The Law Reform Commission

CONTEMPT OF COURT
CONSULTATION PAPER

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Section I: Introduction

1. Consideration of the possible reform of the law of contempt of court in the Cayman Islands is timely. The need for such consideration has arisen out of two particular, and relatively recent, developments. First, the coming into force of the Bill of Rights – Part I of the Constitution – which deals, in so far as may be relevant to a consideration of the law of contempt, with the rights to a fair trial (section 7) and to freedom of expression (section 11). The law of contempt has always sought to strike a proper balance between, on the one hand, the due administration of justice and, on the other, the right of individuals and the media to express their opinions freely, even vigorously, without fear of adverse consequences. However, the need to achieve this balance has been highlighted by the introduction of human rights legislation in various countries. It was the decision of the European Court of Human Rights in Sunday Times v UK (1979) 2 EHRR 245, in which it was held that the UK had violated the European Convention on Human Rights, that prompted the passing of the UK Contempt of Court Act 1981 ("the 1981 Act"). At that time, the Convention was not part of the domestic law of the UK although it was subsequently incorporated into that law by the Human Rights Act 1998. The relevant provisions of the UK 1998 Act and Part I of the Islands' Constitution follow closely the provisions of the European Convention. Prior to the introduction of such legislation, if there was an irreconcilable conflict between freedom of expression and the right to a fair trial, the latter would prevail. It may very well be that the introduction of such legislation heralds an adjustment of the balance in favour of freedom of expression. Nor should we overlook the fact that we are concerned with the right to a fair trial in two separate contexts: the right of the accused or, in a civil case, the parties, but also the right of the alleged contemnor.

2. The second relatively recent development is the growth of electronic means of communication which are instantaneous and unconstrained by geographical considerations. The emergence of websites such as Google Search and YouTube and social websites such as Facebook and Twitter have facilitated this growth. In the UK, a juror was recently sentenced to a term of six months imprisonment for researching the defendant on the internet despite a direction from the judge not to do so: see A-G v Dallas [2012] EWHC 156 (Admin). Most of the traditional media will have their own websites which invite comments from the public, frequently expressed anonymously, on matters reported in their online editions. Thus, it would be possible for a reader of the online edition of the Caymanian Compass resident

outside the Islands to comment on a pending criminal trial in such a way as to prejudice the right of the accused to a fair trial by, for example, referring to his previous convictions. This places on local media a duty to monitor such comments for possible contempt just as, no doubt, they monitor the contents of their own publications. It is an indication of the relative speed with which circumstances relevant to the reform of the law of contempt change that, despite the passing of the 1981 Act, the UK Law Commission revisited the whole subject in 2012 and produced a comprehensive Consultation Paper, No 209. As stated in that paper, "the existing laws of contempt of court … pre-date the internet age".

3. As a criminal offence contempt of court is anomalous. In the Islands, as in some other common law jurisdictions, it is the only criminal offence in respect of which no maximum penalties are prescribed by statute. Despite this the alleged contemnor can be tried summarily and without the procedural protections associated with either summary trial or trial on indictment. The court can act of its own motion or the matter can be brought before the court on an application for a committal order made by the Attorney General, any person aggrieved by the alleged contempt or even, it would appear, a member of the public: see R v Metropolitan Police Commissioner ex p Blackburn (No 2) [1968] 2 QB 150. The alleged contemnor is invited to "show cause" why he should not be committed for contempt thus giving the impression that the normal burden of proof to the criminal standard is reversed. The penalties, whether imprisonment or a fine or both, are not, unlike with other criminal offences, subject to any statutory maxima. In theory, depending on the nature of contempt, the court can impose a coercive sentence of imprisonment, that is, one which is unlimited in point of time, the contemnor being released when he has "purged" his contempt by doing, or agreeing to do, what he was ordered to do in the first place. These anomalies tend to foster the impression that, in dealing with contempt cases, the courts are acting as prosecutor, judge and jury while protesting that their only concern is to protect the interests of stakeholders in the administration of justice and that what might be seen as anomalies are reasonably necessary for achieving that purpose. As part of the balancing exercise referred to above, one concern which needs to be addressed is the extent to which the perpetuation of these anomalies can be justified by reference to differences between contempt of court and other criminal offences.

