];

2. The court will look at each publication separately[57] and test matters as at the time of publication[58]; 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[59];

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. That risk must be substantial;[60]

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;

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;

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;

(c) The residual impact of the publication on a notional juror at the time of trial.

It is this last matter which is crucial.[61]

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[56] See *Attorney-General v News Group Newspapers Ltd* [1987] 1 QB 1 at 18A, Parker LJ and *Attorney-General v BBC and Hat Trick Productions* [1997] EMLR 76, Auld LJ.

[57] But see the recommendation of the National Heritage Committee that the law be amended, referred to in the Parliamentary answer given by the Lord Chancellor on February 27, 1998, at para 4–155.

[58] See *Attorney-General v English* [1983] 1 AC 116 at 141F–G (per Lord Diplock) and *Attorney-General v Guardian Newspapers Ltd (No3)* [1992] 1 WLR 874 at 885E.

[59] See *Attorney-General v Independent Television News Ltd* [1995] 2 All ER 370 at 381b–d, where Leggatt LJ accepted that, if several newspapers published prejudicial material, they could not escape from liability by contending that the damage has already been done. Each could have caused its own additional risk of prejudice, or, as it might be said, each could exacerbate and increase that risk.

[60] For a consideration of the meaning of "substantial" see *Attorney-General v English* [1983] 1 AC 116 where the term was said to mean no more than "not remote", and see *Arlidge, Eady & Smith on Contempt*, (3rd, ed, Sweet & Maxwell, London, 2005) at paras 4.45 *et seq*. See also the discussion by Sir Charles Gray, "The Bastion of Freedom of Expression—Is It Threatened by the Laws of Confidentiality, Privacy or Contempt?" M Saville and R Susskind eds, *Essays in Honour of Sir Brian Neill: The Quintessential Judge* (Butterworths, 2003), p 218.

[61] This seventh proposition of Schiemann LJ was further discussed, and followed, in *Attorney-General v Unger* [1998] 1 Cr

One must remember that in this, as in any exercise of risk assessment, a small risk multiplied by a small risk results in an even smaller risk.[62]

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.

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.

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 trial,[63]

(b) the focusing effect of listening over a prolonged period to evidence in a case,[64]

(c) the likely effect of the judge's directions to a jury."

2.52. In the light of this analysis, the author of this issues paper has argued that the test for liability set down by the Contempt of Court Act 1981 is one of the factors that has made the law something of a dead letter in the United Kingdom.[65] By implication, if the law of contempt were to be codified, as has been suggested, a different formula would have to be adopted.

App R 308, [1998] EMLR 280.

[62] *Attorney-General v Independent Television News Ltd* [1995] 2 All ER 370 at 383g, Leggatt LJ.

[63] *Attorney-General v News Group Newspapers Ltd* [1987] QB 1 at 17–18, Parker LJ; *Attorney-General v Independent Television News Ltd* [1995] 2 All ER 370 at 382–83, Leggatt LJ.

[64] *Ex p The Telegraph plc* [1993] 1 WLR 980 at 987, Lord Taylor CJ, CA. See also Lord Donaldson MR in *Leary v BBC*, September 29, 1989 (Lexis) cited at para 6–32 of *Arlidge, Eady & Smith on Contempt*.

[65] "ATH Smith "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 HKLJ 593. The current English Attorney-General interprets the absence of any recent prosecutions somewhat differently, taking the view that this is proof that the system is working well in preventing abuse and encouraging responsible journalism. See Dominic Grieve, "Attorney-General: Contempt of Court: why it still matters" Kalisher Lecture, 12 October 2010, available at http://www.attorneygeneral.gov.uk/NewsCentre/Speeches.

Q4 If the law of contempt of court were to be codified or put into a statutory form, should the test for contempt be that it creates a "real risk" to the administration of justice?

Internet developments[66]

2.53. The rules governing contempts by publication were established long before the revolution that is represented by the internet.[67] Since much prejudicial material may now be readily available on the internet there is a real difficulty in New Zealand should a juror decide to conduct independent research. A number of factors are at work that make the administration of this area of the law rather more complex that it was hitherto. This is particularly true of the so-called "fade factor",[68] a presumption that the further away in time the media reports are from the trial, the less likely that they will give rise to the degree of prejudice that could constitute contempt.

2.54. Recent surveys have shown that the internet is very widely used in New Zealand now.[69] The internet stores information in a way that makes it very accessible (by comparison with the efforts to which a juror would have had to go beforehand). The so-called "fade factor" which is an issue that the judge must take in to account in assessing the "real risk" test, does not operate in the same way as it has done hitherto, if the material is readily available online to an inquisitive juror.

1. Detecting evidence of internet misuse by jurors

2.55. Although there is evidence in the recent case law[70] that some jurors have conducted research notwithstanding judicial instruction not to do so, the evidence tends to have come to light through carelessness on the part of the juror concerned. Juror research is very difficult to detect – a juror determined to cover his or her tracks could do it in an internet café, or from home, whereas previously they would have had to go to a library to scour through past newspapers and magazines.

2.56. It is very difficult to know the extent to which jurors do not comply with their oaths not to conduct their own research. In a recent United Kingdom study,[71] research

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[66] See JJ Spigelman, "The Internet and the Right to a Fair Trial" (2005) 29 *Crim Law Jo* 331. See also ATH Smith, "The Future of Contempt in a Bill of Rights Age" (2008) 38 HKLJ 593.

[67] The problems here are in many respects similar to those considered by the Law Commission in its paper, *Suppressing Names and Evidence*, Report (2009), Chapter 7.

[68] The expression appears to have been used for the first time in this context in *R v Unger* [1998] 1 Cr App R 308, [1998] EMLR 280, Simon Brown LJ.

[69] World Internet Project New Zealand, "The Internet in New Zealand" (AUT University, 2009), asserts that five-sixths of New Zealanders use the internet.

[70] See the cases discussed at para 2.589 *et seq*.

[71] The research paper Cheryl Thomas, "Are Juries Fair?" Ministry of Justice Research Series 1/10 (Feb 2010), available at www.justice.gov.uk/publications/research.htm, concludes 12% of jurors serving on "high profile" cases admitted looking for information on the internet. See also Professor J Hunter, D Boniface and Professor D Thomson", "What Jurors Search for & What they Don't Get – PILOT STUDY – Juror Comprehension & Obedience to Judicial Directions against Juror Investigation" (Centre for Interdisciplinary Studies of Law, Faculty of Law, University of New South Wales, 2010).

found that one in 10 of the jurors in the United Kingdom in fact conducted their own research. Partly in response to that, the English Chief Justice has said that in giving instructions to jurors not to conduct research on the internet, and explaining the reasons why jurors should not do this (or discuss the case on-line):[72]

> "[W]e recommend a direction in which the principle is explained not in terms which imply that the judge is making a polite request, but that he is giving an order necessary for the fair conduct of the trial. Such a direction will naturally fall to be given at the outset of the trial …".

2.57. In New Zealand, it has recently been reported that a trial was aborted because it had been discovered that two jurors had been conducting their own research on the internet.[73] The jurors were quite possibly committing an offence under section 401(1)(c)[74] of the Crimes Act 1961 (failing to comply with a judicial direction) in doing that, but it appears that no proceedings were taken in relation to them.

2.58. There are at least two reasons of principle why jurors should not do this, both of them based on the premise that juror research of this kind undermines the right to a fair trial. The first reason is that the practice violates the principle that trials should occur in public and the material upon which guilt or innocence should be publicly known. The second is that all the evidence upon which guilt or innocence is determined should be subjected to examination and challenge by both the prosecution and the defendant.

2. Evidence of internet misuse in UK

2.59. There is certainly some anecdotal evidence of independent juror research appearing in the Law Reports in the United Kingdom, generally in situations where a convicted person appeals on the grounds that a juror has been using the internet and it renders the conviction unfair. In *R v Karakaya*,[75] material was found in the jury room at the conclusion of a trial in which a man had been convicted of serious sexual attacks. The documents were entitled "The Feminist Position on Rape" and "Rape and the Criminal Justice System".

2.60. The convictions were quashed on the grounds (amongst other things) that the content of the documents (which was critical of judges generally in their handling of rape cases) might have served to undermine the confidence of the jury in the fairness of the summing up and the accuracy of the judge's directions of law. The downloading of this material and its use by not less than one member of the jury after the jury had retired contravened the well-established principles of open justice,

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[72] *R v Thompson and other appeals* [2010] EWCA 1623.

[73] *Dominion Post,* 10th September 2010. The trial for murder was halted and a fresh jury empanelled a few days later.

[74] The section is set out below, at 5.3.

[75] [2005] 2 Cr App R 5. *Karakaya* was applied in *R v F* [2009] All E R (D) 162 (Feb) CA on February 17, 2009 where a conviction was quashed after it was discovered that a law student had been talking to jurors in the course of a case.

whereby: (1) both the defendant and the public were entitled to know the material considered by the decision-making body; (2) both the prosecution and defence were entitled to a fair opportunity to address the material considered by the jury when reaching their verdict; and (3) once the summing up was concluded, no further evidence, whether oral or documentary, ought ordinarily to be given. Accordingly, the verdict of the jury could not safely be said to be a true verdict according to the evidence.

2.61. Similarly, in *R v Thakrar*,[76] a conviction was also quashed. It became apparent during a trial that, notwithstanding judicial direction, a member of the jury had searched the internet for information about the defendant. The information was inaccurate and other members of the jury did not alert the judge for some three weeks as to what had occurred. The court took the view that if there was a real possibility that a member of the jury had not followed the judicial direction that the information from the internet was "of no weight whatsoever", the conviction would be unsafe.

2.62. In *R v Marshall*,[77] however, *Karakaya* was distinguished on the basis that the particular internet material did not render the conviction unsafe, as the contents were not such as to have a significant bearing on the issues the jury had to decide. This overlooks the obvious point that the juror was nevertheless a person who was not acting in conformity with the obligations imposed by the terms of the oath that was sworn (or affirmation made) at the outset of the trial. If the juror was cavalier as to his or her obligations in one respect, there might have been other respects in which the judicial instructions were ignored, and a better outcome might be that the case should be retried.[78]

Possible steps to prevent internet misuse by jurors[79]

1. Criminalising independent research

2.63. In some Australian jurisdictions, it is a criminal offence for jurors to conduct their own research in defiance of a judicial instruction not to do so. Arguably, such conduct already is an offence in New Zealand too, under the Crimes Act 1961, s 401, although in the one case known to have involved clear misconduct of this sort,[80] no proceedings were instituted. Whether it would be wise to create a specific offence for such purposes is a matter for debate. Jury service is already something of an imposition upon those chosen to undertake it. On the other hand, the possibility of

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[76] [2008] EWCA Crim 2359; [2009] Crim LR 357.

[77] [2007] Crim LR 562.

[78] It should be pointed out, however, that the use of the power to order a re-trial is used far less frequently in the United Kingdom than occurs in New Zealand.

[79] See the remarks of the Solicitor-General, David Collins QC, "Managing Contempt in an on-line World" 3 December 2009, Internet NZ Conference.

[80] Above n 73.

criminal liability (as when a juror fails to appear) is a signal to jurors, perhaps, that the judicial instruction against independent action is to be taken seriously.

2. Requiring prejudicial material to be taken down temporarily

2.64. A possibility for controlling the dissemination of prejudicial material via the internet resides in the power of the courts to direct that material should be removed for the duration of the period during which such material is problematic. Judges routinely direct that material be removed from the websites of government departments,[81] for example, where they can expect maximum compliance. More difficult, at least potentially, is material that appears on the electronic versions of such publications as the daily newspapers. It seems likely that responsible news outlets will co-operate in such circumstances with requests to remove problematic material. The situation is perhaps slightly more difficult where the material in question has been archived, but if the potential for harm is pointed out to the newspapers, co-operation should still be forthcoming. It should make no difference if the material was unobjectionable so far as the law of contempt was concerned when it was first published if, as the proceedings unfold, the material becomes problematic. But if compromising material has found its way in to the hands of non-accredited outlets, who are not subject to the constraints of responsible journalism, it may be far more difficult to secure voluntary compliance, and the potential for harm should not be underestimated.

2.65. In *Police v K*,[82] Judge Harvey sitting as a Youth Court judge made a partial non-publication order relating to proceedings in which a young accused was facing criminal charges jointly with adults. The order permitted contemporaneous broadcasts or publications in the traditional news media (such as in a newspaper or broadcast as part of a television programme), but not on the internet, by way of on-line news publication or stored video which could be replayed or accessed at a later stage.

2.66. He subsequently invited media representatives to make representations as to the scope of the order, which he reversed,[83] principally it would seem on the basis that:[84]

> "…the evidence reveals (and this was not available to me before) that the theory of the 'document that does not die' is significantly mitigated by the ability of the media to remove material from the internet as required."

2.67. Judge Harvey's comments in *Police v K* suggest that, in New Zealand at any rate, there may well be a way for the private research by jurors to be curtailed. It opens up the possibility of monitoring the internet in sensational cases by the office of the

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[81] See for example Priestley J in *R v Skelton* (High Court, Hamilton, CRI 2006-019-6530, 9 July 2008).

[82] [2008] DCR 853.

[83] For the appeal, see CRI 2008-292-000378, CRI 2008-292-013286, CRI 2008-292-013287, 26 August 2008.

[84] At [54].

Solicitor-General (the Crown Law Office), particularly in retrials of such cases and ask that the material to be taken down until the trial has been completed. Defence Counsel can also ask that material be taken down. However, the Crown is not in a position to require material to be taken down unless it can establish the material is or might constitute a contempt of court, on the basis that its publication will pose a "real risk" to the fairness of a trial. It is true that, in the early stages of an investigation, it will be difficult to establish such a test has been met. It may well be the issues in the trial do not start to become clear until rather late in the day. But the closer to the trial date, the more likely it is the Crown will be able to establish a risk is present, such that an order for material to be taken down can be sought from the courts if necessary.

2.68. If there was ever any real doubt about the matter, the point that "bloggers" are not beyond the reach of the criminal law when they breach suppression orders is made clear by the decision of Judge Harvey in *Police v Slater*.[85] This was a prosecution for a series of breaches of name suppression orders via the medium of a "blog". The defendant was found by the judge to have been the publisher of all of the material that was the subject of the charges. The Judge held the material was "published" in New Zealand, notwithstanding it was hosted on a server outside New Zealand, since it was available free to internet users in this country who may and do access it.

2.69. It would seem to follow from this that if material is published on the internet which may well give rise to a charge of contempt of court, it is open to the appropriate authorities to require that it be taken down. This may not be a perfect or complete solution, and will not prevent the determined internet user. But it will probably thwart the curiosity of most jurors tempted to have a peek, but who do not have the technical sophistication to interrogate the "bots" and "caches" through which this material might be traced by the experts.

3. Greater control to be given to the trial judge?

2.70. A principal difficulty confronting the judge in charge of a trial would appear to be that there is no rapid and effective method to control the actions of non-parties to criminal proceedings who behave in ways that might compromise or jeopardise those proceedings. It seems clear that the courts have the power at common law to make an order forbidding third parties from publishing material that would jeopardise the integrity of a criminal trial.[86] Such an order can be made at the instigation of either the Crown[87] or the defence. The enforcement of such an order is, however, a

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[85] [2011] DCR 6. For a recent decision, in the context of defamation, in which the detailed workings of the internet (involving Google) are examined, see the judgment of Eady J in *Metropolitan International Schools Ltd v Designtechnica Corp* [2009] EWHC 1765, [2010] 3 All ER 548. See also *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1243, where Eady J held an internet intermediary such as a search engine, if undertaking no more than the role of a passive medium of communication, cannot be characterised as a publisher at common law.

[86] There are certainly examples of this being done, as in *R v Gwaze* (High Court, Christchurch, CRI 2007-009-1571, 9 August 2009).

[87] *Television New Zealand v Solicitor-General* [1989] 1 NZLR 1 (CA). See further below at para 2.128 *et seq*, "Prior restraint".

different matter. At the moment, it would seem, the procedure is to send the matter to the Crown Law Office, with a view to the possible initiation of proceedings by the Solicitor-General. It seems probable that a High Court judge would have the power (arising from the inherent power to prevent interferences with the administration of justice) to order the arrest of a person suspected of publishing potentially prejudicial material, although there would appear to be surprisingly no authority on the point. It is less clear that a District Court judge would have either the authority in the first place,[88] and whether he or she could order the arrest in consequence. Given that the District Courts in New Zealand try many of the most serious offences, this would seem to be a lacuna in the law.

Q5 Should consideration be given to the enactment of a statutory power to the courts to prevent interference with the administration of justice by third parties to the proceedings?

Q6 Should courts be given the power to direct the police to take steps to enforce the order of the court if necessary?

The mens rea for publication contempts

2.71. Ever since the eighteenth century decision in the case of the *St James's Evening Post,*[89] the prosecutor has been under no obligation to establish that the publisher intended to interfere with the administration of justice by means of the publication. Liability was said to be "strict", so far as the mental element was concerned. It was enough if the person against whom the proceedings were taken was aware the material was to be published.

2.72. That this is also the law in New Zealand was affirmed in *Attorney-General v Hancox*,[90] where the editor of a radio station identified a member of the security services in breach of a suppression order, in the belief that the observance of the order was rendered no longer necessary because it had been breached earlier by two reporters on the radio programme for which he was editorially responsible.

2.73. This was reaffirmed by a Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd* in which part of the contempt alleged consisted in the publication of the results of an interview with a juror. The Court held explicitly that although relevant to penalty, proof of an intention to interfere with the administration of justice was not necessary to constitute contempt:[91]

> "Accordingly we hold that the mens rea element is satisfied by proof that the defendant knowingly carried out the act or was responsible for the

[88] The jurisdiction of the District Court is considered in para 7.13 below.

[89] (1742) 2 Atk 469, 24 ER 565.

[90] [1976] 1 NZLR 171.

[91] At 55-56.

conduct in question. Proof of an intention to interfere with the due administration of justice may assist the conclusion that the publication had the required tendency, and its presence or absence would also be relevant to penalty; but the absence of such an intention will not necessarily lead to a conclusion that no contempt has been committed."

Who may be liable for a publication contempt?

2.74. There is authority in New Zealand law that editors,[92] newspaper proprietors,[93] printers,[94] reporters,[95] television broadcasters and broadcasting corporations[96] might all be held responsible for a publication contempt in appropriate circumstances. In *R v Griffiths*,[97] it was held that the distributors of an American owned magazine (*Newsweek*) who were selling an issue that contained material that prejudiced a current trial (of a prominent doctor, accused of killing his patients and inheriting their property) were liable.

2.75. It was held that the distributors were responsible and there was no defence of innocent dissemination available at common law in the law of contempt. This has been altered by statute in the United Kingdom.[98] If, as has been suggested in this paper, the law of contempt should be placed in to a statutory form, consideration should be given to clarifying the law in this area.

1. Mens rea of intermediaries, such as editors and those who host websites (Internet service providers).

2.76. In *Solicitor-General v Radio Avon Ltd*,[99] the Court of Appeal reserved the question of whether an editor is in effect vicariously liable for a publication (a news broadcast, in that case) of whose contents he was unaware. The court had heard no argument on the question (which had not at that stage been resolved in New Zealand) as to whether, if there was to be liability for editors of radio stations in New Zealand, the "news editor" was necessarily the appropriate person to bear it.

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[92] *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

[93] *Attorney-General v Crisp* [1952] NZLR 84.

[94] *Attorney-General v Davidson* [1925] NZLR 849 (CA).

[95] *Knapp Robertson & Associates v Robertson* (1987) 6 NZAR 493.

[96] *Television New Zealand v Solicitor-General* [1989] 1 NZLR 1 (CA); *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100.

[97] [1957] 2 QB 192.

[98] The Contempt of Court Act 1981, alters the common law in this respect, in relation to both publishers (s 3(1)) and distributors (s 3(2)) by making available a defence of innocent dissemination. In both cases, there is a duty of care placed around the operation of the defence, and a burden of proof is placed upon the person seeking to rely on the defence in either case.

[99] Discussed above para 2.10.

2.77. A not dissimilar question might arise in relation to an internet service provider, or a blogging service, which hosts material but has very little oversight of the contents of the material posted. It may well be the state of the law is such that persons and institutions in that situation are within the scope of the law as publishers, and might very well be guilty of contempt even in the absence of knowledge. Arguably, there should be a defence of "innocent dissemination" in such circumstances.[100] For practical purposes, however, the mental element hurdle can be overcome if the host is warned that the material posted is objectionable, and nevertheless refuses to make it unavailable to the public.

At what point in time is a publisher at risk of proceedings for contempt? The "sub judice"[101] "rule".

2.78. The so-called "*sub judice rule"* addresses the question of the time at which the publisher is at risk of infringing the law of contempt in relation to future proceedings. At common law, the test was that liability might arise when the proceedings were "pending or imminent". These terms are in themselves somewhat elastic, so it was difficult for a person contemplating publication to know whether he was at risk. If, for example, a known suspect wanted for a criminal offence was a fugitive or a suspect who had not yet been charged, would it be open for a publisher to mention the suspect had a long string of convictions for serious offences?

1. When does the sub judice period begin?

2.79. It has been held that the law of contempt is potentially applicable once a case is *sub judice* and in relation to criminal proceedings this can arise even before a suspect is arrested or charged. The Court of Appeal has held that the period begins when the commencement of criminal proceedings is "highly likely".[102] This mirrors the common law requirement in the United Kingdom that proceedings had to be "pending or imminent" before strict liability was triggered.