4. Any paper which attempts to cover the whole of the law of contempt is immediately faced with a problem of classification. The methods by which the due administration of justice can be prejudiced are many and various ranging from disrupting court proceedings to dismissing your employee because he has given evidence against you. Various classifications have been suggested over the years. For convenience, we propose to deal with the existing law, and possible changes to it, under the following broad heads:

(1) contempt in the face of the court;

(2) contempt by publications tending to prejudice the conduct of particular proceedings;

(3) juror contempt;

(4) scandalising the court;

(5) acts interfering with the course of justice;

(6) jurisdiction, procedure and penalties;

(7) contempt by disobeying a court order or, what amounts to the same thing, by breaching an undertaking given to the court.

5. We have been assisted in the preparation of this paper by the work of other Law Reform Commissions. We would refer in particular to the Hong Kong Law Reform Commission's Report (December 1986), the exhaustive Australian Law Reform Commission's Report No 35 (1987), the Western Australia Law Reform Commission's Report, Project No 93 (June 2003) and, most recently, the UK Law Reform Commission's Consultation Paper referred to above. We would also refer to our earlier Consultation Paper dated 3 September 2010 dealing with contempt in the face of the court.

The existing legislation

6. In the Islands, as in other common law jurisdictions, there are a number of statutory provisions which either create offences designed to protect the integrity of the judicial process or are otherwise relevant to the exercise of the respective jurisdictions of the Grand Court and the Summary Court to determine and punish contempts: see Appendix 1. All of these provisions criminalise conduct which, absent the statutory provision, would most likely constitute contempt and, accordingly, we refer to them as contempt-like offences. One of them, section 29 of the Summary Jurisdiction Law (2006 Revision) states that the failure of a person duly summoned to give evidence to be sworn, to answer lawful questions or to produce documents in his possession "shall, independently of any other liability, be guilty of contempt of the court". However, this is limited in its application to civil proceedings in the Summary Court which, despite the extensive civil jurisdiction of the Summary Court, are a relative rarity. The remaining relevant contempt-like offences prescribe maximum penalties and whether they are dealt with summarily or on indictment will be determined by the same criteria as with other criminal offences. Section 111 of the Penal Code (2013 Revision) in particular contains a rag-bag of contempt-like offences punishable by imprisonment for four years. In so

far as penalties are concerned the difference may be more theoretical than real. Where conduct could be charged either as contempt or as a statutory offence, the maximum penalty prescribed for the statutory offence will, in practice, fetter the court's powers when the same conduct is charged as a contempt. Having said that, there is considerable overlap between these statutory offences but the penalties vary significantly. If the conduct is charged as contempt, it will be subject to the particularly summary procedure reserved for that offence. We refer further to some of the relevant statutory provisions below. Generally, in so far as statutory offences are concerned, we need to consider to what extent the law of contempt, or certain parts of it, can and should be replaced by specific statutory offences which would be subject to the usual procedural safeguards. We also need to consider the extent to which duplication between contempt-like offences and common law contempt can and should be avoided and to ensure that the former offences present a coherent whole.

The function of the law of contempt

7. Despite its name it is not the function of the law of contempt of court to uphold the dignity of judges. Rather it is to protect the interests of those who are likely to be affected by the outcome of the proceedings in question, that is, in criminal proceedings, both the prosecution as representing the public interest and the accused and, in civil proceedings, the parties. The accused will be adversely affected if, for example, details of any previous convictions are published in such a way that there is a real risk that they will come to the attention of the jury. It is equally in the wider public interest that such details are not published since this may lead to existing or imminent proceedings being aborted or delayed with consequent expense falling on the public purse. Undue pressure on prospective witnesses to give or not to give evidence or, in civil proceedings, on the parties to settle or not to settle will be regarded as an actionable interference with the administration of justice although they have nothing to do with the judge's conduct of those proceedings. We would suggest that both the existing law and any proposals for reform should be judged against this touchstone: is the risk of interfering with the proper interests of the stakeholders in the due administration of justice such as to justify any, and, if so, what, restrictions on freedom of expression?

Section II: Contempt in the face of the court

8. This branch of the law of contempt is such that, in discussing the desirability of reform, we do not believe it is possible to deal separately with substantive and procedural issues. We therefore propose to discuss both before attempting to formulate issues for consideration.

Defining the offence

9. "It is not possible to particularise the acts which can or cannot constitute contempt in the face of the court": Izuora v R [1953] 1 All ER 827 (PC) at 830 per curiam. At the highest level of generality it has been described as "conduct, active or inactive, amounting to an interference with, or obstruction to, or tendency to interfere with or obstruct, the due administration of justice": Ex parte Bellanto; Re Prior [1963] SR (NSW) 190, 202. Thus, throwing missiles at the judge (or, indeed, at any other participant in the proceedings), stripping naked, a witness refusing to be sworn or to answer lawful questions, the giving of a clenched fist salute by way of a political statement, even a refusal to stand when the judge enters the court, have all been held to constitute contempts in the face of the court. It is easier to give examples of conduct which constitute such contempt than determine conduct that will not. Thus, the principal substantive criticism is that this branch of the law of contempt lacks that certainty which criminal offences should have: cp. Bill of Rights, section 7(2)(b). A contemnor may not know, or reasonably be supposed to know, that he has committed an offence until after he is found to have committed it.

10. The uncertainty referred to above is exacerbated by two additional factors. First, what is the meaning or the relevance of the relevant conduct having taken place "in the face of the court"? Originally, this meant what it said, namely, that the conduct took place within the view or hearing of the presiding judge. This involved a direct link between the commission of the offence and the manner of its disposal since the judge could, and would, determine guilt or innocence and, if guilt, the punishment "on the spot" and without the aid of external agencies. However, over time, the concept of "in the face of the court" was extended to include the precincts of the court and the immediately surrounding area. There is even some authority for the proposition that the breach of a court order or direction intended to regulate the conduct of a particular trial constitutes contempt in the face of the court wherever the breach occurs: see R v Griffin (1988) 88 Cr App Rep 63, 67 per Mustill LJ followed in R v Stewart & Ors [2003] CILR 8. It has also suggested that a failure by, say, a witness, a juror or an attorney to attend court without just excuse amounts to a contempt in the face of the court. It would not appear that the concept, however defined, has any relevance other than in its procedural consequences. In the past courts have tended to stretch the concept of what conduct can be regarded as having taken place "in the face of the court" with a view to enhancing their ability to deal with it in a summary fashion. Once that link is broken, the "in the face of the court" concept disappears and it should be possible to define the offence with greater certainty than exists at present.

11. The other uncertain factor is the extent to which *mens rea* is a constituent of the offence. It is clear that the acts of the alleged contemnor which are said to constitute the *actus reus* of the offence must be intentional. The witness who accidentally knocks over his glass of water while in the witness stand may temporarily disrupt the proceedings – as much as the clenched fist or sedentary contemnor – but no one would suggest he is guilty of contempt. But what if, in a fit of exasperation, he throws it at cross-examining counsel? For him to be guilty of contempt would it have to be proved that in so acting he intended to obstruct or interfere with the administration of justice? The answer, in so far as the Islands are concerned, is that proof of such an intention is not required: see R v Stewart & Ors, above. The position in other jurisdictions is less certain although the courts seem to be inclined against the need for proof of intention. Of course, in many, perhaps most, cases, it will be easy to infer an intention to obstruct or interfere with the administration of justice from the conduct itself which is perhaps why there is little judicial discussion of the point. But that would not, we think, be a necessary or even proper inference in the example we have given and to say that the exasperation of the witness would doubtless lead the judge to do nothing more than warn the witness as to his future conduct is a less than satisfactory response.