2.80. Plainly, this is a somewhat flexible standard whose application will vary from case to case. The lack of certainty in this area was one of the triggers for the appointment of the Phillimore Committee in the United Kingdom after the treatment accorded to the television programme *The Frost Report* which had been subjected to criticism by the Court of Appeal in the case of *R v Savundranayagan*.[103]

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[100] Provision is made in the Criminal Procedure (Reform and Modernisation) Bill before Parliament at the time of writing for such a defence to be available in the context of court suppression orders. See clause 216.

[101] Those who dislike the use of Latin in modern New Zealand law (of whom Sir Bruce Robertson is one) would like to see this practice discontinued. The United Kingdom substitute for this particular usage is the requirement that the proceedings be "active" and I would advocate that this be adopted in New Zealand.

[102] *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 at 3.

[103] [1968] 1 WLR 1761.

2.81. The difficulty of setting the point of time at which the strict liability rule was applicable was addressed by the Phillimore Committee, which successfully recommended that proceedings were to be regarded as "sub judice" (although the terminology was changed, to "active") at clearly identified times. In the case of a criminal process, the time would start when there had been a warrant issued for the arrest of a suspect, or when the person had been arrested. This clarified what had previously been a difficult issue for the press.

2.82. A question arises as to whether a similar arrangement might be put in place in New Zealand. One difficulty with doing so, which has been pointed out by Justice Randerson,[104] is that the press (and the public) might well become interested before those stages have been reached – the press might wish to interview victims, for example, and as a result publish material that later has a bearing on the criminal trial itself.

2.83. This problem was addressed in the United Kingdom by leaving the common law of contempt intact, and providing[105] that nothing in the Act "restricted liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice". In other words, if an intending publisher knew proceedings were pending or imminent and published with the purpose of interfering with those proceedings when they ultimately took place, a contempt would be committed.

2.84. This sets the test for liability at a very high level. A publisher in such circumstances would very often be able to assert his or her purpose was to do something other than prejudice the impending proceedings (for example, merely to criticise the way in which the police had handled a particular investigation) and that the risk to the administration of justice was purely incidental. He or she did not intend to interfere with the administration of justice, although he or she realised that it might occur.

2.85. Something very similar to this happened in *Attorney-General v Sport Newspaper*.[106] In that case, in the course of publishing an article that was extremely critical of the police for the way in which they had handled the conduct of a police investigation, the publication stated the suspect for whom the police were searching already had a number of convictions for serious offences of the type for which he was currently being sought. It was held that the proof of the requisite intention to cause prejudice could not be established, and the application to commit was refused.

2.86. It is arguable it may be better to set as the test of liability, in the situation where a person knows that proceedings are highly likely to be commenced, he or she publishes material known to be likely to cause a risk to the proceedings.

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[104] The Hon Justice AP Randerson, Chief High Court Judge, "Contempt of Court and the Media" LexisNexis Media Law Conference 2008. I am grateful to Justice Randerson for making the paper available to me.

[105] In s 6(c).

[106] [1991] 1 WLR 1194; [1992] 1 All ER 503.

2. When does the "sub judice" period terminate?

2.87. It is not entirely clear when the *sub judice* period ceases, but generally it is thought that it ends in practice when there has been a verdict.[107] The proceedings do not become *sub judice* again when an appeal is brought. As Randerson J has noted, "in practical terms the chances of prejudice are far less after conviction despite the possibility that a retrial may result from an appeal".[108]

2.88. Several points arise from that observation. The chances of prejudice are generally less because any prejudicial comment made will have an impact, if any, upon the sentencing judge and the Court of Appeal rather than the jury, and judges can be expected to put out of their minds any such prejudicial comment. But given there is, in serious cases, a right to go to the Court of Appeal, without the need for any leave requirement, the numbers of those who do appeal is very high in New Zealand. To this it might be added the willingness to grant a re-trial at the end of a successful appeal is far higher in New Zealand than obtains in the United Kingdom. Caution is required when a retrial is ordered.[109]

2.89. Justice Randerson draws attention to remarks of Panckhurst J in *Attorney-General v TV Network Services Ltd*:[110]

> "I very much doubt that it is realistic to expect the media to await expiry of the appeal period, the accident of retrial (ordered in a comparatively small percentage of cases), and occasionally the delay of a new trial before open discussion and comment can proceed. Where necessary, freedom of speech must bend to accommodate the right of an individual to a fair trial. But in my view the freedom would generally be bent beyond breaking point, if free speech remained trammelled after verdict".

2.90. Justice Randerson goes on the make the point, however, that "it should not be assumed that the Courts will not intervene in appropriate cases where prejudicial material is published after conviction and while an appeal is pending".

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[107] In the United Kingdom the period lasts until sentencing is complete. Contempt of Court Act 1981, s 2(4), and sch 1, para 5(a).

[108] Above n 104.

[109] See *R v Burns* [2002] 1 NZLR 387, where (unusually) the Court of Appeal upheld the continuation of a name suppression order pending the hearing of an appeal.

[110] (High Court, Invercargill, CP2/96, 16 August 1996).

Q7 Is it desirable that the point in time a publisher is at risk of proceedings for contempt should be clarified?

The changed character of the modern media

Quite apart from the developments in the new modes of news dissemination, the old media have changed, in a way described by the then Solicitor-General, John McGrath QC:[111]

> "Over the last 15 years the conventional acceptance of the media that it needs to function in a way that protects the needs of the criminal justice system has come under pressure. Some would argue that it is no longer workable. This attitudinal change appears, to this observer, to be due to the emergence of real competition in the news market, in itself linked to the corporatisation of state television and the arrival of TV3 as a competing private broadcaster."

2.91. In the 15 years that have passed since those remarks were penned, one might plausibly argue that the developments alluded to have continued in the same direction. Sky TV is now widely watched. Only one large newspaper is still family owned (the *Otago Daily Times*) whereas the ownership of many of the other newspapers has been concentrated in the hands of Fairfax Ltd, an Australian owned corporation which also has a widely visited website ('Stuff').

2.92. Undoubtedly and perfectly properly, such enterprises have the profit motive in mind, if only for the sake of survival in what is now a highly competitive market place.[112] But in the need to compete, the "needs of the criminal justice system" to which Mr McGrath QC was referring are apt to be even further compromised and marginalised.

2.93. There are concerns about whether the law is fair in its application to those who are subject to it, and concerns about whether it is adequate to the tasks that we set for it. There is increasing worry, in particular, that the rights of an accused to receive a fair trial are imperilled by a press whose appetite for sensational stories is limitless.

Recent challenges to publications alleged to constitute contempt

2.94. In the light of the preceding paragraphs, a number of cases are now outlined in which the representatives of the mainstream media have in effect tested the boundaries of the laws of contempt. The Solicitor-General in *Solicitor-General v Wellington Newspapers Ltd* had also brought proceedings against Radio New Zealand for contempt. Radio New Zealand had decided on legal advice not to report on Mr

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111 "Contempt and the Media: Constitutional Safeguard or State Censorship?" [1998] 1 NZL Rev 371, 386.

112 See the remarks of the editor of the *Dominion Post* in *Solicitor-General v Fairfax Ltd & Panckhurst* (High Court, Wellington, CIV 2008-485-705, 10 October 2008). Although the group executive editor of Fairfax Media had "rejected suggestions that revenue from newspaper sales had any part in the decision [to publish]", (at [41]), the editor Mr Panckhurst had been reported as saying that "we do want to sell more newspapers and we make no apology for that" (at [51]).

Gillies' previous convictions and the other prejudicial material, but by mistake had broadcast a single news report referring to his previous bail. The High Court was equally divided as to whether RNZ's broadcast justified a conviction for contempt and so the application against RNZ was dismissed.

2.95. In *Solicitor-General v TV3 Network Services Ltd & Television New Zealand*,[113] the Solicitor-General sought findings of contempt against the respondents for their coverage of a murder trial. Mr Lynch was alleged to have intentionally driven on the wrong side of road in order to collide with an oncoming car and kill himself. The female occupant in the other car died and her two young children suffered injuries. The trial was aborted on its second day on account of television coverage which the Judge regarded as emotive and sensational and would prejudice the accused. The Judge was not satisfied a fair trial could be assured. The jury was discharged and a retrial ordered. The Solicitor-General submitted the effect of each broadcast was to arouse sympathy for the deceased and her family and to create antipathy towards the accused.

2.96. The Court found the content of the presentations was not such as to bring about a real risk of interference with the administration of justice. The circumstances of the Solicitor-General's case fell short of meeting the standard of proof and the application was dismissed.

2.97. In Solicitor-*General v TV3 Network Services Ltd*,[114] TV3 had screened an item relating to Mr Wickliffe's escape in 1991 from the maximum security prison at Paremoremo. The programme was screened while Mr Wickliffe was on trial for another murder and issues were therefore raised concerning Mr Wickliffe's right to a fair trial. Six members of the jury saw the programme. The Court of Appeal quashed the guilty verdict and a new trial was ordered.

2.98. The Solicitor-General commenced proceedings against TV3 for contempt of court. TV3 accepted its conduct in broadcasting the programme constituted contempt. The only issue was assessment of the appropriate penalty. A fine of $50,000 was imposed and court costs of $16,500 were awarded to the Solicitor-General.

2.99. In *Solicitor-General v W&H Specialist Publications Ltd*,[115] M, a former policeman, was convicted of the assault and sexual violation of his former partner. He was subsequently released from prison after successfully appealing his conviction. Shortly before his retrial, the New Zealand Woman's Weekly published an article about M, stating he wanted back his job in the police, his current partner supported him and he had been acquitted of an earlier rape charge. The article also contained photographs of M and his partner.

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[113] (High Court, Christchurch, M520/96, 8 April 1997).

[114] (1998) 16 CRNZ 401 (Full Court of the HC).

[115] [2003] 3 NZLR 12; [2003] NZAR 118 (Full Court of the HC).

2.100. On the application of the Crown Solicitor, the retrial was adjourned for a period of four months on the ground that the publication so close to trial created a real risk the trial would be unfair. M was ultimately acquitted in April 2002.

2.101. In July 2002, the Solicitor-General applied for orders that W & H Specialist Publications Ltd, the publisher of the *Woman's Weekly*, be fined for contempt of Court. The Solicitor-General argued the sympathetic account of M's current relationship amounted to out-of-Court "similar fact" evidence and was tantamount to an attack on the credibility of the complainant. He also argued the inevitable adjournment prolonged the ordeal for the complainant and M and was a serious contempt.

2.102. The Court considered it was unwise to publish the article before trial but it was unable to conclude in the context of the publication that the material published carried a real risk of prejudice to the administration of justice. Accordingly, the application was dismissed.

2.103. In *Solicitor-General v Fairfax New Zealand Ltd & Panckhurst*, the Solicitor-General applied to have the respondents held in contempt of Court in respect of publishing extracts from intercepted communications obtained under interception warrants during covert surveillance operations. Those communications were held to be inadmissible at the trials of those arrested and ultimately charged under the Arms Act 1983 (as a consequence of the Solicitor-General declining consent for prosecutions under the Terrorism Suppression Act 2002, which was the basis of the original interception warrants). The Solicitor-General submitted the articles created a real risk of interference with the due administration of justice and in particular risked compromising the right of those charged to receive fair trial.

2.104. The application was dismissed. The Court held that while at least seven of the published extracts contravened known suppression orders either wholly or in part, the Solicitor-General had not proved beyond reasonable doubt that as matter of practical reality the actions of the respondents in publishing the articles caused a real risk of interference with administration of justice by compromising the fair trial rights of the accused. Expert evidence was called by both parties as to the likely impact on jurors of the published material, and on the ability of jurors to follow appropriate directions designed to minimise any prejudice that might have been caused. In any event, the court held it was most unlikely anyone would recall detail of communications by the time of trial and the accused were unlikely to be prejudiced by publications in relation to the offences.

2.105. The Court expressed concern regarding the actions of the respondents in publishing the extracts which involved, at the least, reckless failure to ascertain the correct position before publication. It commented that breaches of suppression orders and unlawful conduct by major news organisations and a senior newspaper editor, should result in their prosecution for breach of the suppression orders. The Court urged Parliament to consider substantial increases in fines for such offences to ensure prosecution is a meaningful deterrent.

Prejudgment as a head of liability

2.106. The question of the extent to which public prejudgment of an issue which is before the courts might constitute contempt is not entirely clear. The principal objection to this sort of publication is that, if one of the parties was at liberty to discuss publicly the merits of a forthcoming case, the other side to the litigation would feel the need to respond, and this could give rise to trial by media.[116] In the United Kingdom the prejudgment test was criticised by the Phillimore Committee as being not easy to define and spreading a net that is too wide.[117] How far it has survived in the United Kingdom other than as an aspect of contempt that is intended to pressure an opponent in litigation[118] is a moot point.

2.107. So far as New Zealand law is concerned, the commentary in *Laws New Zealand* states that:[119]

> "Comment on pending legal proceedings which purports to prejudge the issues to be tried by the Court is intrinsically objectionable as it usurps the proper function of the Court. This, it seems, may be punished or restrained as a contempt irrespective of the effect or likely effect on the particular proceedings in question".

2.108. The correctness of this summary was doubted by Doogue J in *Greenpeace New Zealand Inc v Minister of Fisheries*,[120] where it is observed that "the cases relied upon in the footnote do not necessarily support the statement made." The Judge did note, however, that the decision of the House of Lords in *Attorney-General v Times Newspapers*,[121] (which is the common law origin of this species of contempt) had been applied "without considered argument" in two instances.[122]

2.109. The Judge held there was no basis for an injunction on the facts of the case, since the matters which the applicants identified as wishing to injunct did not purport to determine the issues identified by the principal parties to the substantive proceedings. The Court left open the question of whether, on the basis of the House of Lords decision in *Attorney-General v Times Newspapers*, prejudgment of issues and trial by newspapers was a basis for potential contempt of court in New Zealand.

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[116] This was the concern at the heart of the *Sunday Times* case in the United Kingdom: *Attorney-General v Times Newspapers Ltd* [1974] AC 273. See in particular Lord Reid at p 300, and Lord Cross at p 322.

[117] At para 111.

[118] Discussed below at para 2.112.

[119] *Contempt of Court*, part 29.

[120] [1995] 2 NZLR 463.

[121] [1974] AC 273.

[122] *Knapp Robertson and Associates v Robertson* (1987) 6 NZAR 493 (HC); *R v Chignell* (1990) 6 CRNZ 467. See also *Cameron v Otago Daily Times* (1868) Mac 645; *Macassey v Bell* (1875) 2 NZ Jur 158 (SC).

The Court noted it was significant that the Attorney-General was not a party to the proceedings.

2.110. It has been doubted that a report that merely prejudges the outcome of proceedings is, in itself, a contempt.[123] Such a report would be unlikely to provoke the reaction at which this species of contempt is directed.

Seeking to put improper pressure on one of the parties or on one of the witnesses

2.111. The principles underlying this head of contempt were identified in *Attorney-General v Sunday Times* by Lord Diplock. His Lordship identified, as the three requirements of the due administration of justice, that all citizens should:[124]

> (a) Have unhindered access to Courts for the determination of disputes as to their legal rights and liabilities;
>
> (b) Be able to rely on the Courts as free from bias against any party and for decisions based only on facts proved in evidence properly adduced; and
>
> (c) Once the dispute has been submitted to a Court, be able to rely upon there being no usurpation by any other person of the function of the Court to decide it according to law.

He added:[125]

> "Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

2.112. There have been several New Zealand cases in which this head of contempt has arisen. In *Duff v Communicado Ltd*[126] author Alan Duff made a number of public statements about Communicado (and other defendants to an alleged breach of contract action). An application was made to commit him on the grounds that he was applying illegitimate pressure to Communicado, as a litigant.

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[123] *Douglas Hood Ltd v Canterbury Regional Council* (1998) 13 PRNZ 80, citing Blanchard J in *Duff v Communicado Ltd* [1996] 2 NZLR 89. See the article by Simon Mount, "The Interface Between the Media and the Law" [2006] NZ Law Rev 413 at 423 which suggests counsel and others engaged in litigation frequently make these sorts of assertions. Justice Randerson makes the point in the article cited in n 104 that "[t]he police and defence lawyers quite frequently consider it appropriate to speak to media representatives about the case, sometimes, it seems, in response to a statement made by the other side." The Crown Law Office has published a "Media Protocol for Prosecutors" (1 January 2010).

[124] At 309.

[125] At 309.

[126] *Duff v Communicado Ltd* [1996] 2 NZLR 89.

2.113. The Judge held a public statement relating to the parties in civil litigation currently before a court will be in contempt of Court if:

(a) it goes beyond fair and temperate comment and

(b) either

(i) when viewed objectively, it can be seen to have a real likelihood of inhibiting a litigant of average robustness from availing itself of its constitutional right to have case determined by the Court, or

(ii) it is intended by the maker of the statement to have an inhibiting effect on litigant.

2.114. The plaintiff has the onus of proving contempt beyond reasonable doubt. Here, contempt of Court was proved beyond reasonable doubt. Mr Duff was ordered to pay $2,000 costs plus reasonable disbursements.

2.115. The principles were applied in *Solicitor-General v Smith*,[127] where a Member of Parliament intervened in a legal dispute involving one of his constituents. He made a number of public inflammatory statements, and twice made telephone contact with one of the parties, apparently seeking to persuade her not to take further part in the proceedings. The Court held the comments made privately to the party constituted contempt, since they were neither fair, reasonable nor moderate. They were intended to persuade the party to give up the case. The public statements were also contempt – they were one sided, emotive and extreme in their language, and inflammatory and intimidatory in their effect. The statements were uttered with the actual intention of persuading the participant to give up the case. Even if that were not so, the statements viewed objectively were such as to create a real likelihood that a litigant of average robustness in the litigant's position would be inhibited from availing herself of the right to have the case determined in court.

2.116. In *Progressive Enterprises Ltd v North Shore City Council*,[128] Progressive successfully challenged NSCC's grant of a resource consent to the National Trading Company Ltd. NSCC and NTC filed an appeal. The NTC launched a media campaign (including radio and newspaper advertisements, bus-shelter posters and flyers), suggesting Progressive was using the courts to prevent competition. Progressive applied to have NTC held in contempt of court because of the campaign.

2.117. The application was dismissed. The Judge held the purpose of the criminal contempt legislation was to avoid the real likelihood a potential litigant would be improperly deterred from pursuing or participating in litigation. Here, there was no

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[127] [2004] NZLR 540. The case is discussed further in the context of scandalising the court at para 3.32 below.

[128] [2006] 2 NZLR 262.

malicious falsehood or defamation committed, but more importantly no real risk that Progressive would be shamed into abandoning its opposition to the consent process.

2.118. The standard to be applied in a case such as the present in assessing whether or not a party might be dissuaded from litigating was not that of some 'averagely robust' person, since that test was not appropriate when the party in question was "a formidably robust person". There needed to be a real risk of interference with the administration of justice, and the impugned conduct "needed to be improper" and "whether it is proportionate to characterise the conduct as criminal".[129] Accordingly the Court was not satisfied NTC's conduct could be said to infringe any standard of "impropriety" that could justify classification as crossing the threshold of contempt of court.

What is the role of the public interest in this area?

2.119. The extent to which the public interest can be used to justify a publication that has in fact caused a real risk of prejudice is problematic. How can it be in the public interest for a person to have his liberty put at risk by a prejudicial publication? Recognising this, the common law took the view that the public interest was no defence to an allegation of contempt.[130]

2.120. Litigation frequently gives rise to issues of real public concern, and it would be detrimental to the public interest if all comment had to cease in the face of forthcoming litigation. But it is not clear whether New Zealand's law follows the common law on this point. In *Solicitor-General v Fairfax New Zealand Ltd and Pankhurst*, the editor of the *Dominion Post* cited the "public interest" as a reason for publishing material that was, in the submissions of the Solicitor-General, highly prejudicial to forthcoming trials for offences under the Arms Act 1983. The Court held that since it was not likely the trials would start for a period of anything up to two years, the degree of risk was not sufficiently high as to call for the use of the contempt sanction, and the question of the availability of the "public interest" accordingly fell away.

2.121. However, in *Solicitor-General v Smith*, the defence was raised by both the Member of Parliament and by TV3. The Court was able to deal with the point relatively briefly, because it took the view that the defence was not available if there was an intention to interfere with the administration of justice, which it found to be present in both instances. It was not therefore necessary for the issue to be examined in any great depth in the New Zealand context.

2.122. The Court appears to have accepted the submissions of counsel for the defendant to the effect that, for the defence to be available at all, it "must be for the purpose of

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[129] At [40].

[130] The issue is complicated, and it is difficult to make a clear summary of the common law within a short compass. See generally *Arlidge, Eady & Smith on Contempt* para, 5-201 *et seq*.

ventilating a question of public concern."[131] It was acknowledged[132] that there were some issues of genuine public concern raised on the facts of the scenario with which the MP was seeking to deal, in particular: the length of time proceedings can take in important domestic cases in the Family Court, as they had in the case at hand: the fact the proceedings were for the most part in secret[133] and the fact there was no presumption in favour of the natural parents of the child in custody disputes. But the Court took the view that since the MP's primary purpose was to affect the outcome of the case, he was intending to interfere with the administration of justice, and the defence was not made out.

2.123. It is not at all clear how far the decision of the High Court states the law of New Zealand, since the decision does not address the point that at common law, no such defence was available. In the United Kingdom the Contempt of Court Act 1981 sought to change the law by providing in s 5[134] that:

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

2.124. The defence is not available if the material is published with the intention of interfering with the administration of justice.[135] It was widely supposed, when this measure was enacted, that this provision would assist in the balance between freedom of expression and the conduct of a fair trial. In truth, the section has almost never been pleaded or litigated.