12. Leaving aside procedural questions for the moment, we would favour defining this branch of the substantive law of contempt either by codifying it or, as we would prefer, replacing it by free-standing statutory offences. As will be apparent from Appendix 1, there are already a number of existing statutory offences which penalize conduct which also constitute the common law offence of contempt in the face of the court. Some of those offences deal with specific topics such as, for example, refractory witnesses: see Penal Code (2010 Revision) section 111(1) (b). Others deal with this branch of the law of contempt more generally covering the topics discussed above: see, for example, Penal Code, section 111(1) (a). We have no evidence as to the extent to which these offences, as opposed to the corresponding contempt offence, are utilized in the Islands although we suspect that, faced with a refractory witness, the court is more likely to deploy its common law powers rather than simply refer the matter to the prosecuting authorities. The Western Australia Law Reform Commissions recommended the introduction of two statutory offences, first, wilfully insulting the presiding judicial officer or officer of a court acting in the course of his or her official duties and, secondly, interrupting or disrupting court proceedings without reasonable excuse. The Australia Law Reform Commission did not see the need for the first of these offences. Whatever reforms are adopted there will be a need to ensure that any new statutory offences mesh in with the existing offences so as to form a coherent whole. Whether they should form part of the Penal Code or separate legislation will depend very much on the procedure to be adopted for the disposal of these offences. If they are to be disposed of in accordance with existing procedures applicable to statutory offences, that is,

either by summary trial or trial on indictment, the substantive reforms can be introduced by way of amendments to the Penal Code. If some special procedure is to be introduced or retained for disposing of any new statutory offences, it may be that discrete legislation will be required dealing with both substantive and procedural matters.

Procedure

13. There can be little doubt that the principal criticisms which this branch of the law of contempt have evoked relate to the manner in which alleged contempts are disposed of procedurally. We have already pointed out the anomalous nature of contempt generally: see paragraph 2, above. These anomalies are most apparent in the way contempts in the face of the court can, at least in theory, be disposed of, that is, by an immediate sentence of imprisonment or fine. However, time and time again appellate courts have stressed that this summary jurisdiction should be sparingly exercised and only in the most serious of cases: see Re Bolton [2004-5] CILR 8, CICA. Other jurisdictions have adapted their own procedures so as to introduce at least some of the protections which are traditionally associated with due criminal process without simply referring the matter to the prosecuting authorities if an equivalent statutory offence is involved or, if not, to the Attorney General with a view to him considering whether to initiate a committal application pursuant to GCR, Order 52 or its local equivalent. We have, as yet, no evidence as to the extent to which either the Summary Court or the Grand Court have adapted their procedures to meet this concern. It may be that contempts in the face of the court which cannot be effectively dealt with by way of warning or exclusion from the court are sufficiently rare that recourse to even a fine, let alone imprisonment, has not been necessary.

14. A number of arguments have been advanced from time to time for retaining the summary power, as described above, to commit a person for contempt in the face of the court. Thus it is said that the summary power is a long-established feature of common law jurisdictions; that the possession of such a power is inherent in the notion of a court; that it permits a flexible range of responses; that it enables the matter to be disposed of speedily; and that the presiding judge will have the advantage, which an alternative tribunal will not, of being able to rely on his own unaided senses and will avoid a situation where the judge has to give evidence before some other tribunal. Some of these arguments obviously have force although we question whether they are strong enough to justify the retention of a procedure which lacks most of the formal protections of the Criminal Procedure Code and other legislation and would appear not to be compliant with the section 7 of the Bill of Rights. The validity of the historical argument – the first of those referred to above – is somewhat undermined by the fact that there was a time when charges of contempt were tried on indictment. The last of those arguments ignores the fact that,

with the extension of the geographical concept of "in the face of the court" many such contempts are neither viewed nor heard by the presiding judge. As to the risk that he might have to give evidence before some other tribunal – a risk which we accept should be minimized if not avoided - it must be extremely rare that the presiding judge is the only person to view or hear the alleged contempt. The same criticism could be made in respect of some of the offences contained in section 111 of the Penal Code. Some of the intervening arguments might justifiably be regarded as reasons for replacing the summary procedure rather than retaining it. Generally, we believe that these arguments confuse two separate issues, first, the need for courts to have sufficient powers to prevent continuing disruption to their proceedings and, secondly, the method by which past disruptions are disposed of. While we would not question for one moment the need for courts to have any necessary preventative powers, we do not consider that it follows from that that they should have the summary power of punishing past disruptions that they currently possess. We note that section 35(1)(b) of the Judicature Law (2007 Revision) already confers power on the Grand Court – extended by subsection (2) to the Summary Court – to order the removal of any person, including an attorney, who "is guilty of misconduct calculated to prejudice the just and fair trial of any cause or matter".