2.125. It was considered by the House of Lords in *Attorney-General v English*,[136] where a newspaper had published a highly emotive article written concerning the subject of euthanasia (and in support of a 'pro-life' candidate at a forthcoming election), taking the stance that mercy killing was altogether too readily resorted to in the modern world. As it happened, the article was published on the very day a doctor was to be prosecuted for the death of a badly deformed neonate, it being alleged that the doctor had deliberately killed the infant. The publishers were unaware that the trial was forthcoming.

2.126. The Divisional Court had come to the view the requisite degree of risk to the fairness of the trial had been proved and that the discussion was not "merely

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131 At [68].

132 At [72].

133 Numerous breaches of provisions of the Guardianship Act 1968, s 27A were separately alleged.

134 See generally *Arlidge, Eady & Smith on Contempt*, Chap 4, Part X.

135 Section 6(c).

136 [1983] 1 AC 116.

incidental" to public discussion. Both the newspaper and the contributor (a well known public figure, Malcolm Muggeridge) were fined.

2.127. The House of Lords held, however, the Divisional Court had been wrong to treat the section as a "defence" and allowed the appeal. It falls on the prosecution to prove the risk created is not incidental to the discussion of public affairs. The Divisional Court had also been wrong to pose the question whether the passage to which objection was taken was "necessary" to the discussion, since that formed no part of the statutory test. The test was whether or not the risk created was merely an incidental consequence to the expounding of the main theme.

Q8 Should consideration be given in New Zealand to the introduction of a public interest type defence?

Prior restraint

2.128. The common law has traditionally set its face against granting interlocutory injunctions to restrain speech.[137] This is particularly true in the law of defamation, unless the defendant swears he will prove the truth of what he intends to say, and unless the applicant can prove the mooted plea of justification is bound to fail.[138] The legislation permitting judges to make orders restraining publication of names or other material where the interests of justice require this is an exception to this default position.

2.129. In addition to the legislation, the law is that injunctions may be granted at the instance of one of the parties to litigation (very often a defendant in a criminal case) in appropriate circumstances, as in *Television New Zealand v Solicitor-General*,[139] where the police made statements about the murder suspect whom they were seeking to arrest. Before any arrest had been made, the Solicitor-General obtained an interim injunction restraining Television New Zealand from broadcasting any personal information about a murder suspect and any details of the murder beyond those released by the Police.

2.130. Television New Zealand appealed, arguing that while proceedings were merely potential, as opposed to pending or imminent, there was no jurisdiction to grant the injunction. The Court of Appeal disagreed with that argument, citing *Attorney-General v News Group Newspapers Ltd.*[140] However, the Court concluded that the material that TVNZ sought to broadcast was "not so factual or detailed in its account as to be likely to prejudice a fair trial."

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[137] See Blackstone, *Commentaries on the Laws of England* (1765), Book IV, pp 151-2.

[138] *Bonnard v Perryman* [1891] 2 Ch 269.

[139] [1989] 1 NZLR 1 (CA).

[140] [1988] 2 All ER 906.

2.131. The Court said:[141]

> "In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial."

2.132. That language was cited and applied in *R v Chignell and Walker*,[142] in which the Crown sought injunctions to restrain the media in advance of the retrials of two persons convicted of murder in particularly salacious circumstances. There was enormous media interest which had been advanced in the Court of Appeal as a reason not to grant a retrial. The judge sympathised with the prosecution in this situation, but was not persuaded the protection afforded to freedom of speech and information by s 14 of the Bill of Rights Act was outweighed by a "mere risk" to the fairness of the impending trial. The usual measures could be employed to vitiate the risk.

2.133. In another case, the Attorney-General applied for an interim injunction to restrain TV3 from showing a documentary about a fatal road accident.[143] The driver was about to be charged with manslaughter and it was feared a programme about the accident would prejudice a fair trial. An injunction was granted. TV3 then applied for rescission of the order and the Attorney-General sought to have the injunction continued on the basis that the injunction should be granted by way of prior restraint.

2.134. Justice Fraser concluded any broadcast would seriously prejudice the fairness of the trial. An injunction was granted restraining broadcast until the criminal proceedings against the driver had concluded. The injunction was also to continue for a potentially longer period, to cover the period for appeal and any re-trial. No costs were awarded in respect of the original application for an interim injunction but costs of $1000 were awarded to the Attorney-General on the application for the continuation of the injunction.

2.135. The Attorney-General applied to vary the terms of the injunction ordered by Fraser J (above).[144] TV3 contended the order should enure only until verdict. The Judge found the circumstances had changed since the order was made and there was no need for the injunction to enure beyond verdict. TV3's application was granted.

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[141] At 3.

[142] (1990) 6 CRNZ 467.

[143] *Attorney-General (AG) v TV3 Network Services Ltd* (High Court, Invercargill, CP 2-96, 8 March 1996).

[144] *Attorney-General v TV3 Network Services Ltd* (High Court, Invercargill, CP 2-96, 16 August 1996).

2.136. The Court held in order to justify interference with the freedom of the media it must be shown there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial. The material here was not sufficiently detailed and the trial not sufficiently close to do that.

Standing to commence proceedings

2.137. It is clear that a person whose interests might be jeopardised by a forthcoming publication, such as the defendant to a criminal charge who fears the publication will present a "real risk" of interference with the fairness of the trial, has standing to bring proceedings for an injunction to prevent publication. In *Burns v Howling at the Moon Magazines Ltd*,[145] it was held it is not the case that the power to bring proceedings is reserved only to the Solicitor-General.

Tactical considerations bearing on the decision to employ the law of contempt

2.138. In England at least, the use of the law of contempt to prevent the publication of possibly prejudicial material appears to have become almost a dead letter. In recent years, the Attorney-General has been extremely reluctant to use the law of contempt for a number of reasons. The first is that the law requires the state to show an alleged contemnor has created a substantial risk of serious prejudice, and that is a very difficult test to meet. A substantial risk of some prejudice is not enough; and a small risk even of very serious prejudice will not do either.

2.139. A second difficulty is that the institution of proceedings for contempt in advance of the trial said to have been prejudiced hands the defence a tactical advantage, in the sense that is it is a concession by the state that a risk of prejudice (and in the United Kingdom a substantial risk of serious prejudice) has been created by the prejudicial publicity. The third issue arises in connection with the role of the "public interest" in this area.

2.140. It is quite clear that, in the case of criminal contempts of the kind discussed in this chapter, it must be established by the prosecutor to a standard of judicial satisfaction beyond reasonable doubt[146] that there was a real risk as opposed to a remote possibility that the conduct would undermine public confidence in the administration of justice.

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[145] [2002] 1 NZLR 381.

[146] *Duff v Communicado Ltd*, citing *Solicitor-General v Wellington Newspapers Ltd*; *Witham v Holloway* (1995) 131 ALR 401; *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48; *Siemer v Stiassny* [2007] NZCA 117, [2008] 1 NZLR 150.

3. "SCANDALISING THE COURT": INTERFERING WITH THE COURTS IN THE EXERCISE OF THEIR JUDICIAL FUNCTION[1]

3.1. One issue confronting those who administer the law of contempt in contemporary New Zealand concerns the extent to which the law should be employed to protect the judicial system against scurrilous attacks, both upon individual members of the judiciary, and upon the institution collectively. This version of contempt is referred to (if somewhat anachronistically)[2] as "scandalising the court".

The mischief at which the law of "scandalising" is directed

3.2. Scandalising shares the general essence of the contempt law in that it involves the creation of a real risk of an interference with the administration of justice and the judicial system. The particular mischief is to be found in the undermining of public confidence in the administration of justice.[3] In the language of the High Court of Australia:[4]

> "The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges."

3.3. The offence of scandalising exists to protect the proper functioning of the court, not the dignity of its judges, and its purpose is to guard the institution and not the individual judges. As Lord Steyn explained in the case of *Ahnee v DPP*, the offence of scandalising:[5]

> "… does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice."

3.4. The rule of law requires that judges (and the judicial process) are entitled to protection from unwarranted attacks on their integrity because such attacks have a tendency to undermine public confidence in the judicial arm of government. The

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[1] See M Addo, *Freedom of Expression and the Criticism of Judges: a Comparative Study of European Legal Standards* (2000). See also C Walker, "Scandalising in the Eighties" (1985) 101 LQR 359; D Hay, "Contempt by Scandalising the Court: A Political History of the First Hundred Years" (1987) 25 Osgoode Hall Law Journal 431; D Pannick, *Judges*, (1987), pp109–18; Hon Justice Michael Kirby, "Attacks on Judges – A Universal Phenomenon" (1998) 72 ALJ 599.

[2] For discussion of the language of contempt, see para 1.43 above. Wild J in *Solicitor-General v Smith* [2004] 2 NZLR 540 describes the terminology as being "a little quaint", at [4].

[3] *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225. It must be proved that there is a real risk that public confidence will be so undermined.

[4] *Gallagher v Durack* (1983) 152 CLR 238 at 243.

[5] [1999] 2 AC 294 (PC) at 307.

present law is to the effect that it is an offence to impute improper motives and cast doubt on the impartiality of judges.[6] It is also an offence to subject the judiciary to "scurrilous abuse".[7]

The need to accommodate criticism

3.5. This law, if applied too strictly, can plainly act as a fetter on freedom of speech, and questions arise as to whether the current state of the law satisfies some of the requirements that have to be met when expression is thus constrained. It is necessary to draw a distinction between language that is scurrilous abuse. or an allegation of partiality, and what is legitimate criticism. It is not the purpose of this branch of the law to inhibit robust scrutiny of the judicial process. Furthermore, it is not the purpose of the law to impose a requirement of deference on the part of those who comment upon the judicial process. Particular importance is nowadays attached to such attacks being "baseless"[8] or "unwarranted",[9] ie without foundation in fact.

3.6. There has been an increasing recognition by the courts of the need to be sensitive in a democracy to the right of citizens to criticise institutions, including the administration of justice. The classic statement is to be found in *Ambard v Attorney-General for Trinidad and Tobago*,[10] where the Privy Council advised that an article criticising apparently discrepant sentences was not a contempt, even though it contained strong criticism of the judge. Lord Atkin formulated what is still the modern approach to scandalising:[11]

> " . . . whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

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6 *Badry v DPP of Mauritius* [1983] 2 AC 297.

7 *R v Gray* [1900] 2 QB 36.

8 See *Gallagher v Durack* at 243.

9 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 38.

10 [1936] AC 322.

11 At 335.

Overseas jurisdictions

3.7. Before turning to the position in New Zealand, it is proposed to examine some other common law jurisdictions in which there is recent experience of the law of contempt by scandalising.

1. England and Scotland

3.8. It has been many years now since any English Attorney-General[12] has sought to invoke the law of scandalising. As a result, it is somewhat difficult to know what might be the current state of the law in a number of respects. The impact of the enactment of the Human Rights Act 1998 may well have affected the position, since Article 10 of the European Convention has been interpreted in ways that accord a higher degree of protection for freedom of speech than did the common law. On the other hand, the Convention specifically permits restrictions upon the freedom of speech where this is necessary for "maintaining the authority and impartiality of the judiciary".[13]

3.9. Notwithstanding the specific exemption in the European Convention, there have been suggestions that the current law is inconsistent with free speech guarantees.[14] It has also been argued[15] that the common law of scandalising is incompatible with the European Convention on Human Rights, since it may be unable to meet the test that restrictions require the law to be a response to a "pressing social need."[16]

3.10. That the application of the contempt law can nevertheless sometimes be justified is demonstrated by several cases, including *De Haes and Gijesels v Belgium*.[17] The European Court acknowledged that the domestic courts, as guarantors of justice whose role is fundamental in a state based upon the rule of law, must enjoy public confidence. They must accordingly be protected from *unfounded* and destructive

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[12] In *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 150, a private citizen applied to the Court of Appeal for an order that the writer of a critical journal article (Quentin Hogg QC, later a Lord Chancellor) be held in contempt. The Court declined the application, without commenting upon the entitlement of the citizen from whose action in the Divisional Court the article in question arose to bring such proceedings before the Court.

[13] It may be noted that the New Zealand Bill of Rights Act, which is based upon the International Covenant on Civil and Political Rights does not, by contrast, explicitly contain any such exemption from the freedom of expression guarantee that it incorporates.

[14] See generally C Walker, "Scandalising in the Eighties" (1985) 101 LQR 359; *R v Kopyto* (1987) 47 DLR 213 Ontario Court of Appeal. O Litaba, "Does the 'Offence' of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?" (2003) 8 Deakin LR 113. See also Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing, Oregon, 2002).

[15] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2003), at pp 970–1. See also M Addo, "Are Judges beyond criticism under article 10 of the European Convention on Human Rights?" (1997) 47 ICLQ 425.

[16] In New Zealand terms, the question would be whether or not the restrictions could be justified within s 5 of the Bill of Rights Act.

[17] (1997) 25 EHRR 1. Other cases that might be cited include *Barford v Denmark Series A No 149* (1989) 11 EHRR 493 and *Prager and Oberschlik v Austria* (Application 15974/90) (1995) 21 EHRR 1.

attacks.[18] It may be concluded, therefore, that if the law is sufficiently clearly defined, and there are proper procedural protections, the common law would still pass muster under European law, and in all probability under the New Zealand Bill of Rights Act too.

3.11. In Scotland, by contrast with the situation in England, there have been recent signs that the law retains some vitality. Although not referring to the specific terminology of "scandalising", it is clear that the High Court of Justiciary in *Anwar, Respondent*,[19] was in effect addressing the *actus reus* of "scandalising". The case concerned what were held to be misleading and factually inaccurate remarks made by a solicitor at the conclusion of the case, about the prosecution of a client under the Terrorism Acts 2000 and 2006, and possibly also of the trial process he had undergone.

3.12. These issues were considered with particular reference to the values underlying Article 10 of the European Convention, the freedom of expression provision. It was considered to be of significance that at least some of the solicitor's remarks contained what could be described as "an element of political expression": see at [33]. The court should be slow to characterise such statements as contempt, since political speech attracts the highest degree of protection under Article 10. Moreover, the courts "... ought to be open to lively and truculent criticism". No such finding should be made unless, at least, the comments in question were "grave and insulting": see [32].

3.13. It was nonetheless expressly acknowledged that Convention jurisprudence attached importance to the court's central role in upholding the rule of law, which required it should enjoy public confidence. This would justify at any rate some restrictions upon unjustified and destructive attacks. Any such restrictions would need to be prescribed by law, to pursue one or more of the legitimate aims set out in Article 10 itself and, of course, had also to qualify as being "necessary in a democratic society": see at [30]. (Those legitimate aims include maintaining the authority and impartiality of the judiciary.)

3.14. After reviewing a number of the older Scottish cases and citing extensively from the Court of Appeal decision in *R v Metropolitan Police Commissioner, ex parte Blackburn*,[20] reference was made to the decision of the five judge court in *Robertson v HM Advocate*,[21] and to its emphasis on the essence of contempt as being "conduct which challenges or affronts the authority of the court or the supremacy of the law itself".[22] In the instant case, none of the solicitor's comments were held to fulfil the criteria for contempt (although he was criticised for their misleading character in some

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[18] This was thought by the Court to be especially important in view of the fact that judges are subject to a need for discretion, which may inhibit them from replying to criticism: at [36]-[37].

[19] [2008] HCJAC 36, 2008 SLT 710.

[20] [1968] 2 QB 150.

[21] 2007 SLT 1153.

[22] Those words being cited from *HM Advocate v Airs* 1975 SLT 177.

instances and for misrepresenting the nature of the convictions themselves). The court made it clear that it did not think that the law was obsolete, saying:[23]

> "It is quite possible to conceive of language which would be of such an extreme nature that it did indeed challenge or affront the authority of the court or the supremacy of the law itself, particularly perhaps where the integrity or honesty of a particular judge, or the court generally, is attacked. That would be true, whether or not it related to particular ongoing proceedings. For that reason, if for no others, we reject the submission of senior counsel for the respondent that there could not be a contempt of court following the conclusion of the particular proceedings in question. We believe that what we have just said is wholly consistent with the terms of art 10 of the Convention".

2. Australia[24]

3.15. It is also clear this form of contempt is far from "obsolete" in the Australian state jurisdictions,[25] where there have been a number of recent instances of the invocation of this law. In *R v Hoser & Kotabi Pty Ltd*,[26] attacks were made upon the partiality of two judges in a book, allegations being made of both bias and corruption, and the claim was made that one of the judges had accepted bribes. The statements were treated as contempt, the charge was upheld by the Supreme Court of Appeal of Victoria,[27] and the High Court of Australia refused leave to appeal.[28]

3.16. In *Director of Public Prosecutions v Francis and Anor (No 2)*[29] a talkback host used language to describe a Magistrate who had granted bail to a suspected paedophile that was "offensive", "abusive", "vitriolic" and "degrading". The talkback host pleaded guilty to a charge of bringing a judicial officer into contempt or lowering his authority. The judge declined to accept the submission there was no malice on Mr Francis' part, since he had taken no steps to ascertain the accuracy of the legal and factual background to the incidents that occasioned his remarks.

3.17. It was submitted in mitigation that the *Festival City Broadcasters* who had employed the defendant had already paid out a sum of $110,000 in settlement of a claim in defamation by the Magistrate. The judge made the point that although this counts as

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[23] At [37].

[24] See: H Burmester, "Scandalizing the Judges" (1985) 15 Melb ULR 313; Frank Bates, "Scandalising the Court: Some Peculiarly Australian Developments" (1994) 13 CJQ 241; O Litaba, "Does the 'Offence' of Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?" (2003) 8 Deakin LR 113.

[25] In *Re Colina; ex parte Torney* [1999] HCA 57, (1999) 200 CLR 386, counsel at first instance abandoned the point that the law might be obsolete, and it was not pursued in the High Court of Australia. See Kirby J at [54].

[26] [2001] VSC 443.

[27] *Hoser & Kotabi Pty Ltd* [2003] VR 194 (VSCA).

[28] *Hoser & Anor v R* [2005] HCA trans 357 (26 May 2005).

[29] [2006] SASC 261.

an admission of wrongdoing, "it does not redress the damage caused by unjustifiably exposing the Magistrate and the judicial system to public ridicule, odium and contempt".[30]

3.18. In McGuirk *v University of NSW*,[31] a judge of the New South Wales Supreme Court dismissed an allegation of contempt by scandalising, initiated by the University who were held to have sufficient standing in the matter to be able to bring such a complaint.

3.19. An allegation of contempt by scandalising was upheld against a leading QC who referred in court to the presiding judge as a "cretin".[32] The suggestion that the judge was incompetent falls somewhere between "scurrilous abuse" and an attack upon the credibility of the court that would undermine public confidence. The court said that "…there was a real risk that the statements so widely published would undermine public confidence in the administration of justice. It could not be otherwise".

3.20. The reference to the width of the distribution of the comments is interesting, since, if the press had not reported what was said, the impact upon the public confidence would have been minimal. This raises the more general question as to whether it is appropriate for a person to be held responsible for the content of his remarks when they are more widely disseminated in the course of the proceedings for contempt. There was some discussion in the report about the extent to which the counsel was aware of the presence of the press and of the extent to which he intended his remarks to be heard.

3.21. There has been general concern in the various Australian jurisdictions about certain features of scandalising law. In particular, there has been discussion about:

(1) The right of the judges to speak in their own defence, where there is said to be a "convention" that the judges must remain silent;[33]

(2) The bringing of defamation proceedings by individual judges; and

(3) Who should act as the spokesman for the judiciary in responding to attacks whether on individual judges or collectively. The then Attorney-General,[34] Hon

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[30] At [36].

[31] [2009] NSWSC 1058.

[32] *Attorney-General for State of Queensland v Colin Lovitt QC* [2003] QSC 279.

[33] Justice Margaret McMurdo, "Should Judges Speak Out?" (Speech at Judicial Conference of Australia, April 2001); Enid Campbell, "Judges' Freedom of Speech" (2002) 76 ALJ 499; Enid Campbell and H P Lee "Criticism of Judges and Freedom of Expression" (2003) 8 MALR 77 commenting on criticism of judges generally; Kim Gould, "When the Judiciary is Defamed: Restraint Policy Under Challenge" (2006) 80 ALJ 602; Justice Sackville, "How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary" (2005) 31 Monash UL Rev 191; Hon Justice Anthony Whealy, "Contempt: Some Contemporary Thoughts" (2008) 8 The Judicial Review; *Guide to Judicial Conduct* (second edition) 2007.

[34] "The Role of the Attorney-General" (2002) 13 Public Law Review 252; Gareth Griffith, "The Office of Attorney-General in New South Wales" (2007) 11 Legal Hist 79.

Daryl Williams, stated he did not see it as his function to be the "defender of the judiciary", and contrasted his role against that of the Attorney-General in the United Kingdom. This caused something of a stir at the time,[35] and subsequently.[36]

3. Hong Kong

3.22. In Hong Kong, there have been several relatively recent cases in which this aspect of the contempt jurisdiction has been invoked. In *Wong Yeung Ng v Secretary for Justice*[37] there was a prolonged newspaper campaign against certain members of the judiciary, the judiciary generally and a campaign of harassment of one particular judge by organising that he be followed and photographed throughout the course of his day. It was found that the newspaper and its editor were in contempt. The editor was sentenced to four month's imprisonment and the newspaper was fined $HK5m.

3.23. In the course of refusing leave to appeal to the Hong Kong Final Court of Appeal, (Litton PJ) said:[38]

> "Every civilized community is entitled to protect itself from malicious conduct aimed at undermining the due administration of justice. It is an important aspect of the preservation of the rule of law. Where the contemnor goes way beyond reasoned criticism of the judicial system and acts in bad faith, as the applicant has done in this case, the guarantee of free speech cannot protect him from punishment."

3.24. The principles were considered again in *Secretary for Justice v Choy Bing Wing*.[39] The director of a corporate claimant, who had been permitted to represent it in court, made insulting allegations against an individual judge in seeking to have him disqualified for bias. He used such epithets as "cheating", "dirty", "filthy" and "crook".

3.25. It was held that he had not been exercising, in good faith, any ordinary right of criticism – even misguidedly. He was acting, on the contrary, in bad faith and without any justification, in order to achieve a specific calculated result (ie the removal of the judge from the hearing of an appeal). The allegations were totally unwarranted and baseless. Moreover, it was proved beyond reasonable doubt there was "a real tendency to interfere with the administration of justice".

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[35] Ben Heraghty, "Defender of the Faith? The Role of the Attorney-General in Defending the High Court" (2002) 28 Monash U LR 206.

[36] Gareth Griffith, "The Office of Attorney-General in New South Wales" (2007) 11 Legal Hist 79; James Plunkett, "The Role of the Attorney-General in Defending the Judiciary" (2010) 8 JJA 160.

[37] [1999] 3 HKC 143.

[38] At 147.

[39] [2005] 4 HKC 416.

3.26. The court considered the observations of Mortimer VP in *Wong Yeung Ng v Secretary for Justice*[40] to be of continuing relevance:

> "Bona fide, balanced and justified criticism is susceptible to reasoned answer or even acceptance. Sustained scurrilous, abusive attacks made in bad faith, or conduct which challenges the authority of the court, are not susceptible to reasoned answer. If they continue unchecked they will almost certainly lead to interference with the administration of justice as a continuing process".

3.27. Mention was made of the particular circumstances of Hong Kong and the relative vulnerability of confidence in the administration of justice in a small and young democracy. It is a question whether the same considerations arise in New Zealand. Arguably they do not, and it may be that the (often misguided) criticism of judges, particularly in the exercise of their sentencing powers, must be seen as part and parcel of the fact that justice is not a cloistered virtue, but must be subject to open scrutiny and criticism.

The position in New Zealand

3.28. As with the other types of contempt, this branch of the law is a creature of the common law, and the jurisdiction to punish is the one inherited through the common law.[41] Professor Taggart has pointed out[42] that in *Attorney-General v Blomfield and Geddis*,[43] the existence of this jurisdiction was doubted by some of the judges, at least so far as the scandalising was concerned.[44] For example, Chapman J states:[45]

> "As the matter stands we have the highest judicial authority for the statement that the remedy is obsolete. If it is obsolete in England there is no reason for saying that it should be revived here."

3.29. But the existence of the power in this respect was asserted without difficulty in both *Re Wiseman*[46] and later in *Solicitor-General v Radio Avon Ltd.*[47] By comparison with the

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[40] [1999] 2 HKC 24.

[41] Dr Grant Morris, "Bar v Bench: Contempt of Court and the New Zealand legal profession in *Gillon v MacDonald* (1878)" (2010) 41 VUWLR 541, giving an account of the law of contempt in late nineteenth century New Zealand, involving the imprisonment by Sir James Prendergast CJ of counsel appearing in a case before him.

[42] M Taggart, "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZ Law Rev 271.

[43] (1914) 33 NZLR 545.

[44] By Stout CJ at pp 558-559 and Denniston J at pp 573-574. Williams, Cooper and Sim JJ each took slightly different views.

[45] At 582.

[46] [1969] NZLR 55. These proceedings for scandalising were but the tip of an iceberg in Mr Wiseman's tangling with the senior judiciary, a tale entertainingly told by M Taggart, above n 42.

[47] [1978] 1 NZLR 225 (CA).

position in England,[48] this version of the law of contempt has been utilised in New Zealand with relative frequency in recent years.

3.30. In *Solicitor-General v Henderson & Vernon*,[49] the Solicitor-General brought applications for contempt by scandalising after the defendants published an article alleging partiality on the part of a District Court Judge. While recognising that not every libel of a judge constitutes a contempt of court, Cook J found that, as a baseless assertion calculated to suggest the Judge had not acted impartially, this libel was likely to strike at the very heart of the administration of justice and so amounted to contempt. The defendants were ordered to pay a fine of $500 and costs of $250.

3.31. In Solicitor-*General of New Zealand v Van der Kaap*,[50] the Solicitor-General applied to commit Mr Van der Kaap for contempt of court based on papers he filed denigrating the Court and the judges. Hammond J held the imputation of base motives and attempts to interfere with the proper discharge of the Court's functions were contempts of court (scandalising and interfering with the lawful business of the Court). Mr Van der Kaap was sentenced to six weeks' imprisonment and fined $1,000.

3.32. Most recently, in *Solicitor-General v Smith*,[51] a Member of Parliament, Dr Nick Smith became involved in the custody dispute involving his constituents. He did a number of things that were alleged to have breached the contempt law. He twice spoke directly by telephone to the person in whose care the child was for the time being (the sister of the mother of the child), there being an interim custody order in place. In doing so it was found he was seeking to put pressure on that person to discontinue participation in the legal dispute,[52] by asking her how she felt about "stealing" her sister's child, and telling her Parliament was the highest court in the land.

3.33. He issued a number of media releases couched in emotive language being strenuously critical of the steps that the courts had taken and were likely to take in the future (such as making the interim custody order a permanent one). He was then interviewed on Radio NZ and in a programme on TV3 on the contents of those press releases, and in the course of that again used highly charged language, concluding that:

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[48] Lord Morris in *McLeod v St Aubyn* [1899] AC 549 at 561 had declared that scandalising was "obsolete in this country", but ironically the jurisdiction was exercised the following year in *R v Gray* [1900] 2 QB 36. The report to be found in (1900) 82 LT 534 is the better report, since it repeats verbatim the language used in the attack on Darling J whereas the "official" report does not do so. In *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 347A, Lord Diplock asserted that it is "virtually obsolescent".

[49] (High Court, Christchurch, M32-85, 29 November 1985).

[50] (High Court, Hamilton, M155-97, 30 May 1997).

[51] [2004] 2 NZLR 540.

[52] This dimension of the case is considered further in para 1.26 above.

> "Knowing what I know about this case I'd be dead scared to allow my own children to be in the care of somebody else knowing what the Court can potentially do and give a custody order and lock you out of those children's lives for years."

3.34. It was held by the court that this was a particularly inflammatory and unfair comment. But it was also objectionable in that people listening to it could have no confidence that if they were to approach the court with their own domestic difficulties, matters entrusted to the Family Court would be dealt with in confidence and they would be untroubled by "unlawful, unwanted and unfair public scrutiny."

3.35. The Solicitor-General applied for an order that Dr Smith, TV3 and RNZ be fined for contempt of Court for having improperly pressured a litigant (the caregiver) and the potentially prejudicial effect of that on prospective litigants in the Family Court; for having attempted improperly to influence the decision of the Family Court and diminish the validity of the Court's decision in the eyes of the public; and for having prejudiced the standing of the Court (this being the feature of the conduct that constituted the "scandalising").

3.36. The Court found the MP intended by his utterances to put pressure on the Court and that his conduct might undermine the confidence of the public that decisions would be arrived at without reference to extraneous influences. The fact the statement was made by a person in a prominent position (such as a Member of Parliament) contributed to this conclusion.[53] The Court held that the defendant's conduct constituted contempt of Court on all grounds.[54] The Court also considered the restriction on such behaviour constituted a reasonable limit upon freedom of expression having regard to the enactment of the Bill of Rights Act.[55]

3.37. Radio New Zealand was also held to be in contempt, because part of the interview it had broadcast was likely to place pressure on the caregiver, or to persuade litigants generally from resorting to the Family Court. It also had a real tendency to influence the Family Court in its decision and undermine public confidence in that decision.

3.38. TV3 was also in contempt of Court. By screening the programme, they intended to put pressure on the caregiver or ran the real risk of dissuading her and other prospective litigants from resorting to the Family Court. Secondly it attempted to influence the Family Court in its decision and undermine confidence in the Court.

3.39. It is at least arguable that each of these incidents could also have been treated as a conspiracy to interfere with the course of justice contrary to s 116 of the Crimes Act 1961, or a specific offence under s 117 (d) of the Act which penalises *inter alia* every

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[53] See JF Burrows, [2004] NZ Law Rev 787, 801.

[54] In the separate decision as to penalty, Dr Smith was fined $5000, TV3 $25,000 and RNZ $5000: *Solicitor-General v Smith* [2004] 2 NZLR 570.

[55] See para 1.26 above.

one who "wilfully attempts … to obstruct, prevent, pervert or defeat the course of justice".

3.40. If that route had been adopted, the defendants would have enjoyed full rights to trial by jury. The question arises as to whether this would be satisfactory in this situation. It might be thought there is a clear need for rapid vindication of the rule of law in such circumstances.

Some areas of uncertainty

3.41. In some areas of the law, there is still considerable uncertainty as to the precise contours around liability.

1. What is the actus reus of the offence of scandalising?

3.42. There have been different formulations as to the *actus reus* of the offence across the common law jurisdictions, and across the centuries of the law's existence. In *R v Gray*. Lord Tenterden CJ said that:[56]

> "Any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority, is a contempt of court."

3.43. The context in which those words were uttered was an allegation of the commission of contempt by "scurrilous abuse". In the modern context, it is suggested that this formulation sets the threshold test far lower than is acceptable. So far as New Zealand is concerned, there needs to be added the qualification that there should be a "real risk" (as opposed to a remote possibility) that "public confidence in the administration of justice should be undermined".[57]

3.44. This is quite a high threshold, and it is problematic as to whether it is met when the publication in which the alleged contempt appears is of very limited circulation. It might, for example, be posted on a website that is of general interest to lawyers, but would be unlikely to be accessed by members of the general public. In the context of free press and fair trial, the courts are expected to assess liability by reference to such factors as the breadth of circulation of the offending publication and so forth.[58] It is not clear how this should apply in the case of a scandalising contempt, and the courts in those proceedings do not assess the publicity given to the material as routinely as they do in cases where the contempt is alleged to interfere with the fairness of a criminal trial, for example. In principle, since the test is whether or not the material has a real tendency to undermine public confidence, it need not be shown that the material has actually had that impact upon public confidence.

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[56] At 40.

[57] *Solicitor-General v Radio Avon Ltd* (CA) at 230.

[58] See the discussion at para 2.51.

3.45. The members of the minority in the Canadian case of *R v Kopyto*[59] went so far as to say that the law of scandalising was compatible with the Charter only if it was read subject to the limitations that: there had to be an intent to cause disrepute to the administration of justice or with reckless disregard as to whether such disrepute would follow; the evil consequences flowing from the act or words were extremely serious; and the extreme imminence of those consequences was such that the apprehended danger to the administration of justice was shown to be real, substantial and immediate. This is commonly understood to be so strict as to render the law of scandalising, in effect, a dead letter.[60]

2. The mental element for the offence

3.46. It would appear to be the case that liability is strict, and the mental element in the offence requires no more than that the person accused intended to utter the words alleged to constitute the actus reus of the offence.[61] A view has been expressed that this is unlikely to be the position in the United Kingdom law following the enactment of the Human Rights Act 1998,[62] and it may be wondered whether, in New Zealand, this position survives unchanged after the enactment of the right to freedom of expression in the Bill of Rights Act.

3. Truth and/or justification as a defence

3.47. The question whether or not truth (or justification) can as a matter of law be a defence to an allegation of scandalising is not susceptible of a simple answer. In *Attorney-General v Blomfield*,[63] Williams J said "that has never been done, and cannot be done in summary proceedings for contempt. The court does not sit to try the conduct of the judge." The difficulty, in other words, is that if truth or justification were to be regarded as a defence, it would be necessary to investigate the question whether there was any substance in the allegation the judge was actually biased or partial, and the summary process is not at all well adapted to pursue those sorts of inquiries.[64]

3.48. The Phillimore Committee were in favour of abolishing the common law in this area, suggesting, in substitution, an offence closely related to "scandalising", but defined

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[59] (1988) 47 DLR (4th) 213 at 241.

[60] E Barendt *Freedom of Speech* (2nd ed, Oxford University Press, 2005) 319.

[61] *R v Editor of New Statesman Ex p DPP* (1928) 44 TLR 301; *Solicitor-General v Radio Avon Ltd* at 232-4; *Ahnee v DPP* [1999] AC 294 at 307D-E.

[62] *Arlidge, Eady & Smith on Contempt,* at para 5-246, n 68.

[63] (1914) 33 NZLR 545. See also *Solicitor-General v Radio Avon Ltd* at 231.

[64] In *Steinmann v De Courte* (1899) 17 NZLR 805 – a motion to remove an affidavit said to exhibit "scandal and impertinence" (referring to a judge) - it appears to have been accepted by Prendergast CJ that there is a "violent and vehement presumption of law that a Judge will not be influenced by prejudice, and proof to the contrary will not be permitted: *Floyd v Baker* 12 Co Rep 24."

by Parliament. It recommended that truth should not be an absolute defence where such an offence was charged, even if it consisted in pure allegations of fact (as it would be if a judge were to sue for libel). This was because the very presentation of such a defence might provide a platform for the repetition of the original assertions or allegations; it might provide a cover under which to rake up some damaging episode in a judge's past life.[65] It did, however, consider that truth should be a defence provided that the publication was for the public benefit.[66] In so far as it would be necessary to establish an *additional* ingredient of "public benefit", such a restrictive rule would hardly seem to accord with the requirements of Article 10 of the European Convention on Human Rights, which protects freedom of expression.[67]

3.49. A similar approach was taken by the High Court of Australia in *Nationwide News Pty Ltd v Wills*,[68] where the comment was made:

> "It is not necessary, even if it be possible, to chart the limits of the law of contempt by scandalising the court. It is sufficient to say that the revelation of truth—at all events when its revelation is for the public benefit—and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court of public confidence".

3.50. This passage suggests that there might be circumstances in which it would be no defence to establish the truth of the allegations without establishing also the nebulous concept of "public benefit". As the law stands in England, the recommendations of the Phillimore Committee suggest there is no reason to suppose a defendant would have to go beyond proving the facts were true.

3.51. In another respect, however, it appears the approach in Australia would be the same as that in England. The use in *Wills*, when describing the basis of scandalising, of terms such as "unjustified", "baseless" and "unwarranted"[69] suggests that the test is objective, as in the law of defamation. That is to say, if a judge is accused publicly of misconduct, in such a way as to undermine public confidence in the administration of justice, it would appear to be no defence to contempt proceedings that such a person *believed* the allegations to be true.

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[65] Para 165.

[66] Para 166. Compare the Rehabilitation of Offenders Act 1974, considered in *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at ch 18.

[67] See *Silkman v Heard*, February 28, 2001, QBD quoted in *Gatley on Libel and Slander* at para 18–14, n 64.

[68] (1992) 177 CLR 1 at 39, Brennan J. And see *R v Hoser and Kotahi Pty Ltd* at [58]–[64].

[69] At 38.

4. Fair comment on a matter of public interest

3.52. There is modern authority for the view that a person charged with scandalising the court may put forward by way of defence that the criticism was fair comment on a matter of public interest,[70] analogous to the defence available in the law of defamation. In *Metropolitan Police Commissioner Ex p Blackburn*,[71] Lord Denning MR stated that:[72]

> "It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not."

3.53. Likewise, the Privy Council in *Perera v R*[73] gave as its final reason for allowing the appeal that what was published was honest criticism on a matter of public interest. More recently in *Ahnee v DPP*,[74] again in the Privy Council, Lord Steyn says:[75]

> "The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of criticising, in good faith, in private or public, the public act done in the seat of justice"."

3.54. In the High Court of Australia in *R v Nicholls*[76] Griffiths CJ drew the analogy with libel:

> "I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such a character as to be likely to impair the confidence of the public, or of suitors or any class of suitors, in the impartiality of the court in any matter likely to be before it, any public comment on such an utterance, if it were fair comment, would, so far

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[70] This was implicit in *Solicitor-General v Smith*, where it was held the defence is not available where there is an intention to interfere with the administration of justice by seeking to put pressure on a tribunal with reference to pending proceedings, as was found to have occurred in that case.

[71] [1968] 2 QB 150. See also the words of Lord Atkin in *Ambard v Attorney-General for Trinidad and Tobago*, cited at para 3.6 above.

[72] At 155.

[73] [1951] AC 482.

[74] [1999] 2 AC 294.

[75] At 306, citing *R v Gray* at 40.

[76] (1911) 12 CLR 280. The Privy Council expressed agreement with this approach in *Ahnee v DPP* [1999] AC 294 at 306D–E. See also *R v Hoser and Kotabi Ltd* at [65]–[91].

> from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel."

3.55. To similar effect were the words of Brennan J in *Nationwide News Pty Ltd v Wills*:[77]

> " . . . it has been said that it is no contempt of court to criticise court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit".

3.56. This would perhaps suggest there is no *additional* requirement of establishing a public benefit over and beyond the mere publication of that which is true or fair comment.

Some practical considerations

3.57. This is an area of the law where there are a number of unique practical matters having a bearing on the way in which the law is administered and applied. Proceedings are initiated by the Solicitor-General who takes in to account matters such as the public interest in deciding whether or not proceedings should be brought.

1. The right of judges to speak out in their own defence

3.58. The dilemma has been set out by a current member of the Court of Appeal, Hon Grant Hammond:[78]

> "Perhaps the most difficult matter for judges today is a perceived inability to respond to personal attacks. This is a difficult issue. Traditionally, judges have not responded at all to that kind of attack. If there is to be a response, the expectation is that the Head of Bench or in some circumstances the Attorney-General will respond on their behalf".

3.59. The right of members of the judiciary to speak out in their own defence was formerly governed in the United Kingdom by the so-called Kilmuir rules.[79] These Rules have never applied in New Zealand, but the conventions they established were

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[77] (1992) 177 CLR at 38–9.

[78] Grant Hammond "Judges and Free Speech in New Zealand" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, forthcoming). His remarks are echoed by Justice John Priestley in "Chipping Away at the Judicial Arm" (2009) 17 Waikato Law Review 1.

[79] The text of the original Kilmuir rules may be found in AW Bradley, "Judges and the Media: the Kilmuir Rules" [1986] PL 383, 384. See also *Press reporting of judges' sentencing remarks,* LCD press release (57/97) published on March 26, 1997 which was intended to provide assistance for judges dealing with media comment, perhaps especially in the context of uninformed criticism about sentencing.

mirrored in New Zealand practice. There is an inhibition now to be found expressed in the Australian Guide to Judicial Conduct,[80] that appears to prevent the individual judge from speaking out, at least in relation to the defence of particular judicial decisions:[81]

> "It is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity.
>
> On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction."

3.60. The Kilmuir Rules (which also dealt with restrictions upon the judges so far as speaking about matters of public concern) were relaxed in a letter from the Lord Chancellor, Lord Mackay of Clashfern to the Lord Chief Justice, Lord Lane, on October 16, 1989.[82] In it, he gave an explanation of his view that:

> "… it must be left to the judges themselves to decide whether, and on what conditions, they should give interviews to journalists or appear on radio or television".

3.61. The difficulty is that the judges do not wish to be seen to be speaking extrajudicially on issues they might later be required to consider in their judicial capacity. It has, however, become common and acceptable for the judges to write articles in learned journals and to give public lectures.

2. Who should speak on behalf of the judiciary when it is under attack?

3.62. Writing in 1998, the then Solicitor-General, J McGrath QC, indicated that there was at that time a "strong" convention that the Attorney-General should speak out in

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[80] (2nd ed 2007), published by the Australasian Institute of Judicial Administration Incorporated. The status of the Guide was considered by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76, and *Saxmere Company Ltd v Wool Board Disestablishment Company* [2010] 1 NZLR 35 at [113] where McGrath J said "[t]he views of such bodies (as the Council of Chief Justices of Australia) do, of course, provide important guidance as to appropriate standards of judicial conduct".

[81] Para 5.6.2, "Public debate about judicial decisions".

[82] GR Rubin, "Judicial Free Speech versus Judicial Neutrality in Mid Twentieth Century England: The Last Hurrah for the Ancien Regime" (2009) 27 Law and Hist Rev 373.

defence of the judiciary when it is under attack.[83] This appears to be supported by the current *Cabinet Manual* which provides:[84]

> "The Attorney-General … has an important role in defending the judiciary by answering improper and unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions."

3.63. In the article cited earlier,[85] Justice Hammond makes the point it is now only sometimes appropriate that the Attorney-General should act as a spokesperson for the judiciary. It is possible that the fact a recent holder of the office of Attorney-General was not a qualified lawyer, has led the strong convention to be weakened somewhat.

3.64. Also writing more recently, Justice Priestley makes the point there are some cases in which neither the Attorney nor the Solicitor-General is able to respond to criticism, even when unfounded, particularly in cases where the government has been a party to the proceedings.[86]

3.65. Another possibility is that the individual whose task it is to answer criticism should be the Chief Justice, or the Head of Bench. This occurred in *Solicitor-General v Smith*, in the course of which the Chief Judge of the Family Court appeared in order to speak in defence of the Family Court. It was a part of the contempt found against the radio journalist that she sought to draw the judge into the detail of the case, notwithstanding that the judge had repeatedly indicated he was not prepared to descend into such detail.