15. **Should the existing law of contempt in the face of the court be:**

(1) **Left as it is both substantively and procedurally;**

(2) **Codified as part of a retained law of contempt;**

(3) **Replaced by separate statutory offence?**

If the existing law is to be codified or replaced by separate statutory offences, what should be their substantive content? In particular, to what extent should the codified or new offences contain a mental element other than that the conduct alleged was intentional?

If the existing law is to be retained or codified, what changes, if any, should be made to the summary manner in which the offence is disposed of? In particular, should there be statutory provisions which regulate disposal and to some degree replicate the protections which an accused would ordinarily be entitled to.

If the existing law is to be replaced, what immediate powers, falling short of criminal sanctions, does a court require to preserve the integrity of proceedings before it?

Recording of proceedings

16. This is one of two discrete topics which are usually discussed as part of the law of contempt in the face of the court. Unlike in the UK and some other jurisdictions, there are no statutory provisions which regulate the use of cameras, tape recorders or any other apparatus for the making of video or sound recordings of court proceedings. In the UK, it is a criminal offence to take a photograph in court or, with a view to publication, make a portrait or sketch of the judge, any juror, witness or party to the proceedings before the court or to publish any such photograph, portrait or sketch: Criminal Justice Act 1925, section 41. Section 9 of the 1981 Act regulates the use of tape recorders by declaring it to be a contempt, without the leave of the court, to use, or bring into court for use, any tape recorder or similar instrument for recording sound or to publish any recording of proceedings made by means of such an instrument. The position at common law is uncertain. There can be no objection to the taking of a note of the proceedings whether by the attorneys involved or, assuming the proceedings are open to the public, by representatives of the media. If the attorney or representative is adept at shorthand, his or her note may be as full and as accurate as an official transcript. The objection seems to be to introducing into court apparatus which it is feared might disrupt the proceedings. It is likely that both the Grand Court and the Summary Court can, as part of their respective inherent jurisdictions, regulate the use of such apparatus and anyone proposing to use it would be well advised to inquire in advance whether such use would be permitted. We would not be disposed to recommend that sound recording devices could be introduced without the leave of the court. Whether such leave should be given will obviously turn on the identity of the person proposing to use such apparatus, the purpose for which the recording is to be made and the availability of official transcripts. In so far as the media are concerned, as long as the apparatus is not such as to disrupt the proceedings, we find it difficult to see on what basis leave could properly be refused.

17. In so far as photographs, etc., are concerned, we can see no good reason why anyone, including the media, should require this facility. There is no general rule which prevents photographs or video recordings being taken of anyone arriving at, or departing from, court and, in the case of newsworthy trials, such photographs or recordings are now common place. We would favour, more for the sake of clarification than anything else, the introduction of a specific criminal offence along the lines of the UK Criminal Justice Act 1925, section 41. Of course, in the last few years the debate has shifted from the taking of still photographs in court to the question of televising court proceedings. We do not consider that this is the time or the place to enter into that debate. The experience in the US, from the O J Simpson trial to the Zimmermann trial, does not fill us with any enthusiasm for permitting

TV cameras into the courtroom. Ironically, those trials which are most likely to excite the attention of the public, criminal trials in the Grand Court, are those where the presence of cameras is likely to be most objectionable. The televising of the hearing of appeals in the Cayman Islands Court of Appeal may not be subject to the same objections but, with all respect to the Court of Appeal, we think it doubtful whether the televising of such hearings would attract a sufficient number of regular viewers, initial curiosity having been satisfied, to justify the expense. Our tentative view is that the proposed criminal offence prohibiting the taking of photographs should extend to the making of video recordings and live television broadcasts.