3. Is the law of defamation an adequate protection?

3.66. Judges are as entitled as any other citizen to take proceedings in the law of defamation to vindicate his or her reputation,[87] and there has been at least one New Zealand example in which a judge pursued proceedings to a settlement.[88] There are some who would argue this is sufficient protection against unwarranted attacks on

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[83] "Principles for Sharing Law Officer Power – The Role of the New Zealand Solicitor-General" [1998] 18 NZULR 197 at 202.

[84] At para 4.8.

[85] Above, n 78.

[86] John Priestley, "Chipping Away at the Judicial Arm" at 16-17.

[87] For example, Garland J, in a letter to the editor, (1996) 146 New Law J at p 1070, mentioned a " … very satisfactory apology from Channel 4 . . . The judiciary too can take action when the media go too far". The *Sunday Times*, August 8, 1993, reported it had paid damages to a judge as the result of an article describing the judge as "guilty of jarring errors of judgment, stupidity, crassness and blatant prejudice and an affront to human reason." See also the Australian cases of *Herald & Weekly Times Ltd & Bolt v Popovic* [2003] VSCA 161 and *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164, which are recent (and successful) examples of the judiciary using defamation proceedings to vindicate their reputations.

[88] "Judge wins payout in radio slander", *The Dominion Post* (New Zealand, 19 August 2002), referring to Judge Michael Lance QC.

the judiciary. But to regard this approach as the solution has a number of drawbacks. The initiation and conduct of defamation proceedings is a stressful business, whoever the protagonist might be, and it would be likely to distract a judge from the performance of his or her judicial obligations. It is also notoriously expensive.

3.67. Another potential difficulty is that the judiciary would almost certainly count as "public figures" for the purpose of the defence of qualified privilege under the *Lange v Atkinson*[89] rules. This would place an extra difficulty in the face of a judicial figure seeking to vindicate reputation, and would require the proof of malice on the part of the defendant, which may sometimes prove to be a considerable obstacle to surmount. But even if the judge were to be successful, the damage done to the judicial process that is at the heart of the contempt is not really addressed by private proceedings.

3.68. One way in which the expense point might possibly be countered is if the state were to support the bringing of defamation proceedings. It could be argued the support sometimes afforded to Ministers of the Crown provides a precedent of sorts for the conduct of legal proceedings at the public expense. It has to be said that, in the limited consultation that has been carried out with the judiciary in the formulation of this issues paper, this suggestion did not attract any real support.

4. *Arguments for and against the retention or abolition of proceedings for scandalising contempt*[90]

3.69. There is no doubt this is one of the most controversial areas of the law of contempt – it seems to excite adverse commentary that far exceeds the practical importance of the law, given it is rarely employed in those jurisdictions that have not abolished the common law.

3.70. It can be argued that, even in a climate when deference is no longer uniformly shown towards the judiciary and when the courts are perceived of as being public institutions whose activities must be open to rigorous scrutiny, there is a role for the law of scandalising to play. It is important to the determination of legal disputes that those deciding them should not be cowed or subjected to unjustified ridicule by a sometimes hostile (and possibly misinformed) press. The language of Article 10 of the European Convention recognises it is sometimes appropriate for freedom of expression to be curtailed "for maintaining the authority and impartiality of the judiciary."

3.71. For reasons given earlier, an action in defamation is not really an option, which means Judges are unable to protect themselves effectively, either individually or collectively, by speaking out. They have no forum in which to do so.

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[89] [1997] 2 NZLR 22; [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257; [2000] 3 NZLR 385 (CA).

[90] See Cram (ed) *Borrie & Lowe: The Law of Contempt* (4th ed, LexisNexis, London, 2010) at 443-447.

3.72. Probably the strongest argument against the existence of the offence of scandalising is that it appears to be self-serving, and appears to permit the judicial system to be both judge and plaintiff in its own cause. Even when the members of a court who decide upon an application for contempt are not those who are the targets of the contempt, the proceedings still appear to give rise to the appearance of the judges acting in their own cause. A slight variant upon this argument is that it vests a power in the judiciary to silence criticism of themselves.

3.73. There are other difficulties that might be identified. To bring contempt proceedings simply draws attention to the allegations and makes them more widely known than they would be otherwise. Indeed, the mere fact of responding to such allegations, and characterising them as a "real risk" might be seen as lending such allegations an air of credibility.

3.74. Where the material complained of is no more than scurrilous abuse, the public are unlikely to credit the allegations, in which case there is a real doubt as to whether or not the confidence of the public is undermined. A counter-argument is that in such circumstances the allegation of contempt will not have been made out and it is in any event rare for the allegation to consist purely of scurrilous abuse.

Reform

1. Suggestions for reform in other common law jurisdictions

3.75. The question whether there needs to be legal constraint in respect of attacks upon the judiciary has been considered by advisory bodies in the United Kingdom on two occasions, and in Reports from the Australian Law Reform Commission,[91] (which recommended a limited offence of scandalising as part of a wider statutory reform, and also discussed defamation) and the Law Reform Commission of Western Australia,[92] (which supported the ALRC's view) – although it does not appear any statutory provisions have been enacted following these reports.

3.76. On every occasion the matter has been considered by the law reform agencies mentioned in the preceding paragraph, it has been concluded that the common law of scandalising should be abolished and replaced. It was suggested that the law of defamation was not adequate to meet all the problems which they addressed and that some form of statutory replacement was required.

2. The recommendations of the Phillimore Committee

3.77. The Phillimore Committee concluded that some additional legal restraint was required, for two reasons:[93]

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[91] Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987).

[92] Law Reform Commission of Western Australia *Report on Review of the Law of Contempt*, (P93-R, June 2003).

[93] Paras 162–164.

> "First, this branch of the law of contempt is concerned with the protection of the administration of justice, and especially the preservation of public confidence in its honesty and impartiality; it is only incidentally, if at all, concerned with the personal reputations of judges. Moreover, some damaging attacks, for example upon an unspecified group of judges, may not be capable of being made the subject of libel proceedings at all. Secondly, judges commonly feel constrained by their position not to take action in reply to criticism, and they have no proper forum in which to do so such as other public figures may have. These considerations lead us to the conclusion that there is need for an effective remedy against imputations of improper or corrupt judicial conduct."

3.78. They were, however, of the opinion that the majority of such cases ought not to be dealt with summarily and recommended a specific indictable offence, for which purpose legislation would be necessary.[94] Even if such an offence were created, however, the Committee considered there would still be a need for a judge to be able to deal summarily with a contemnor who abused him in the course of proceedings in open court.[95]

3. Recommendations of the United Kingdom Law Commission

3.79. The Law Commission recommended[96] that statute should provide for the following offence which was set out in clause 13 of a Draft Bill appended to the Report:

> "13(1) Subject to subsection (2) below, if—
>
> (a) a person publishes or distributes a false statement alleging
>
> (i) that a court or tribunal or such a body as is mentioned in s 2(1)(c) above is corrupt in the performance of its functions, or
>
> (ii) that any judge, magistrate, arbitrator or person holding a statutory enquiry, any member or officer of a court … has been corrupt in the performance of his functions in relation to any judicial proceedings which have come before him and

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[94] See the comments of Lord Keith in *Re Lonrho* [1990] 2 AC 154 at 177C, where he made it clear that contempt ought not to be dealt with by way of indictment. See also *R v D* [1984] AC 778 at 806, Lord Brandon.

[95] See the discussion in *Arlidge, Eady and Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005) at 10-46 *et seq*.

[96] Law Commission, *Offences Relating to Interference with the Course of Justice*, (No 96, HC213, 1979).

(b) at the time when he publishes or distributes it he intends it to be taken as true but knows it to be false or is reckless whether it is false he is guilty of an offence".

3.80. This proposal was directed towards preventing an unwarranted loss of confidence by the public in the administration of justice as a whole. The Commission took the view that allegations falling short of corruption were unlikely to impair public confidence in the administration of justice.

3.81. In the light of the fundamental uncertainties that surround the law of scandalising, the question arises whether they are capable of being satisfactorily resolved by the courts, as and when they arise, or whether it would be better for Parliament to legislate with the intention of injecting greater clarity in to the law. In principle, it might appear the issues that arise are matters of policy, and although they fall to be expressed in technical terms with which the legal profession in particular is familiar, they are arguably matters that should be resolved after general debate by Parliament.

Questions for consideration

Q9 Because of the judiciary's unique role in our society, is there a need for special rules to control those who unjustifiably attack and undermine either the institution generally or particular individual Judges?

Q10 If there is such a need, should it be through the current law of contempt by scandalising or is a statutorily defined regime to be preferred?

Q11 If the latter is to be introduced what should be the applicable tests, and what consequences should be available for breach?

4. INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE

4.1. The inherent power of the courts to protect the administration of justice through the law of contempt has given rise over the centuries to a considerable body of jurisprudence. If the suggestion in this paper (namely, that inherent jurisdiction to develop the common law of contempt might be abolished and replaced by a combination of statute and delegated legislation[1]) is to be taken further, it will be necessary to take account of the fact that the law of criminal contempt now covers a wide range of apparently disparate forms of wrongdoing. In reality, what these different instances have in common is the fact that they involve an interference with the administration of justice.[2] It should not be difficult to draft provisions making that the core of any replacement offence.

4.2. Many of the ancient common law authorities still cited are probably of doubtful relevance in the modern context. For example, the commentary in *Laws of New Zealand* cites the ancient case of *Milward v Welden*[3] as some authority for the proposition that contempt might be committed by prolixity of pleading. Modern courts have other sanctions to prevent such abuse of their processes at their disposal – processes altogether better suited to discourage temporising than the law of contempt.

4.3. Before the abolition of the inherent power to develop the law of contempt can be contemplated as a serious possibility, it will be necessary for a survey of the law to be made to ascertain whether anything would be lost in the abolition that might not be dealt with in some other way. It is contemplated that a new and relatively broadly drafted statutory provision aimed at prohibiting interference with the administration of justice would be enacted. This could supplement other measures, such as by prosecution for other existing statutory offences in the case of serious breaches, or by the exercise of disciplinary powers. Breaches can also be disposed of under the supervisory or case management powers of the court (and in particular, perhaps, the sanction of costs).

4.4. The conduct of such a survey might seem in prospect to be rather a daunting task and it is beyond the scope of this paper to attempt such an exercise. It is intended in this chapter briefly to sketch some of the uses to which the law of contempt has been put and to suggest it is for the most part already covered by the existing law.

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[1] Above, para 1.40.

[2] For an extended consideration, see *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005), ch 11.

[3] (1565) Toth 101, 21 ER 136.

Abusing the court's procedures

4.5. There is common law authority for the proposition that each of the following species of conduct has been in the past regarded as contempt of court. It seems very likely that each is currently a criminal offence under the ordinary law, although the treatment of vexatious claims, and the destruction of documents which might be sought by way of disclosure in forthcoming proceedings are probably marginal when considered as cases of interference with the administration of justice.

1. Forging a court document
2. Putting forward a false case
3. Improper collusion
4. Abuse of the privilege attaching to court proceedings
5. Misconduct by solicitors
6. Gaining improper access to court documents
7. Destroying documents which might be disclosable for court proceedings

Failure to attend court

4.6. Discourtesy to the court by failure to attend at the requisite time, once dealt with by blunderbuss of the law of contempt, has been supplemented over the years by legislation - at least in the case of witnesses and jurors. Sanctions falling short of contempt are now generally regarded as sufficiently strenuous to deal with advocates and parties.

Interference with participants in the legal process

4.7. *Re Johnson*[4] explained the importance of the summary jurisdiction in this context and the public policy reasons justifying its use:[5]

> "The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom in order that such persons may safely have resort to courts of justice."

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[4] (1888) 20 QBD 68.

[5] At 74.

4.8. It would seem to be the case that the circumstances envisaged would inevitably fall within the terms of the various sections concerning contempt in the face of the court.[6] The individuals protected by the law will include judges, jurors, legal advisers and other officers of the court. It may be doubted, however, whether the statutory provisions would confer additional protection upon receivers, liquidators, bailiffs and sequestrators, since they are unlikely to be either going to or returning from court in the course of their business.

Interference with witnesses

4.9. Seeking to put pressure on witnesses can manifest itself in a number of guises.

1. Reprisals against witnesses

4.10. It is a contempt of court at common law to punish a person for having given evidence in legal proceedings.[7] The test for liability turns in part upon the purpose for which the action alleged to constitute the contempt was undertaken.[8] In *Dentice v Valuers Registration Board*[9] the High Court held there was no contempt in circumstances where valuer witnesses were charged by the Valuation Board with incompetence in the preparation of a report presented as evidence in rent review arbitration. It was claimed by the valuers that this amounted to contempt of court on the ground it was an attempt to punish them for having given the evidence. But the court held any censure that might be imposed would not be in respect of having given evidence so much as the failure to achieve the minimum acceptable professional standards.

2. Persuasion of witnesses

4.11. It may be a contempt to seek to persuade a witness to stay away from court[10] and not give evidence,[11] or to alter the evidence he or she has given orally or in an affidavit.[12] This was the form of contempt that was held to have been committed in *Solicitor General v Smith*[13] where, it will be recalled, the MP sought to put private pressure upon the potential witness in two telephone calls.

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[6] Discussed at greater length in Chapter 5.

[7] *Attorney-General v Butterworth* [1963] 1 QB 696.

[8] Ibid.

[9] [1992] 1 NZLR 720.

[10] *Adams v Walsh* [1963] NZLR 158.

[11] *R v Gray* (1903) 23 NZLR 52.

[12] *Re B(JA) (An Infant)* [1965] Ch 1115.

[13] [2004] 2 NZLR 540, considered at para 2.115.

3. Payments to witnesses

4.12. The payment of excessive sums to witnesses could become a form of bribery and corruption which is punishable under s 117 of the Crimes Act 1961. .

Litigants and Parties

1. Pressurising or intimidation

4.13. Litigants and parties to legal proceedings are also protected from improper pressure from their opponents. This was at issue in *Progressive Enterprises Ltd v North Shore City Council*,[14] where the pressure involved public campaigning over the issues to come before the courts. Putting improper pressure privately upon a party is also caught by the law of contempt.[15] The law is sufficiently subtle to distinguish between legitimate threats (to exercise one's legal rights, for example) and those that cross the line into intimidation. It is not entirely clear that the ordinary criminal law does apply in such situations, and it will be necessary for considerable thought to be given as to whether such conduct should continue to be criminalised in some form.

2. Hindering access to the courts

4.14. In *Attorney-General v Times Newspapers Ltd*,[16] Lord Diplock identified as the *first* of the elementary requirements for the due administration of justice:[17]

> "…that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities".

4.15. Thus, it was held in *Raymond v Honey*[18] that a prison governor committed contempt of court when he intercepted the correspondence of a prisoner intended for the prisoner's legal advisers which included an application to the High Court to commit the governor for contempt. The House of Lords upheld the decision. The right of a citizen to unimpeded access to the courts can be taken away only by express enactment.

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[14] [2006] 2 NZLR 262, considered above at para 2.116.

[15] See generally *Arlidge, Eady & Smith on Contempt* at 11-276.

[16] [1974] AC 273.

[17] At 309.

[18] [1983] 1 AC 1.

Approaching jurors: disclosing jury deliberations

4.16. It has been held that it is a contempt of court for a person to approach a juror with a view to asking questions about what had occurred in the jury room. In *Solicitor-General v Radio New Zealand Ltd*[19] the Solicitor-General commenced proceedings against Radio New Zealand for contempt of court after Radio New Zealand contacted jurors long after the completion of a murder trial, and obtained and broadcast their views on the discovery of fresh evidence (the body of one of the victims).

4.17. Applying a number of common law decisions from the United Kingdom, Australia and Canada, the Court held that Radio New Zealand's actions amounted to contempt both in the approach to the jurors for the purpose of obtaining the material, and in relation to its subsequent publication.

4.18. Conduct that tended to undermine the administration of justice was the essence of contempt of Court. Conduct that might undermine the jury system or public confidence in it was capable of constituting contempt. The protection of the jury system required the finality of jury verdicts, candour and full participation of jurors in jury deliberations, and the privacy of jurors.

4.19. Questioning jurors about their deliberations or their attitude to the discovery of further evidence was an attempt to prolong the life of the jury contrary to the principle of finality.

4.20. Participation by jurors in jury deliberations should occur in the certain knowledge that their own views might be expressed without fear of subsequent exposure. The privacy of jurors was an equally important consideration.

4.21. Although relevant to penalty, proof of an intention to interfere with the due administration of justice was not necessary to establish contempt.

4.22. On an application for contempt the plaintiff must prove to a standard of judicial satisfaction beyond reasonable doubt there was a real risk as distinct from a remote possibility that the conduct would undermine public confidence in the administration of justice.

4.23. The final step in determining whether the conduct in question had a tendency to prejudice the administration of justice involved a balancing between the concept of freedom of speech and the need, for the sake of the community, to preserve the jury system from erosion. The Courts must be alert to see that the legitimate open discussion of matters of public concern was not inhibited or stifled. Of equal concern was the sustaining of an impartial and effective justice system. The revelations lacked any counterbalancing virtue or merit. Disclosure of jury

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[19] [1994] 1 NZLR 48; (1993) 10 CRNZ 641 (Full Court of the High Court).

deliberations or the reactions of individual jurors did not raise any legitimate matter of public concern, or otherwise advance the public good or the cause of justice.

4.24. The right to freedom of expression guaranteed in the Bill of Rights Act must be balanced against all other affirmed freedoms and rights. Those include the right to a fair and public hearing by an independent and impartial Court and the right to be presumed innocent until proved guilty according to law. Those rights were at least as fundamental and as important as the right to freedom of speech. At the heart of the criminal trial was the jury's impartiality and its freedom from any constraint from outside. The right to freedom of expression was qualified by the necessity to preserve and protect those fundamental elements in the jury system. The right of freedom of expression did not encompass the contempt alleged and found.

4.25. There was no doubt that the objective of the law of contempt, generally and specifically in this case, was of sufficient importance to warrant the limit of the freedom of expression. The rights already referred to in the case of criminal procedure and the functioning of the jury were at least as fundamental as the freedom of expression. Nothing in the Bill of Rights Act saved the defendant from the application of the law of contempt in this case.

What of the juror who approaches the press?

4.26. It is not entirely clear how far some of this reasoning is applicable where it is the juror who approaches the press. He clearly foregoes his own privacy, as he is presumably entitled to do. But such conduct would seem to put at risk some of the other interests the judgment was anxious to protect. Section 8 of the United Kingdom Contempt of Court Act 1981 makes it an offence for the juror to behave in such a way. It is a further example of a lack of clarity that is the characteristic of the common law mode of proceeding.

Miscellaneous forms of interference

4.27. The law reports also contain precedents making it a contempt of court to obstruct enforcement and court officers executing process, sheriffs, and court-appointed receivers and sequestrators. In certain circumstances interference with legal advisers will attract the contempt sanction, and contempt may also be committed at common law by interference with wardship proceedings and the *parens patriae* jurisdiction.

Subverting the Orders or Procedures of the Court

4.28. Although this area of the law is concerned principally with criminal contempt, it should be recognised there is a practical overlap with the law in its application to civil proceedings. In *Malevez v Knox*,[20] the court applied the well established principle that aiding and abetting a person bound by a court order or undertaking to breach that

[20] [1977] 1 NZLR 463.

order or undertaking is a criminal contempt,[21] even if the order or undertaking was made in the course of civil proceedings. This is the principle from *Seaward v Paterson*[22]applied subsequently by the House of Lords in the case known colloquially as *Spycatcher.*[23] The Court in *Mikitasov v Collins*[24] purported to apply this line of authority, but appears to say aiding and abetting is a civil contempt only.

Concluding remarks

4.29. It is hoped that sufficient material has been discussed in the course of this chapter to demonstrate the law of contempt is indeed "procrustean" and very wide ranging in its application. The question whether it can be satisfactorily replaced by a code, as many commentators would desire, is a correspondingly complex one. But the same challenge confronted those in the nineteenth century who contemplated putting into a code the entire corpus of criminal law, or at any rate that considerable part of it which delineated the sort of conduct that would attract the criminal sanction. Meeting a similar challenge, they might argue, should not be beyond the capabilities of the twenty-first century draftsman.

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[21] *Re G (Celebrities: Publicity)* [1999] 1 FLR 409 – makes it clear that this is a criminal contempt.

[22] [1897] 1 Ch 545, 558. The principle can be traced back to *Lord Wellesley v Earl of Mornington* (1848) 11 Beav 180 at 181, 50 ER 785 at 786.

[23] *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, which contains the judgments at first instance in the Chancery Division, and in the Court of Appeal. The decision of the House of Lords is reported in [1992] AC 191.

[24] [2010] NZAR 664.

5. CONTEMPTS IN THE FACE OF THE COURT

5.1. In criminal proceedings in particular, there is frequently tension in the courts, which will on occasion result in outbursts, perhaps by persons who are intent on displaying support for one of the participants in the proceedings. It is a fundamental dimension of the principle of open justice that legal proceedings must be conducted in an atmosphere of order and decorum. As Lord Denning put it in *Morris v Crown Office*:[1]

> "The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power".

5.2. It is axiomatic that Judges must have the power to control proceedings in court to ensure that order prevails. By contrast with most of the law of contempt, which is a creature of the common law, all of the statutes which establish the New Zealand courts give power to deal with contempts committed in the face of the court.[2] Statute also covers some areas of misconduct that are, at common law, treated as contempt of court in the face of the court.[3] There is, in effect then, already statutory material that does much of the work that was hitherto a matter for the common law in the face of the court, and this section of the Paper can be correspondingly brief.

The scope of contempt in the face of the court

5.3. A typical provision dealing with contempt in the face of the court is to be found in the Crimes Act 1961, s 401:[4]

> "(1) If any person—
>
> (a) Assaults, threatens, intimidates, or wilfully insults[5] a Judge, or any Registrar, or any officer of the Court,[6] or

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[1] [1970] 2 QB 114, at 122B-C.