18. **Should the law concerning the reporting of proceedings be clarified by legislation or left to develop by judicial decision as and when required?**

Should there be introduced a specific statutory offence, based on section 41 of the UK Criminal Justice Act 1925 prohibiting the taking of photographs, etc. in court or the publication of such photographs? Should such offence extend to the making of video recordings or television broadcasts of proceedings?

What restrictions should there be on the introduction and use in court of sound recording devices or the publication of recordings thereby obtained?

Professional privilege

19. The second of the discrete topics referred to above is the extent to which journalists or other media representatives are entitled to refuse to answer questions in the witness box. The law of evidence confers on witnesses a privilege against answering certain types of question in circumstances where, absent that privilege, they would guilty of contempt as refractory witnesses. The obvious example is the privilege against self-incrimination which is available to all witnesses. Another is legal professional privilege which entitles the client or his attorney to refuse to answer questions concerning matters passing between them. In the UK in the early 1960s, an attempt was made to establish that journalists had a similar privilege against disclosing their sources of information. The attempt was unsuccessful: see A-G v Clough [1963] 1 QB 773; A-G v Mulholland and Foster [1963] 2 QB 477. However, section 10 of the 1981 Act did introduce a qualified privilege in that in the UK it is no longer contempt for a person to refuse to disclose the source of information contained in a publication for which he is responsible unless disclosure is "necessary in the interests of justice or national security or for the prevention of disorder or crime". We are not aware of any instance in the Islands where a journalist has, under pain of contempt, been asked to reveal his or her sources and has refused. Accordingly, although we would wish to hear of any concerns that the media have in this regard, we can see no justification for introducing a similar privilege here.

20. **Is there a need for the introduction of a qualified privilege similar to that in section 10 of the 1981 Act and, if not in the same terms as section 10, in what terms?**

Section III: Contempt by publication in relation to particular proceedings

The common law position

21. Any publication which is calculated to interfere with the due administration of justice in relation to pending proceedings is a contempt of court. This is the so-called "sub judice" rule. This core definition gives rise to a number of issues some, but not all, of which have been discussed in the authorities. Generally, there are four types of issue, as follows:

    (1) What is a publication?

    (2) What possible or probable impact does the publication have to have on the pending proceedings so as to constitute contempt?

    (3) When are proceedings pending?

    (4) What mental element, beyond an intent to publish, is required?

Publication

22. There is little authority on what constitutes a publication at common law. That may be because any conduct which is calculated to interfere with the administration of justice is a contempt whether or not that conduct consists of a publication. Section 1 of the 1981 Act defines "the strict liability rule" by reference to "conduct", section 2 restricting the application of that rule to "publications" of a certain character. Thus, at common law, the type of conduct referred to would be determined by its capacity to interfere with the pending proceedings. As a general rule, publications, such as newspapers, radio or television broadcasts, lectures and theatrical performances, have that capacity although it may be that a local newspaper published and distributed in Edinburgh would lack that capacity in relation to a pending criminal trial in Exeter. Conversely, the distribution of leaflets outside the court house while the trial is proceeding would have that capacity irrespective of the quantity distributed and the periods during which they were distributed. Comments published in a newspaper or on a website should obviously be treated differently from the same comments made in private by one person to another unless, of course, that other happened to be a juror, witness or other participant in the proceedings. If this type of contempt is to be addressed by legislation, as we believe it should be, there will need to be a statutory definition of "publication" which

covers not only traditional publications such as newspapers and news broadcasts but also the more recent electronic methods of communication.

23. Section 2(1) of the 1981 Act, as amended, defines "publication" as including "any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public". It is thought that this definition is sufficiently wide to cover electronic communications which are accessible to members of the public although problems may arise in connection with related issues such as the responsibility of intermediaries, the time of publication, etc.