[2] Crimes Act 1961, s 401; Judicature Act 1908, s 56C; Summary Proceedings Act 1957, s 206; District Courts Act 1947, s 112; Family Courts Act 1980, s 16; Employment Relations Act 2000, s 196; Supreme Court Act 2003, s 35. However, see the comments on the anomalous position of the Court of Appeal in para 5.11.

[3] Refusal by a sworn witness to answer questions, for example, which is dealt with in the Crimes Act 1961, s 352, the Summary Proceedings Act 1957, ss 39 and 206 and the Judicature Act 1908, s 56B. See *Beckett v Attorney-General* [1989] 2 NZLR 233; *Re Holland* [1917] GLR 424; *Pandey v Police* (High Court, New Plymouth, CRI 2010-433-26, 15 December 2010).

[4] Equivalent provisions, the wording of which are sufficiently similar as not to require citation in full here are to be found in the statutes identified in note 2 above.

any juror, or any witness, during his sitting or attendance in Court, or in going to or returning from the Court; or

(b) Wilfully interrupts or obstructs the proceedings of the Court or otherwise misbehaves in Court; or

(c) Wilfully and without lawful excuse disobeys any order or direction of the Court in the course of the hearing of any proceedings—

any constable or officer of the Court, with or without the assistance of any other person, may, by order of the Judge, take the offender into custody and detain him until the rising of the Court.

(2) In any such case as aforesaid, the Judge, if he thinks fit, may sentence the offender to imprisonment for any period not exceeding 3 months, or sentence him to pay a fine not exceeding **[**$1,000**]** for every such offence; and in default of payment of any such fine may direct that the offender be imprisoned for any period not exceeding 3 months, unless the fine is sooner paid.

(3) Nothing in this section shall limit or affect any power or authority of the Court to punish any person for contempt of Court in any case to which this section does not apply."

5.4. Although there is some question as to whether this operates only within the precincts of the court, or whether it goes rather wider,[7] it would appear the section has given rise to little difficultly in practice in New Zealand. It seems clear from the language of the Act itself that it covers the judge and other participants in a particular hearing whilst they are going to and from court. But there are some other uncertainties in the application of the provision. If, for example, jurors were to conduct their own internet (or other) "research" into the details of a case to unearth material not put before them by either of the parties, in the face of a very clear direction given by the judge at the start of the trial, would such conduct be susceptible to a prosecution under subsection (1)(c)? Would the directions given to jurors in the video recording which they are obliged to watch before commencing jury service suffice as a "direction" for these purposes, or is that restricted to a judicial direction only?

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[5] For example, see *Mair v Wanganui District Court* [1996] 1 NZLR 556 where the contemnor (calling the judge a "dickhead") was sentenced to 21 days' imprisonment.

[6] "Officers of the Court" include barristers and solicitors, as well as bailiffs and court clerks.

[7] It is suggested in *Laws of New Zealand* Contempt of Court at [8] that misconduct in the precincts of a Court may in certain circumstances be treated as a contempt in the face of the court. However, the authority offered for the proposition is an early English one (*Re Johnson* (1887) 20 QBD 68), which is not concerned with the interpretation of a statutory provision.

5.5. Practically every person present in the court is susceptible to the power of contempt, whether present as defendant, witness, juror, member of the public or advocate.

Justifying the continuing use of the summary procedure

5.6. The fact that the maximum penalty for this version of the offence is no more than imprisonment for three months removes any necessity to justify the continued use of the summary power so far as the Bill of Rights Act is concerned. But the remarks of the Supreme Court in *Solicitor-General v Siemer*[8] show the case for the use of the summary process remains a strong one.

> "The need for speed seems a plausible justification for the most extreme summary process, namely, where the judge acts upon his own motion to deal with disorder in the face of the court …. Such acts pose an immediate and direct threat to the due administration of justice and have to be dealt with quickly. Moreover, there seems little need for a jury since the facts should not be in dispute and sentence is quite properly a function of the judge. Judges are well aware that their apparently arbitrary powers need to be exercised with the greatest restraint. There is no evidence that the power is abused and with the added safeguard of a right of appeal contemnors' rights are reasonably protected. The process is by no means perfect but it does seem a necessary one."

Accommodating the requirements of natural justice

5.7. A difficulty with this aspect of the law of contempt is that in certain circumstances, it might appear that the judge is acting as prosecutor, witness and judge in respect of the same incident.[9] At first sight, this would appear to be in breach of the principles of natural justice, particularly in the case where the judge has been the object of the insulting or disruptive conduct. This point was clearly acknowledged in *Balogh v St Albans Crown Court*,[10] where Stephenson LJ described the summary power to deal with contempt in the face of the court as being "rough justice: it is contrary to natural justice".[11]

Section 27 of the Bill of Rights Act

5.8. Section 27(1) of the Bill of Rights Act provides:

> "Right to justice

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[8] [2010] NZSC 54, [2010] 3 NZLR 767 at [34] per McGrath J (for Elias CJ and McGrath J), citing Nigel Lowe and Brenda Sufrin *Borrie & Lowe: The Law of Contempt* (3rd ed, Butterworths, London, 1996) at 473.

[9] See the criticisms by Professor D. Feldman *Civil Liberties and Human Rights in England and Wales* (2nd ed, Oxford University Press, Oxford, 2002) at 963.

[10] [1975] 1 QB 73.

[11] At 90A.

> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

5.9. The traditional requirements of natural justice are that no person should be a judge in his own cause,[12] and decisions affecting citizens should be taken only after those affected have been given an opportunity to be heard (*audi alteram partem*).[13]

5.10. The major issue for the purposes of this paper concerns the procedures that might be or should be adopted to handle disruptive participants in the courts in a manner that makes the procedures compatible with the requirements of section 27.

A note on jurisdiction in the Supreme Court and Court of Appeal

5.11. A statutory power to deal with contempt in the face of the court is included in the Supreme Court Act 2003, in terms virtually identical with those found in other statutes.[14] There would appear to be no comparable provision in the Judicature Act 1908 for proceedings in the face of the Court of Appeal. This would appear to be something of an anomaly,[15] and no doubt the Court would have power to deal with disruption to its proceedings, either by virtue of the Judicature Act 1908, s 54(3) which provides that Judges of the Court of Appeal remain members of the High Court. Alternatively, the Court is expressly stated to be a court of record,[16]and all courts of record have an inherent power to deal with contempts in the face of the court.[17]

The applicability of other provisions of the Bill of Rights Act

5.12. Other sections of the Bill of Rights Act might have a bearing on the way in which an allegation of contempt in the face of the court is handled. In particular, s 24 provides that a person charged with an offence has the right to be informed of the

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[12] See generally GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at 13.54 *et seq*.

[13] *Judicial Review: A New Zealand Perspective* at 13.40 - 13.46.

[14] See s 36.

[15] The Law Commission has received a reference to examine the law relating to the various New Zealand courts. See New Zealand Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?* (NZLC IP21, 2011). This is perhaps a matter that could profitably be examined by the Commission.

[16] Judicature Act 1908, s 54(1).

[17] *Brompton County Court Judge* [1893] 2 QB 195.

charge,[18] the right to a lawyer,[19] the right to adequate time and facilities to prepare a defence,[20] and the right to free legal assistance.[21]

Legal Aid

5.13. It is very unclear how far each of these rights is applicable in the context of contempt in the face of the court. The availability of rights to legal counsel and the right to legal advice appear to be complicated by the terms of the Sentencing Act 2002. Section 30 of that Act provides in general terms that no sentence of imprisonment is to be imposed on an offender without the opportunity for legal representation, and by s 4 of the same Act, the term "offender" includes a person who is dealt with or is liable to be dealt with for non-payment of a sum of money, disobedience of a court order, or contempt of court. However, the self-same provision excludes from the operation of the Sentencing Act generally a term of imprisonment imposed for, inter alia, contempt, from the definition of "sentence of imprisonment".

5.14. It is extremely difficult to see why imprisonment for contempt of court should be excluded from eligibility for legal advice and the assistance of counsel when facing a term of imprisonment. Contempt in the face of the court is plainly a criminal contempt. It is not impossible that this outcome is the unintended result of a drafting anomaly.

5.15. Since the maximum penalty to which an individual might be sentenced for contempt in the face of the court is limited to three months, it would seem that legal aid would not be available as of right to a person who otherwise would qualify on the basis of lack of means. Section 8(1)(c)(i) of the Legal Services Act 2000 prescribes a period of six months' imprisonment for eligibility to be automatic. The availability of legal aid is therefore a matter at the discretion of the Legal Services Agency.

5.16. The applicability of these provisions in the context of the right to a fair trial has been considered relatively recently by the Supreme Court in *R v Condon*,[22] where it was stated that although the right to a fair trial is an "absolute right", there is no such right to legal representation. However, if, because the accused had no lawyer or for any other reason the trial was fundamentally flawed, the conviction would have to be quashed. The Court took the view that save in exceptional cases, an accused who conducted his or her own defence to a serious charge without having declined or failed to exercise the right to legal representation would not have had a fair trial.

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[18] s 24(a).

[19] s 24(c).

[20] s 24(e).

[21] s 24(f).

[22] [2006] NZSC 62, [2007] 1 NZLR 300.

The English Practice Direction

5.17. In New Zealand, there is no formal publicly available document that regulates procedures in this area. In practice, it seems likely judges will in fact observe the dictates of natural justice.

5.18. In relatively recent years, the English courts[23] have devised what is, in effect, a code that seeks to balance, on the one hand, the need for the judge to be able to control proceedings in court, with the entitlement of the "respondent" to be dealt with in accordance with the principles of natural justice. That experience has subsequently been "codified" into a Practice Direction[24] giving advice as to the most appropriate steps to take when considering imprisonment for contempt in the face of the court.

5.19. The Practice Direction provides as follows:

> "12. Where the committal application relates to a contempt in the face of the court the following matters should be given particular attention. Normally, it will be appropriate to defer consideration of the behaviour to allow the respondent time to reflect on what has occurred. The time needed for the following procedures should allow such a period of reflection.
>
> 13. [The practice direction notes the traditional processes for commencing proceedings for contempt are dispensed with in cases of contempt in the face of the court]…. but other provisions of this practice direction should be applied, as necessary, or adapted to the circumstances. In addition the judge should:
>
> (1) tell the respondent of the possible penalty he faces;
>
> (2) inform the respondent in detail, and preferably in writing, of the actions and behaviour of the respondent which have given rise to the committal application;
>
> (3) if he considers that an apology would remove the need for the committal application, tell the respondent;
>
> (4) have regard to the need for the respondent to be—
>
> (a) allowed a reasonable time for responding to the committal application, including, if necessary, preparing a defence;
>
> (b) made aware of the availability of assistance from the Community Legal Service and how to contact the Service;

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[23] The seminal cases are *R v Hill* [1986] Crim LR 457 and *R v Schott and Barclay* [1997] 2 CrApp R 383.

[24] Which is supplemental to RSC, Order 52 (Schedule 1 to the CPR) and CCR, Order 29 (Schedule 2 to the CPR). Scotland has also recently implemented a new regime for dealing with contempt in the face, Scottish Parliament SIs/2009/201-250/Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Contempt of Court) 2009 (SSI 2009/243), which came in to force in August 2009.

(c) given the opportunity, if unrepresented, to obtain legal advice;

(d) if unable to understand English, allowed to make arrangements, seeking the court's assistance if necessary, for an interpreter to attend the hearing; and

(e) brought back before the court for the committal application to be heard within a reasonable time.

(5) allow the respondent an opportunity to—

(a) apologise to the court;

(b) explain his actions and behaviour; and,

(c) if the contempt is proved, to address the court on the penalty to be imposed on him;

(6) if there is a risk of the appearance of bias, ask another judge to hear the committal application;

(7) where appropriate, nominate a suitable person to give the respondent the information.

(It is likely to be appropriate to nominate a person where the effective communication of information by the judge to the respondent was not possible when the incident occurred.)

14. Where the committal application is to be heard by another judge, a written statement by the judge before whom the actions and behaviour of the respondent which have given rise to the committal application took place may be submitted as evidence of those actions and behaviour."

Sending proceedings for consideration by another judge

5.20. The suggestion in para 12(6) that a judge might send a potential contemnor to be dealt with by a different judge appears to have been first made by Denning LJ in *Balogh v St Albans Crown Court*:[25]

> "I see no reason why one judge of the Crown Court or the High Court should not commit for contempt of another… It depends on all the circumstances whether more than one judge should come in to these summary proceedings."

5.21. In the more remote judicial centres, it may well not be possible to contemplate such a course. But in the major New Zealand centres, it may well be sensible to adopt such a course, with any consequent changes in practice envisaged in the English Practice Direction that might be necessary or desirable in the New Zealand context.

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[25] [1975] 1 QB 73.

Q12 Should a suitably modified version of the English Practice Direction be adopted as guiding New Zealand practice in cases of contempt in the face of the Court?

Cameras, and the use in court of modern electronic devices

5.22. Since 2000, New Zealand practice has been to permit the use of cameras in court to record proceedings. This is the subject of Media Guidelines giving the courts considerable control over the procedure.[26] The precise status of the Guidelines has been the subject of judicial comment. In *R v Sila*,[27] Fogarty J made the point that the Guidelines were of no legal force, and he challenged some of the assumptions upon which the Guidelines had been formulated. In *R v Crutchley,*[28] Keane J agreed the Guidelines do not have the force of law, and can be set aside if the judge takes the view that they conflict with the need to do justice.

5.23. There is, however, no legislation comparable to that in the United Kingdom by which the practice of using other recording devices in court is regulated.[29] It would seem that there is no law prohibiting the use of such commonplace communication devices such as laptops and mobile phones, and this proposition holds good for the use of their photographic and video recording facilities. Access appears to be permitted to social networks such as YouTube, Facebook and Twitter.

5.24. When it became apparent in the UK recently that such practices were forbidden by the High Court judge in the legal proceedings concerning the founder of Wikileaks, Julian Assange,[30] the Lord Chief Justice issued an Interim Practice Guidance,[31] which was in turn followed by a Consultation paper.[32] The paper makes the point that, whereas the traditional methods of filing copy by the media involve a degree of editorial control, "instant reporting without the self-restraint presumed to be

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[26] *In-Court Media Guidelines 2003*. The current guidelines would not seem to permit eg "live streaming". For a discussion, see Burrows and Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Melbourne, 2010) at 8.3.

[27] [2008] NZAR 294 (HC).

[28] (High Court, Hamilton, CRI 2007-068-000083, 16 May 2008).

[29] Contempt of Court Act 1981, s 9 forbids the use without permission of "any tape-recorder or other instrument for recording sound …". Photography, filming and making sketches in court with a view to publication are forbidden by the Criminal Justice Act 1925, s 41(1).

[30] See K. Gledhill "Legal Blogs and Baby Barristers" *NZ Lawyer* (25 February 2011) at 18.

[31] *Interim Practice Guidance : The Use of Live Text-Based Forms of Communication (Including Twitter) From Court For the Purpose of Fair and Accurate Reporting*, 20 December 2010, Judge LCJ. The Guidance is set out in Appendix 3 below.

[32] On 7 February 2011, a Consultation paper "A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting" was issued, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/cp-live-text-based-forms-of-comms.pdf. The paper suggests only accredited members of the press should be permitted to tweet from court, subject to the overriding discretion of the judge as to what might be allowed.

exercised by accredited members of the media might lead to a greater likelihood of prejudicial reporting, and must be considered".[33]

Q13 Should consideration be given to placing the In-Court Media Coverage Guidelines on a statutory footing, and to regulating the use of modern communications devices in court?

[33] Ibid, at [8.6].

6. CIVIL CONTEMPTS

The purposes of civil contempts

6.1. Civil contempt of court is a mechanism by which a party to litigation is enabled to compel compliance with a court order[1] (or an undertaking, which is the same thing for these purposes)[2] through the threat of sanctions. The possible sanctions include imprisonment, fines or sequestration of property. In the case of contempt by a company, imprisonment is not available against the company itself, but the other sanctions are available.

6.2. Usually the threat of contempt proceedings is sufficient to persuade the recalcitrant litigant (or other participant in the process) to comply with the obligations imposed by the court. But if litigants decline to comply with court orders, the proceedings begin to take on a more public dimension, in the sense that it is in the public interest that court orders should be obeyed. The more wilful and defiant the refusal to comply, the more the proceedings become criminal in character.

6.3. In short, proceedings for civil contempt can have a dual character, being both coercive and punitive. But the identical procedure is used to pursue both objectives, and this causes confusion.

6.4. The process was characterised by Sedley J in *Guildford Borough Council v Valler*,[3] as being to all intents and purposes a form of "private prosecution"[4] where the purpose of the proceedings was punitive. His Honour accepted the distinction between civil and criminal contempt was historically important and might be analytically useful. He said he was unable to accept committal on the motion of an antagonist in civil proceedings was in any admissible sense the private law right which the "older *dicta*"[5] suggested it was.

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[1] Which might include ancillary orders such as interrogatories, discovery and disclosure and other orders made in the process of case management.

[2] *Malevez v Knox* [1977] 1 NZLR 463, citing 9 Halsbury's Laws of England (4th ed) para 75 as authority; see also *Hussain v Hussain* [1986] Fam 134 at 139.

[3] [1993] TLR 274, 275 (Lexis), *sub nom Guildford Borough Council v Smith*.

[4] By contrast, however, it has also been argued that the language of "prosecution" is altogether inappropriate to describe the process of invoking the summary contempt jurisdiction. See eg the argument of counsel in *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 412A, and his reference to the case of *R v Daily Herald Editor, Printers and Publishers Ex p the Bishop of Norwich* [1932] 2 KB 402 at 411–12. See also Mustill LJ in *R v Griffin* (1989) 88 Cr App R 63 at 67 (" . . . there is no prosecutor").

[5] The full judgment (Lexis) does not disclose what *dicta* the learned judge had in mind.

Justification of the civil contempt jurisdiction

6.5. The explanation for the imposition of liability for civil contempt is that the administration of justice is effective only if there is a means to enforce the judgments of the courts. As McGrath J put it in *Siemer v Solicitor-General*:[6]

> "Effective administration of justice under our constitution requires that the orders of the courts are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court orders are quickly brought to account."

The right to be heard

6.6. It was held in *Hadkinson v Hadkinson*[7] that court orders must be obeyed unless they have been set aside, even if it might be argued the orders were not made validly in the first place. For a considerable time after that decision, the case was also treated as authority for the proposition that those in contempt were unable to seek the assistance of the court without first purging their contempt. That was arguably a very rough form of justice indeed, and it may be doubted that it is compliant with the requirements of ss 25(a) and 27(1) of the Bill of Rights Act, guaranteeing the right to a fair trial and the right to natural justice respectively.

6.7. These arguments do not appear to have been put before the court in *Attorney-General for England and Wales v Tomlinson*,[8] where a person seeking leave to extend the time limit within which to file a defence to proceedings was clearly in breach of an injunction and guilty of contempt of court. The court held this was merely a factor that should be taken in to account in deciding whether or not he was entitled to the relief sought. Delay was permitted to enable the defendant to submit to the jurisdiction of the court.

6.8. The House of Lords has confirmed the question of the right to be heard should be approached on the basis of a *discretion* to be exercised flexibly, according to the circumstances, rather than on the basis of a *rule*.[9] The discretion will be exercised in the light of the particular facts,[10] and in particular taking into account the nature and

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[6] [2010] NZSC 54, [2010] 3 NZLR 767 at [26].

[7] [1952] P 285.

[8] [1999] 3 NZLR 722.

[9] *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 46, Lord Bridge. But see the approach adopted in Canada in *Paul Magder Furs Ltd v Ontario Att-Gen* (1991) 85 DLR (4th) 694, where Brooke JA observed "[i]t is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged." He cited *Hadkinson v Hadkinson* [1952] P 285, and also *Newfoundland (Treasury Board) v The Newfoundland Association of Public Employees* (1986) 59 Nfld & PEIR 93 at 95.

[10] *Campbell Mussels v Thompson* (1984) 81 Law Soc Gaz 2457, CA; *Jademan (Holdings) Ltd v Wong Chun-Loong* [1990] 2 HKLR 577.

merits of the application sought to be made.[11] "A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute".[12] The modern, more flexible approach was reflected in the words of Lord Bingham CJ in *Arab Monetary Fund v Hashim*[13] where he indicated that the preferable course is to ask:

> " . . . whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders".

Civil and Criminal contempts compared

6.9. The difference between a civil contempt and a criminal contempt can be broadly stated: the former is a mechanism that seeks to coerce compliance with a court order, usually at the behest of one of the parties to the proceedings. The purpose of criminal contempt, by contrast, is punitive, and seeks to punish a person for having failed to comply with obligations either imposed or undertaken.[14] Where the dividing line is drawn in any particular instance is far more difficult to ascertain with precision and the distinction has been much criticised.[15] Indeed, it has been suggested that the common law governing civil contempt should be abolished, and replaced by statutory forms of proceedings for the enforcement of a court order and by the separate offence of a "disobedience contempt".[16]

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[11] *Atlantic Capital Corporation v Sir Cecil Denniston Burney*, CA Civil Div transcript 1142 of 1994, September 15, 1994 (Lexis). See also *Fakih Bros v P Moller (Copenhagen) Ltd* [1994] 1 Lloyd's Rep 103 at 108. In *National Bank of Greece v Constantinos Dimitriou*, *The Times*, 16 November, 1987 (Lexis), a defendant was in breach of a *Mareva* injunction for non-disclosure of assets, and the Court of Appeal accordingly refused to vary the terms of the injunction in order to permit payment of his solicitors. In the words of Parker LJ, "[i]t is an appeal by a defendant who has consistently and flagrantly misled the court and who has also been in flagrant contempt of court, for there is no doubt that he has deliberately disobeyed the order . . . that he should disclose his assets. Of that there can, as it seems to me, be no possible doubt. So far as such a defendant is concerned, it would appear that the court should not assist him in any way when he is still in the position that he has not disclosed what he has been told to disclose and deliberately has not done so". See also *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695, [2000] 2 All ER 395; *Grupo Torras SA v Sheik Fahad Mohammed Al Sabah*, *The Times*, March 30, 1999, CA, Smith Bernal; the matter is shortly discussed by A Srivastava and A Keltie in "Purging the Contempt" (1999) 149 New Law Jo. 535.

[12] Per Lord Nicholls in *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 All ER 945 at [17].

[13] Unreported, 21 March, 1997. In Case C-394/07 *Gambazzi v DaimlerChrysler Canada Inc* [2009] ECR I-02563, the European Court of Justice considered a situation where a judgment had been obtained in default in the United Kingdom High Court because the defendant had been excluded as a result of his contempt. The national court before which it was sought to enforce the judgment (in this case Italian) was required to consider whether the "exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard" in deciding whether to enforce the judgment.

[14] In *Attorney-General v Newspaper Publishing* [1988] 1 Ch 333 at 362, per Sir John Donaldson MR it is suggested that there are only two broad forms of contempt.

[15] *Witham v Holloway* (1995) 183 CLR 525, 534.

[16] Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987) recommendation [46].

6.10. It can be argued that this course, or a variant of it, would have much to recommend it, since it should greatly simplify the law. The distinction between the two forms of contempt is a product of history, and the significance of the distinction has diminished significantly in practice as the courts have increasingly amalgamated the two in matters such as the burden of proof, the requirements of service, the particularising of the charge, standing to bring proceedings, waiver and similar matters. This is a reflection of the fact that, although a party to legal proceedings has a particular interest in having the order or ruling observed, there is also a public interest in the outcome when the refusal to comply with the court order or undertaking is being wilfully flouted.

Some residual differences between Civil and Criminal Contempts[17]

6.11. If abolition were to be regarded as a desirable and viable option, there are some residual differences to which attention would be required. These include: that the privilege against self-incrimination is available in criminal contempts but not in civil; a constable or bailiff may not take proceedings in relation to civil contempts on a Sunday; discharge from custody may be made conditional upon the payment of costs in criminal but not civil contempts; sequestration orders are not available upon criminal contempts; and the Royal prerogative is available for criminal but not civil contempts. A person in whose favour an order has been made has the power to waive a civil contempt, but this does not apply in criminal cases.

***Solicitor-General v Siemer* in the Supreme Court**

6.12. The nature of the distinction between civil and criminal contempts was considered by the Supreme Court in the case of *Solicitor-General v Siemer*, and it may be as well to set out the background to this important case at the outset. The proceedings for contempt arose from a deliberate and ongoing breach, over years, by the respondent (Mr Siemer) of an injunction made in private civil litigation)[18](*Siemer v Stiassny*). After Mr Siemer was twice held in contempt by the High Court, on the application of the private party Mr Stiassny,[19] the Solicitor-General filed an application to commit for contempt seeking an indefinite term of imprisonment until the respondent complied with the injunction. The Solicitor-General contended this was a civil contempt, involving as it did a deliberate and ongoing breach of an order capable of being remedied at any time by the respondent if he so chose. Mr Siemer had "the keys to his prison in his own pocket" and could avoid any penal consequences by complying with the injunction.

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[17] For more detail, see *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005) ch 3.

[18] *Ferrier Hodgson v Siemer* (High Court, Auckland, CIV-2005-404-1808, 5 May 2005).

[19] *Ferrier Hodgson v Siemer* (High Court, Auckland, CIV-2005-404-1808, 16 March 2006), including being sentenced to a short term of imprisonment.

6.13. A full bench of the High Court found the respondent in contempt,[20] and held the proceeding to be civil, but chose to impose a six month finite term of imprisonment instead of the indefinite term sought by the Solicitor-General.

6.14. Mr Siemer appealed against the finding of contempt on the basis that this was in substance a criminal case and therefore he should have had the right to trial by jury. The Court of Appeal[21] upheld the contempt finding on the basis that this was in substance a civil proceeding, involving civil contempt. Accordingly the right to trial by jury in s 24(e) of the Bill of Rights Act did not apply. However, the Court determined that a finite term of imprisonment was incorrect as that would only be an appropriate remedy for a criminal contempt. Given the conclusion that this was a civil proceeding, the Court of Appeal allowed the appeal only to the extent of altering the sentence from a finite sentence to "a *maximum* term of imprisonment of six months", thereby allowing earlier release if the contemnor complied with the injunction.

6.15. Mr Siemer appealed to the Supreme Court. The Solicitor-General opposed the substantive appeal on the basis that the Court of Appeal's reasoning was correct. The Supreme Court held the proceeding was in substance criminal and that the defendant had indeed been "charged with an offence" for the purposes of Bill of Rights Act protection, because of the penal consequences (in this case; the likelihood of a term of imprisonment). The Supreme Court did not dwell on the distinction between civil and criminal contempt. For the minority, McGrath J made the point that:[22]

> "When a court holds someone to be in contempt of court, whether the contempt is one categorised as criminal or civil,[23] its determination stigmatises that person. The effect of the court's finding is equivalent to that resulting from conviction on a charge of committing a statutory crime".

6.16. Delivering the judgment for the majority, Blanchard J says:[24]

> "It is no answer, either, to say, as the Solicitor-General does, that the present case only involves civil contempt, because the threat of prison is being used only or primarily to coerce compliance with an order of the court made in a civil proceeding; and that under the order made by the Court of Appeal Mr Siemer will be given the keys to his own prison because his imprisonment will be ended if and when he complies. He still

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[20] (High Court, Auckland, CIV-2008-404-472, 8 July 2008).

[21] *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556.

[22] At [15] per McGrath J (for Elias CJ and McGrath J).

[23] "A classification which, except where required by statute, is probably best avoided as unhelpful". Footnote in the original.

[24] At [57] per Blanchard J (for Blanchard, Wilson and Anderson JJ). Footnote omitted.

faces deprivation of liberty if found to be acting in breach of the injunction".

6.17. By different routes of reasoning, the minority and majority in the Supreme Court held the right to jury trial in s 24(e) of the Bill of Rights nonetheless did not apply as the summary trial method was the only way of dealing with contempt in New Zealand. If proceedings by way of indictment were ever available in New Zealand, that was no longer the case. The sentence was amended to the maximum term available under the criminal law's general summary jurisdiction, which is three months.

Parallel proceedings?

6.18. In the light of the analyses in *Siemer*, the time may have come when it would be appropriate to separate the two strands of the law; the coercive element, on the one hand, and the procedure for punishment on the other. These should be regarded as separate proceedings, so that their purpose is clear from the outset. The first of these would be an application to the court for the enforcement of a court order or undertaking, and the second, an application to punish (by way of committal or otherwise) for a wilful refusal to comply with a court order.

Standing to bring proceedings

6.19. If the course suggested in the preceding paragraph were to be pursued, a question would arise as to who would have standing to commence proceedings in both cases. The usual person to instigate proceedings in cases of civil contempt is the person in whose favour the order is made. Where proceedings are brought for punitive purposes, it could be either the party [25] or the Solicitor-General. In certain circumstances, it might be appropriate for the court to act of its own motion, and refer the matter to the Solicitor General.

The continuing importance of a summary procedure

6.20. Even though the members of the Supreme Court were reluctant to characterise the conduct in the *Siemer* case as being either civil or criminal,[26] they were effectively

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[25] Sedley J in *Guildford Borough Council v Valler* made the point that an application to commit for contempt is to all intents and purposes a form of "private prosecution."

[26] As the Court explained on an appeal against a costs order, in *Siemer v Solicitor-General* [2011] NZSC 32, at [3]-[4]:

> "[3]... This Court did not classify contempt proceedings as either criminal or civil but saw them as a unique summary process with protective features which the Court identified. Mr Siemer had to be treated as having been "charged with an offence" in terms of s 24 of the New Zealand Bill of Rights Act 1990 because of the penal consequences if he were found to have committed a contempt.
>
> [4] But it certainly does not follow that costs are then to be determined under the Costs in Criminal Cases Act rather than in the manner appropriate for a process governed by the High Court Rules."

unanimous as to the importance of the use of a judge-only or summary process. The majority said:[27]

> "[W]e do not believe that the jury trial procedure for contempt would ever be appropriate, even accepting that a means exists or could be devised for summoning a jury and putting a case for contempt before it. Such a procedure would be highly undesirable because it would undermine the authority of the court by interposing a body of lay persons between the court's order and its enforcement and giving to them the task of interpreting the order. That task should be for the court alone to undertake."

6.21. The minority in *Siemer* noted that even if the penalty were higher than the three months stipulated in the Bill of Rights Act a summary process was nevertheless justified:[28]

> "The need for speed is not, however, confined to contempts in the face of the court and intimidation and harassment of witnesses. It applies equally to any continuing contempt such as the persistent disobedience of court orders in this case. Urgency is also important in other types of out-of-court contempt because of their corrosive effect on the administration of justice as well as the loss of public confidence that it engenders.
>
> ... The common law summary procedure remains the only means yet identified which enables effective protection to be given to the threats to the rule of law that all contempts provide. The unusual nature of the procedure emphasises the gravity of the threat to the administration of justice and in the eyes of the court. The procedure also adequately protects persons who come before the court. For all these reasons we consider the constitutional importance of the objective of the summary process and the impact that accommodating a jury trial would have on the courts' ability to ensure the effective administration of justice clearly indicate that the procedure is a proportionate response to the needs of the rule of law.
>
> It follows that we consider the summary procedure for all contempt of court proceedings is a justified limitation of the right to a jury trial under s 24(e). The summary procedure accordingly is not in breach of the Bill of Rights Act."

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[27] At [65] per Blanchard J (for Blanchard, Wilson and Anderson JJ).

[28] At [35] – [37] per McGrath J (for Elias CJ And McGrath J)].

Conclusions

6.22. It is not entirely straightforward to say, after the decision in *Siemer*, what remains of the traditional distinction between civil and criminal contempts. A litigant seeking to have a court order enforced must still make an application to commit as before. What the consequences of such an application might be for such matters as the availability of legal aid or where the appeal rights lie in any case are matters that now fall to be determined afresh. Whilst the decision might be seen as giving rise to a number of loose ends, it might nevertheless afford the stimulus to contemplate the adoption of fresh terminology and procedures as have been sketched in this chapter.

Q14 In the light of the decision of the Supreme Court in *Siemer v Solicitor-General*, should consideration be given to the adoption of different terminology and procedures, separating the application to punish for contempt from the enforcement of court orders?

7. JURISDICTION

7.1. The general issue of jurisdiction to punish for contempt is more complicated than is at all desirable. This has arisen because of the distinction that is drawn between the "inherent" power to punish for contempt, which is available only to "superior"[1] courts of record,[2] and "implied" powers, which are available to other courts ("inferior" courts of record)[3] having only statutory powers from which the exercise of a power of contempt is necessarily implied.[4] Regrettably, although the legislation creating the more significant New Zealand courts states that these are courts of record,[5] it does not specify whether they are either "superior"[6] or "inferior"[7] courts.

Supreme Court

7.2. It is unclear to what extent the Supreme Court has an inherent jurisdiction to punish for contempt in relation to its own proceedings. Historically, the inherent jurisdiction arises as a result of the fact that a court is a superior court of record,[8] and the New Zealand Supreme Court is a creature of statute and is expressed by the Supreme Court Act 2003 to be a court of record.

7.3. In *Simpson v Kawerau District Council*,[9] in the context of an application for leave to appeal against conviction, the Supreme Court said somewhat cautiously that:[10]

> "The Supreme Court is created by statute, the Supreme Court Act 2003. Its jurisdiction is both created and limited by statute. Unless a statutory provision authorises the Court to hear and determine an appeal, the Court has no power to give leave. It has no inherent jurisdiction".

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[1] The expression "superior court of record" was examined in some detail recently by a strongly constituted Divisional Court in *R (Cart) v Upper Tribunal (Public Law Project Intervening)* [2011] QB 120, Laws, Sedley and Richards LJJ, Owen J and Sir Scott Baker. The court concluded that in spite of the fact that the Upper Tribunal was so designated, it was not necessarily on that account completely immune from judicial review.

[2] Hawk. PC 6.2, c. 22; *Ex p Fernandez* (1861) 10 CB (NS) 3, 142 ER 349. See I H Jacob, "The Inherent Jurisdiction of the Court" (1973) 23 CLP 23; K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 ALJ 449; M S Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 LQR 120.

[3] *R v Lefroy* (1873) LR 8 QB 134. See *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005) at para 13-7. See also CJ Miller *Contempt of Court* (3rd ed, Oxford University Press, Oxford, 2000) at 3.39: "Jurisdiction to punish for constructive or indirect contempts committed out of court is vested solely in the superior as opposed to the inferior courts. The superior courts of record are the House of Lords, the Court of Appeal, the High Court of Justice, Crown Courts…".

[4] See generally Rosara Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Cant LR 220 at 224.

[5] Including the District Courts Act 1947, s 3(1).

[6] Cf the Constitutional Reform Act 2005, in the United Kingdom, establishing the Supreme Court: s 40(1) states that court is a "superior court of record".

[7] Comment is made at para 1.45 as to the suitability of such terminology in the 21st century.

[8] See above, n 2.

[9] (2004) 17 PRNZ 358.

[10] At [2].

Although the Court appears in the final sentence to be saying without qualification that it has no inherent jurisdiction, it seems plain from the context that this was in relation to the power to hear appeals, and not too much should be read into it as a general proposition.

7.4. Moreover, so far as the law of contempt is concerned, the Supreme Court Act 2003, s 35(4) provides that:

> "The Supreme Court has the same power and authority as the High Court to punish any person for Contempt of Court in any case to which subsection (1)[11] does not apply".

It would seem to follow from this that it certainly has as much inherent power to punish for contempt as does the High Court.

7.5. The issue is unlikely to be problematic, and it is difficult to see how the issue of contempt of that court will be likely to arise. It did arise in *Re Lonrho plc*[12] in which an attempt was made by a prominent businessman (Tiny Rowland) to put pressure on the House of Lords by publishing a special edition of *The Observer* newspaper (of which he was the proprietor) with the intention of putting pressure on the House of Lords in relation to litigation in which he was personally involved. The House took the view that the publication did not reach the standard of liability for contempt of court, namely that it had created a "substantial risk of serious prejudice". As Lord Bridge put it:[13]

> "So far as the appellate tribunal is concerned, it is difficult to visualise circumstances in which any court in the United Kingdom exercising appellate jurisdiction would be in the least likely to be influenced by public discussion of the merits of a decision appealed against or of the parties' conduct of the proceedings".

7.6. The situation is somewhat complicated by the fact that judges continue to be judges of the High Court after appointment to the Supreme Court.[14]

Court of Appeal

7.7. Like the Supreme Court, the Court of Appeal is statutory in origin, and it too is expressed to be a "court of record" in the constituent legislation.[15] But unlike the

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[11] Subsection (1) deals with contempt in the face of the court.

[12] [1990] 2 AC 154.

[13] At 209.

[14] Supreme Court Act 2003, s 20(2).

[15] Judicature Act 1908, s 54(1).

Supreme Court, there is no statutory provision to the effect that the court should have the contempt powers of the High Court.[16] The general view would appear to be that the Court of Appeal is a statutory body, having no general inherent jurisdiction. Thus in *Prior v Parshelf 45 Ltd (In Receivership)*, [17] where the question at issue was whether or not the court might grant a Mareva injunction as a condition for giving leave to appeal to the Privy Council, the Court of Appeal compared the position of that Court to its United Kingdom equivalent:[18]

> "As was observed in *Staples*, the English Court of Appeal is a branch of the Supreme Court. It therefore possesses an inherent jurisdiction which supplemented the powers given to it by statute and by rules. This Court is not in a similar position. It is constituted under Part II of the Judicature Act (s 57(1)). Its jurisdiction derives from statute and, in relation to appeals to the Judicial Committee, from the Privy Council Rules"

7.8. So far as the law of contempt is concerned, however, jurisdiction was taken in *Re Wiseman*,[19] the case having been moved into the Court of Appeal on the motion of Roper J. It was held that the Court of Appeal "now has all the powers of the Supreme Court to deal with the matter." The basis upon which jurisdiction was asserted was not made plain by North P.

7.9. More recently in *R v Smith*,[20] it was decided by the Court that it did have an inherent power to revisit its own decisions in certain circumstances:[21]

> "The Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available."

7.10. Subsequently, in *R v Palmer*[22] the Court expressed the view that in the light of *Smith*, it possessed the jurisdiction to reopen a case which had been the subject of a final judgment so long as the Court was satisfied that:

(a) There was a "fundamental error in procedure";

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[16] Above, para 7.4.

[17] [2000] 1 NZLR 385.

[18] At 391.

[19] [1969] NZLR 55.

[20] [2003] 3 NZLR 617.

[21] At [36].

[22] [2007] NZCA 350 at [8] per William Young P. See also *R v Dolman* [2009] NZCA 434.

(b) There is no alternative remedy available; and

(c) A substantial miscarriage of justice would result if the error is not corrected.

High Court (formerly the Supreme Court)

7.11. The High Court has the most extensive inherent power of all the New Zealand courts. As the Court of Appeal explained in *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*:[23]

> "By virtue of the provisions of the earlier Supreme Court Acts of 1860 and 1882 the High Court has all the jurisdiction possessed by the superior Courts in England at the time the 1860 Act came into force. It follows that subject to any statutory qualification the High Court has any jurisdiction which the English Courts had in 1860 to punish contempts of disobedience…".

7.12. It may deal summarily with any contempt affecting its own proceedings, and it has jurisdiction to punish for contempt of inferior courts where the inferior courts have no jurisdiction, unless that jurisdiction is expressly taken away by statute.[24] It also has considerable jurisdiction over inferior courts and tribunals, which may be by way of judicial review under the Judicature Amendment Act 1972.[25]

District Courts

7.13. It was stated in *McMenamin v Attorney-General*[26] that the District Courts have only the contempt powers conferred by statute and implied as a result of statutory interpretation.[27]

> "An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process. All this is well understood."

7.14. The decision was followed and applied in *Paraha v Police*, [28] where it was stated that, although the District Court has no inherent jurisdiction, it has the inherent power to

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[23] [1983] NZLR 612 at 615.

[24] *Attorney-General v Blundell* [1942] NZLR 287; *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* at 616.

[25] *Beckett v Attorney-General* [1989] 2 NZLR 233.

[26] [1985] 2 NZLR 274 (CA).

[27] At 276.

[28] [2008] NZAR 581.

control its processes so as to prevent abuse. This was in the context where an appeal was taken to the High Court against the decision of a District Court refusing to continue interim name suppression, refusing to prohibit the publication of photographs of the appellants and to prohibit publication of media reports, pending trial, associating them with the words "terrorists". The High Court took the view that there was no right of appeal against the exercise by the District Court under the inherent power to prevent abuse.

7.15. The ambit of the inherent power of the District Court was considered again by Dobson J in *Transport Accident Investigation Commission v District Court.*[29] The Investigation Commission had published a report into a railway accident laying blame upon two locomotive drivers for an accident. A District Court Judge ordered that the publication of the report or its wide availability to the public be prohibited. The drivers were prosecuted but acquitted, and the Investigation Commission brought proceedings by way of judicial review as to the legality of the District Court Judge's decision.

7.16. The High Court granted judicial review. The Court made the point that the essential conceptual difference between the inherent jurisdiction of the High Court and the inherent powers of the District Court is that while the former extends to the capacity to initiate steps potentially directed to non-parties or persons not before the Court, the latter is restricted to the exercise of powers between parties to the litigation and to the subject matter of the proceedings between them. The District Court did not have power to make the suppression orders against non-parties.

7.17. The inherent jurisdiction of the High Court extends to restraining publications by non-parties which are likely to interfere with or obstruct the fair administration of justice in inferior courts. The publication of the investigation report could have been prohibited by the High Court under its protective jurisdiction (as a function of the inherent jurisdiction) in aid of the proceedings in the District Court.

Family Court

7.18. The Family Court is part of the District Court, so the general principles just stated apply equally in that context. This was accepted by Judge Boshier in *Y v Y*,[30] a case involving the breach of a court order.[31]

> "Where loss of liberty is at stake, I should want the Court's power to be very clearly stated. In some instances it is, and power to punish for contempt for failure to pay maintenance is express, and is clear …"

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[29] [2008] NZAR 595.

[30] (1994) 12 FRNZ 176.

[31] At 190.

7.19. In *Re B [Contempt of Court]*[32] Judge Inglis QC seemed to assert there was a power in the court to punish for contempt, in a case where there had been an attempt to intimidate a court-appointed psychologist. The remarks were *obiter*, since the learned judge decided not to exercise the power that he believed himself to possess, referring the matter to the High Court.

7.20. It may be doubted whether this can stand with later authority, and in particular the case of *P v F*,[33] where Joseph Williams J took the view that the power to punish was not inherent in the Family Court, but must come from statute:[34]

> "I do not think that it can be argued that the power to punish for contempt outside the court – for failing to comply with a court order – can be said to be a power so obviously necessary for a Court to work effectively as to emanate from the judicial function itself. That is, I do not think that such a power is inherent by necessity in every Court and every Judge".