24. **If there is to be a statutory definition of "publication", is the definition in section 2(1) of the 1981 Act adequate?**

Risk of prejudice

25. It is generally accepted that, at common law, there must be a real risk of prejudice to the due administration of justice as opposed to merely a remote possibility. It is not however necessary for the prosecution to establish that there has in fact been prejudice by proving, for example, that the offending publication has come to the attention of any participant in the relevant proceedings. The concern is to avoid the risk of the accused or, in civil cases, the parties being adversely affected by improper persuasion. Judges are assumed to be immune from such persuasion which is why contempt proceedings of the type now being considered are rare in civil cases which are invariably tried without a jury. Section 2(2) of the 1981 Act codifies what is generally understood to be the common law position: it 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." The use of the words "substantial" and "seriously" thus impose a two-fold qualification to the strict liability rule.

26. **If this is a matter to be covered by legislation, should the 1981 Act test be adopted or some different and, if so, what test?**

When are proceedings pending?

27. Different considerations will apply to criminal and civil proceedings. In so far as criminal proceedings are concerned, the position at common law as to when they can first be regarded as pending is uncertain. The debate turns largely on the question whether proceedings which can be described as imminent but in respect of which there has been no arrest, with or without a warrant, can be described as pending. In so far as civil proceedings are concerned, it is generally accepted that they cannot be described as pending until the writ or other initiating process is issued. It is also generally accepted that criminal and civil proceedings cease to be

active when the time for appealing has expired or any appeal has been disposed of save that, if a new trial is ordered, the proceedings will continue to be regarded as pending until the new trial and any further appeal is disposed of or the time for a further appeal has expired.

28. The 1981 Act uses the word "active" rather than "pending", a use which we adopt. Schedule 1 draws a distinction between criminal proceedings, appellate proceedings and other proceedings. Criminal proceedings will usually first become active when an arrest warrant is issued or on an arrest without warrant and cease to be active when disposed of by acquittal or sentence. Other – that is, generally civil - proceedings will first become active when the case is set down for trial or, if earlier, a trial date is fixed and cease to be active when disposed of. Appellate proceedings first become active on the giving of notice of appeal or, if earlier, the making of an application for leave to appeal and cease to be active when disposed of. There is a special provision for criminal appeals where the case is remitted to the court below or a new trial is ordered: in that situation the new trial becomes active immediately on the disposal of the appellate proceedings. There is no such provision for civil appeals although it is possible for a new trial to be ordered: cp. Court of Appeal Law (2011) Revision, section 5. There would therefore appear to be short periods between judgment at the trial and the initiation of an appeal and between any order for a new trial and the fixing of the new trial date when the proceedings are not active.

29. It should be borne in mind that that there is no absolute prohibition on the publication of material referring to proceedings which are active. Even at common law, as we have seen, it is only publications which carry a real risk of prejudice to pending proceedings that have that effect. Nonetheless, there are a number of debatable issues here. First, those responsible for a publication will need to know, or have the means of finding out, whether an arrest has been made and, more particularly, since this information is less likely to be in the public domain, when an arrest warrant has been issued. That will depend on the willingness of the police to provide such information. Secondly, is there any reason for treating proceedings as active between verdict and sentence given the jury's function will end with the verdict? Thirdly, is there any reason why appellate proceedings should be treated as active unless and until, in the case of criminal appeals, a new trial is ordered? The assumption that judges are immune from improper persuasion may be, as one commentator has described it, "elitist" but we question whether treating the sentencing or the appellate processes as "active" represents the proper balance which the law of contempt seeks to achieve or, indeed, is consistent with section 11 of the Bill of Rights. On the other hand, it can be argued that, since what might be an inappropriate publication at the pre-verdict stage of the trial process is unlikely to carry a real risk of prejudice at the sentencing or appellate stages, it matters little whether those stages should be treated as "active".

30. **When should proceedings be treated as becoming and ceasing to be active?**

In particular, to what extent should the sentencing and appeal processes be treated as active?