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[32] (1999) 18 FRNZ 530. Writing extrajudicially, Judge Inglis stated the same point in BD Inglis, "Contempt Powers and the Family Court", and in his book, *New Zealand Family Law in the 21st Century* (Brookers, Wellington, 2007) at 8.8.

[33] (2009) 27 FRNZ 603, [2009] NZFLR 833.

[34] At [33].

8. PROCEDURE AND SENTENCING

Introduction

8.1. As has been indicated in chapter 6,[1] there is a case for looking afresh at the procedures by which contempt proceedings are initiated, with a view to establishing more clearly whether their purposes are the enforcement of court orders on the one hand, or penal and punitive on the other. Depending upon the responses to that particular suggestion, the current relevant procedures may have to be altered. It is suggested that it may be helpful to have an instrument (whether a Practice Direction or something comparable) in which the whole procedure, whether civil, criminal or indeterminate, is prescribed or identified. This could deal with the steps necessary to initiate proceedings, the relevant modes of presenting evidence in support, procedures surrounding the hearing,[2] legal assistance and advice, and appeals. Such an instrument would obviate the need, as now, for the relevant law and practice to be ascertained from a myriad of sources of varying degrees of accessibility.

Sentencing - Committal

8.2. At common law, the penalty is at large,[3] but the effect of the decision of the Supreme Court in *Solicitor-General v Siemer*[4] is that the maximum penalty in the event that a case is dealt with in the absence of a jury (as will be the case since there is no likelihood that procedure on indictment will be reinstated) is limited to three months imprisonment. The Court suggests that if the offender continues to refuse to comply with the court order, he or she could be made the subject of a fresh application to commit upon release from prison.

8.3. The effect of a Bill currently before Parliament[5] would be (if enacted) to raise the threshold for jury trial to three years' imprisonment. It may be asked whether it is appropriate now for any criminal offence still to be punishable at large, particularly when in current sentencing practice, very long finite sentences of imprisonment are not to be found.[6]

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[1] See in particular para 6.18.

[2] As suggested in chapter 5 for contempt in the face of the court.

[3] In the United Kingdom, the maximum penalty for both civil and criminal contempts is fixed at 2 years.

[4] [2010] NZSC 54, 3 NZLR 767.

[5] Criminal Procedure (Reform and Modernisation) Bill 2010.

[6] A description and analysis of sentences actually handed down in cases of contempt is to be found in appendix 3 of *Arlidge, Eady & Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005), cited by the Court of Appeal in *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [64] per Baragwanath J. In New Zealand, s 86 of the Parole Act 2002 would seem to apply.

8.4. This in turn raises questions about the appropriate levels of punishment for each type of contempt.

Q15 Is a fixed period of imprisonment more appropriate than an indeterminate sentence?

Q16 Is the appropriate penalty a maximum of two years, or three years, or greater?

Other sanctions

8.5. The other sanctions available to the courts when considering the issue of penalty and enforcement include the issuing of injunctions, sequestration, and the ancient procedure of attachment, which is technically still available,[7] but is now regarded as obsolete, in both the United Kingdom[8] and New Zealand.[9] For the purposes of this consultation exercise, it has not seemed necessary to traverse them in any detail.

[7] It was employed, evidently, in the case of *Malevez v Knox* [1977] 1 NZLR 463.

[8] I Cram (ed), *Borrie and Lowe: The Law of Contempt* (4th ed, LexisNexis, London, 2010) at 13.9.

[9] *The Laws of New Zealand* Contempt of Court (online ed) points out at [87] that the current High Court Rules do not refer to attachment, but refer instead to "the arrest order", r. 17.84.

9. THE HISTORY OF CONTEMPT OF COURT IN NEW ZEALAND

History

9.1. The New Zealand law covering the area traditionally thought of as being encompassed by the field of contempt of court is a peculiar amalgam of common law and statute. It has developed piecemeal as the need has been perceived, and, perhaps as a result, it is extremely unclear in many places. This situation arises in part because there is frequently no direct New Zealand authority on a moot point (although there may be some authority that can be relied upon from another jurisdiction), or because what authority does exist is contradictory (for example, over the extent to which the inherent jurisdiction survives in areas where the legislature has acted).[1]

9.2. New Zealand inherited the common law system at a time when the distinction between civil and criminal contempts was reasonably well established.[2] In 1883, Lord Selborne's Contempt of Court Bill[3] consisted of "two principal classes [which] may be taken to comprise criminal and civil contempts respectively".[4] Whereas the former is essentially punitive in character, and was intended to prevent interference with the administration of justice, the latter was a process whereby individuals might be compelled to comply with court orders and was essentially coercive in character.

9.3. A question then arises as to why criminal contempt was not apparently included for consideration as part of the Criminal Code Act 1893? There is nothing in any of the writings of Sir James Fitzjames Stephen, the principal author of the draft code that was eventually to become the New Zealand Criminal Code Act 1893 to suggest that he saw this as being in any sense problematical, even though he was a high priest of the cause of codification. There appears to be nothing in Stephen's *History of the Criminal Law*[5] or *Digest*[6] that touches upon this. Given that he was the framer of our code, it suggests that to the Victorian mind, contempt of court was really a jurisdiction *sui generis*.

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[1] See the split decision of the Court in *Attorney-General v Blomfield* (1914) 33 NZLR 545.

[2] JF Oswald, *Contempt of Court, Committal, and Attachment and Arrest Upon Civil Process In the Supreme Court of Judicature* (1892); J Fox, *The History of Contempt of Court* (1927).

[3] *Hansard*, 3rd series, vol 276, col 1707.

[4] Fox, above, n 2 at 44.

[5] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (in three volumes) (1883).

[6] Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (1877).

The early case law

9.4. New Zealand inherited the common law in 1840, and a Supreme Court was established by Ordinance of December 1841. The inheritance would have included the law of England as it existed at that time. It has not been necessary, for the purposes of this issues paper, to inquire very closely into the state of the law in that period, but there is clear evidence that the contempt laws were employed. In a case quite fully reported in the *New Zealand Spectator and Cook's Strait Guardian*,[7] for example, there is an extended account of proceedings against a person who wrote a letter to the newspaper (the second named defendant being the editor) complaining that he had been unfairly fined for failing to report for jury duty, the letter charging the Judge (Stephen J), with "partiality and corruption in his office as a Judge of the Court". In giving judgment, the Judge refers to a number of the leading English cases and cites from authorities such as Blackstone's *Commentaries* (he was referring to an edition edited by Stephens) and Hawkins, *Pleas of the Crown*, vol 2, title Attachment, c.22.[8]

9.5. The law of contempt became something of a *cause célèbre* when the Chief Justice Sir James Prendergast, imposed a sentence of a month's imprisonment upon a leading counsel of the day.[9]

9.6. It is perhaps surprising against this background that, when the Criminal Code Act was enacted in 1893, it did not mention of the law of contempt. It did, however, contain a provision that was open to the interpretation that it had abolished the contempt jurisdiction. Section 5 of the early legislation stated that:

> "Every one who is a party to any offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent herewith and not repealed, and shall not be proceeded against at common law."

9.7. Given that the law of contempt was entirely a creature of the common law, the possibility of conflict appears obvious to the modern eye. The point does not appear to have troubled anybody at the time, and the provision was re-enacted unchanged in the Crimes Act 1908, s 5. In *Attorney-General v Blomfield*,[10] the point was taken for the first time in a case where the gist of the alleged offence lay in the publication of two defamatory cartoons of a judge following the conclusion of litigation. It was alleged

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[7] *R v Robinson and McKenzie*, 28 July 1852, page 2.

[8] At the time of reception of the law, the writ of Attachment was the mechanism by which contempt proceedings were initiated. It is now obsolete in the United Kingdom, although it was employed in New Zealand in *Malevez v Knox* [1977] 1 NZLR 463.

[9] Re *GE Barton* (1876) 2 NZ Jur (NS) 13 at 13-14 (SC). I have had access to a paper to be published by Dr Grant Morris, "Bar v Bench: Contempt of Court and the New Zealand legal profession in *Gillon v MacDonald* (1878)" (2010) 41 VUWLR 541 giving an account of the law of contempt in late nineteenth century New Zealand. See "Contempt of Court" (1878) 3 NZ Jur 16 at 16-18. The case is referred to again in "Contempt of Court" (1878) 3 NZ Jur 39 at 40.

[10] (1913) 33 NZLR 545.

that such conduct might constitute contempt of court through scandalising. The panel consisted of six judges, and their opinions on the question whether there was still an inherent power to punish for contempt are sharply divided. Several members of the Court (Stout CJ, Williams and Chapman JJ) took the view the offending cartoons were not, in any event, sufficient to warrant punishment as contempt, but one (Cooper J) said that the jurisdiction had indeed been abrogated by the 1908 Act, at least to the extent the conduct of which complaint was made was already dealt with in other parts of the Crimes Act or any other statute.

9.8. The matter arose for consideration again in *In Re Cobb, Nash v Nash*[11] in which there was an application for committal for contempt of a person who had approached a juror with the purpose of influencing him. On this occasion, the Full Court of the Supreme Court, sitting In Banco (Stout CJ, Hosking, Salmond and Reed JJ) held unanimously that:[12]

> "We conclude accordingly that in the enactment of s 5 of the Crimes Act the Legislature had not in mind, and was not in any manner dealing with, the law as to summary process for contempt. The purpose and effect of that section were merely to abolish common-law felonies and common-law misdemeanours as the subject-matter of indictment, and to provide that for the future the only indictable offences should be those set out in the Criminal Code or in some other statute not inconsistent therewith. This being so, the Supreme Court preserves unimpaired and unaffected its original jurisdiction to secure the efficiency and the purity of the administration of public justice by dealing summarily with all conduct which is recognized by the common law as amounting to criminal contempt of Court. Save as one of the elements to be taken into consideration in determining whether this discretionary jurisdiction ought to be exercised in any particular case, it is immaterial whether the act of contempt is or is not at the same time a statutory offence capable of prosecution by indictment."

9.9. There the matter in effect rested, although there appears to have been some doubt about the matter because, in 1961, a proviso was added to the section (now section 9):

> "Provided that –
> Nothing in this section shall limit or affect the power or authority of the House of Representatives or of any Court to punish for contempt..."

9.10. In *Solicitor-General v Radio Avon Ltd*[13] it was said that this was "obviously intended" to give legislative effect to the *Nash* decision. It is quite clear, then, that the High Court

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[11] [1924] NZLR 495.

[12] At 498.

[13] [1978] 1 NZLR 225 (CA).

at least retains a considerable inherent power to punish for contempt at common law.

APPENDIX 1

List of Questions

Q1 **What disadvantages would flow from the codification of the law of contempt?**

Q2 **Should the right to fair trial take priority over all other protected rights?**

Q3 **Are the measures employed by the courts adequate to ensure trials are conducted fairly?**

Q4 **If the law of contempt of court were to be codified or put into a statutory form, should the test for contempt be that it creates a "real risk" to the administration of justice?**

Q5 **Should consideration be given to the enactment of a statutory power to the courts to prevent interference with the administration of justice by third parties to the proceedings?**

Q6 **Should courts be given the power to direct the police to take steps to enforce the order of the court if necessary?**

Q7 **Is it desirable that the point in time a publisher is at risk of proceedings for contempt should be clarified?**

Q8 **Should consideration be given in New Zealand to the introduction of a public interest type defence?**

Q9 **Because of the judiciary's unique role in our society, is there a need for special rules to control those who unjustifiably attack and undermine either the institution generally or particular individual Judges?**

Q10 **If there is such a need, should it be through the current law of contempt by scandalising or is a statutorily defined regime to be preferred?**

Q11 **If the latter is to be introduced what should be the applicable tests, and what consequences should be available for breach?**

Q12 **In the light of the decision of the Supreme Court in *Siemer v Solicitor-General*, should consideration be given to the adoption of different terminology and procedures, separating the application to punish for contempt from the enforcement of court orders?**

Q13 **Should a suitably modified version of the English Practice Direction be adopted as guiding New Zealand practice in cases of contempt in the face of the Court?**

Q14 **Should consideration be given to placing the In-Court Media Coverage Guidelines on a statutory footing, and to regulating the use of modern communications devices in court?**

Q15 **Is a fixed period of imprisonment more appropriate than an indeterminate sentence?**

Q16 **Is the appropriate penalty a maximum of two years, or three years, or greater?**

APPENDIX 2

Text of the relevant statutory provisions

108 Perjury defined

(1) Perjury is an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his evidence on oath, whether the evidence is given in open court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him to mislead the tribunal holding the proceeding.

(2) In this section the term oath includes an affirmation, and also includes a declaration made under section 13 of the Oaths and Declarations Act 1957.

(3) Every person is a witness within the meaning of this section who actually gives evidence, whether he is competent to be a witness or not, and whether his evidence is admissible or not.

(4) Every proceeding is judicial within the meaning of this section if it is held before any of the following tribunals, namely:

(a) any court of justice:

(b) the House of Representatives or any Committee of that House:

(c) any arbitrator or umpire, or any person or body of persons authorised by law to make an inquiry and take evidence therein upon oath:

(d) any legal tribunal by which any legal right or liability can be established:

(e) any person acting as a court or tribunal having power to hold a judicial proceeding:

(f) a disciplinary officer, the Summary Appeal Court of New Zealand, or the Court Martial of New Zealand acting under the Armed Forces Discipline Act 1971.

(5) Every such proceeding is judicial within the meaning of this section whether the tribunal was duly constituted or appointed or not, and whether the proceeding was duly instituted or not, and whether the proceeding was invalid or not.

110 False oaths

Every one is liable to imprisonment for a term not exceeding 5 years who, being required or authorised by law to make any statement on oath or affirmation, thereupon makes a statement that would amount to perjury if made in a judicial proceeding.

111 False statements or declarations

Every one is liable to imprisonment for a term not exceeding 3 years who, on any occasion on which he is required or permitted by law to make any statement or declaration before any officer or person authorised by law to take or receive it, or before any notary public to be certified by him as such notary, makes a statement or declaration that would amount to perjury if made on oath in a judicial proceeding.

112 Evidence of perjury, false oath, or false statement

No one shall be convicted of perjury, or of any offence against section 110 or section 111, on the evidence of 1 witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

113 Fabricating evidence

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to mislead any tribunal holding any judicial proceeding to which section 108 applies, fabricates evidence by any means other than perjury.

114 Use of purported affidavit or declaration

Every one is liable to imprisonment for a term not exceeding 3 years who—

(a) signs a writing that purports to be an affidavit sworn before him or a statutory declaration taken by him, when the writing was not so sworn or taken, or when he knows that he has no authority to administer that oath or take that declaration; or

(b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or made, as the case may be, by the deponent or before a person authorised to administer that oath or take that declaration.

115 Conspiring to bring false accusation

Every one who conspires to prosecute any person for any alleged offence, knowing that person to be innocent thereof, is liable—

(a) to imprisonment for a term not exceeding 14 years if that person might, on conviction of the alleged offence, be sentenced to preventive detention, or to imprisonment for a term of 3 years or more:

(b) to imprisonment for a term not exceeding 7 years if that person might, on conviction of the alleged offence, be sentenced to imprisonment for a term less than 3 years.

116 Conspiring to defeat justice

Every one is liable to imprisonment for a term not exceeding 7 years who conspires to obstruct, prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

117 Corrupting juries and witnesses

Every one is liable to imprisonment for a term not exceeding 7 years who—

(a) dissuades or attempts to dissuade a person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter (whether civil or criminal, and whether tried or to be tried in New Zealand or in an overseas jurisdiction); or

(b) influences or attempts to influence, by threats or bribes or other corrupt means, a member of a jury in his or her conduct as such (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction, and whether the member has been sworn as a member of a particular jury or not); or

(c) accepts any bribe or other corrupt consideration to abstain from giving evidence (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction); or

(d) accepts any bribe or other corrupt consideration on account of his or her conduct as a member of a jury (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction, and whether the member has been sworn as a member of a particular jury or not); or

(e) wilfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

256 Forgery

(1) Every one is liable to imprisonment for a term not exceeding 10 years who makes a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.

(2) Every one is liable to imprisonment for a term not exceeding 3 years who makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine.

(3) Forgery is complete as soon as the document is made with the intent described in subsection (1) or with the knowledge and intent described in subsection (2).

(4) Forgery is complete even though the false document may be incomplete, or may not purport to be such a document as would be binding or sufficient in law, if it is so made and is such as to indicate that it was intended to be acted upon as genuine.

257 Using forged documents

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, knowing a document to be forged,—

(a) uses the document to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or

(b) uses, deals with, or acts upon the document as if it were genuine; or

(c) causes any other person to use, deal with, or act upon it as if it were genuine.

(2) For the purposes of this section, a document made or altered outside New Zealand in a manner that would have amounted to forgery if the making or alteration had been done in New Zealand is to be regarded as a forged document.

264 Paper or implements for forgery

Every one is liable to imprisonment for a term not exceeding 10 years who, without lawful authority or excuse, has in his or her possession or under his or her control anything capable of being used to forge any document with intent to use it for such a purpose.

APPENDIX 3

INTERIM PRACTICE GUIDANCE: THE USE OF LIVE TEXT-BASED FORMS OF COMMUNICATION (INCLUDING TWITTER) FROM COURT FOR THE PURPOSES OF FAIR AND ACCURATE REPORTING

Preamble

1. This interim guidance applies to court proceedings which are open to the public and to those parts of the proceedings which are not subject to reporting restrictions.

2. There is a degree of uncertainty about the use which may be made of live text-based communications, such as mobile email, social media (including Twitter) and internet enabled laptops in and from courts throughout the jurisdiction. For the purposes of this interim guidance these means of communication are referred to, compendiously, as live, text-based communications.

3. A consultation relating to the use of live, text-based communications will be conducted shortly. Those who will be consulted include the Judiciary, the Secretary of State for Justice, the Attorney General, the Director of Public Prosecutions, the Bar Council, the Law Society, the Press Complaints Commission, and the Society of Editors in addition to interested members of the public via the Judiciary website.

4. Pending the outcome of the consultation, this interim guidance should be considered by courts, litigants, their legal representatives and the media if and when any application is made to the court to permit the use of live, text-based communications. If any difficulties arise in respect of the use of such communications, or the outcome of the consultation becomes known, it may become necessary to issue a formal Practice Direction.

5. This interim guidance is intended to be consistent with, and has been drafted in light of, the legislative structure which:

    a. prohibits,
        i. the taking of photographs in court (section 41 of the Criminal Justice Act 1925); and,
        ii. the use of sound recording equipment in court unless the leave of the judge has first been obtained (section 9 of the Contempt of Court Act 1981).
    b. Requires compliance with the strict prohibition rules created by sections 1, 2 and 4 of the Contempt of Court Act 1981 in relation to the reporting of court proceedings.

    It has immediate effect.

General Principles

6. The judge has an overriding responsibility to ensure that proceedings are conducted consistently with the proper administration of justice, and so as to avoid any improper interference with its processes.

7. A fundamental aspect of the proper administration of justice is the principle of open justice. Fair and accurate reporting of court proceedings forms part of that principle. The principle is however subject to well-known statutory and discretionary exceptions. Two such exceptions are the prohibitions on photography in court and on making sound recordings of court proceedings.

8. The statutory prohibition on photography in court, by any means, is absolute. There is no judicial discretion to suspend or dispense with it. Any equipment which has photographic capability must not have that function activated.

9. Sound recordings are also prohibited unless, in the exercise of its discretion, the court permits such equipment to be used. In criminal proceedings, some of the factors relevant to the exercise of that discretion are contained in Paragraph I.2.2 of the Consolidated Criminal Practice Direction. The same factors are likely to be relevant when consideration is being given to the exercise of this discretion in civil or family proceedings. The use of live, text-based communications from court should be approached in the same way.

10. There is no statutory prohibition on the use of live text-based communications in open court. But before such use is permitted, the court must be satisfied that its use does not pose a danger of interference to the proper administration of justice in the individual case.

11. Subject to this consideration, the use of an unobtrusive, hand held, virtually silent piece of modern equipment for the purposes of simultaneous reporting of proceedings to the outside world as they unfold in court is generally unlikely to interfere with the proper administration of justice.

Use of Live, Text-based Communications: General Considerations

12. The normal, indeed almost invariable, rule has been that mobile phones must be turned off in court. An application, whether formally or informally made (for instance by communicating a request to the judge through court staff) can be made by an individual in court to activate and use a mobile phone, small laptop or similar piece of equipment, solely in order to make live text-based communications of the proceedings.

13. When considering, either on its own motion, or following a formal application or informal request, whether to permit live text-based communications, and if so by whom, the paramount question will be whether the application may interfere with the proper administration of Justice. The most obvious purpose of permitting the

use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings.

14. Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of criminal trials e.g., where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of a jury. However, the danger is not confined to criminal proceedings; in civil and sometimes family proceedings, simultaneous reporting from the courtroom may create pressure on witnesses, distracting or worrying them.

15. Two further considerations are material:

    a. if, having given permission for such use, the court proceedings are adversely affected, permission may be withdrawn; and,

    b. it may be necessary for the judge to limit live, text-based communications to representatives of the media for journalistic purposes but to disallow its use by the wider public in court. That may arise if it is necessary, for example, to limit the number of mobile electronic devices in use at any given time because of the potential for electronic interference with the court's own sound recording equipment, or because the widespread use of such devices in court may cause a distraction in the proceedings.

16. The operation of this interim guidance will be monitored and inform the consultation process referred to above.

Lord Judge The Lord Chief Justice of England and Wales 20 December 2010