Time of publication

31. This is a convenient place to deal with one of the issues which arises out of the emergence of the modern media. Daily newspapers have a limited shelf life perhaps two days at the most. The shelf life of weekly or other periodicals may be somewhat longer but it has always been assumed that the relevant time is the date of first publication. If that date is before the date upon which the proceedings can be described as pending, imminent or active, there is no contempt. Modern media publications, on the other hand, have an indefinite shelf life and will continue to be accessible to members of the public until such time, if at all, as someone, having the power to do so, terminates public access. In England, following a Scottish authority, it has been held that publication is a continuing event and that so long as the offending material remains accessible to the public after proceedings become active, it matters not that it first became available prior to that time. This obviously obliges publishers, on becoming aware that proceedings are active, to prevent further public access to the offending material. The UK Law Commission has proposed that that burden should be lessened by providing that the publisher will not be obliged to delete the material until the court before whom the relevant proceedings are being conducted makes an appropriate order. Failure to comply with the order will ordinarily constitute contempt.

32. **How should this issue be addressed?**

Strict liability

33. It is established in the Islands, as in other common law jurisdictions, that the only relevant intent is the intent to publish. The reference in our core definition to "calculated to interfere" means no more than that viewed objectively the publication has that tendency. The prosecution does not have to prove that the alleged contemnor intended to interfere with the administration of justice although intentional contempt will be regarded as a particularly heinous manifestation of the offence. The strict liability rule applies at common law not only to the author of the offending publication but to all those – publishers, distributors, service providers and other intermediaries – who participate in the process by which the publication becomes available to the public.

34. The objection to strict liability is that it runs counter to the general principle applicable to other serious crimes, namely, that the prosecution must prove guilty intent. Under the existing law, it is possible for a person to be subjected to the

indefinite penalties of the law of contempt in respect of conduct which, at its worst, could only be described as negligent. Although this type of contempt requires proof that the relevant proceedings are pending or, at the least, imminent, it is not necessary, at common law, for the prosecution to establish that the publisher knew they were pending or imminent. The general argument to the contrary is that the right of the accused to a fair trial is so important that, on this occasion, it trumps freedom of expression. More specifically, an argument that, although the particular publication might have the tendency to prejudice the trial, that was not the publisher's intention, is one which it is easy to raise and difficult to rebut particularly if, which would normally be the case, it is for the prosecution to prove intent beyond reasonable doubt. The tentative view we take is that the introduction of a defence of innocent publication or distribution, which we recommend below, reduces significantly the force of the arguments in favour of introducing a requirement for any further guilty intent. Although we appreciate that the law of contempt now has to take account of the so-called "citizen journalist", most prosecutions are and will continue to be against corporate publishers. If, at the time of publication, a newspaper either knows that proceedings are active, or could with reasonable diligence have discovered that they were, and the publication is, viewed objectively, calculated to prejudice or impede the proper conduct of those proceedings, arguments that the publisher did not know that the publication would or might have that effect or did not intend that it should seem somewhat hollow.

35. Some Law Commissions, most notably, in Australia, have recommended the abolition of the strict liability rule in its application to contempt. However, many of the Australian States do not generally embody the requirement of a guilty intent in their statutory definitions of crimes but provide for specific defences such as mistake. Accordingly, their recommendations have largely been along the lines of enabling the alleged contemnor to establish, on the balance of probabilities,that he did not intend to prejudice or impair the conduct of the relevant proceedings. The English Law Commission, in its recent and on-going review, did not recommend any change to the strict liability rule which had been specifically preserved, albeit subject to qualifications, by the 1981 Act.

36. **Should the strict liability rule be abolished or modified other than by reference to the question of innocent publication or distribution?**

    If so, should the mental element of the modified offence be defined by reference to intention or knowledge and, if the latter, knowledge of what?

    Should the burden of proving any modified offence remain with the prosecution or should the absence of intention or knowledge simply be a defence?

Codifying the core

37. Paragraphs 21 to 36, above, discuss the four topics which arise out of the core definition of this type of contempt. We do not believe it is possible to codify that definition without addressing all of those topics although it would obviously be possible to provide a statutory definition which, like the 1981 Act, contains no mental element beyond an intention to publish. However, the issues we have raised assume that, at all events, the core definition needs to be statute based. At present, the law of contempt in the Islands is, with minor differences, the same as it was in the UK before the 1981 Act. In so far as contempt by publication is concerned, as in other areas, we are of the view that it is not sufficiently certain particularly in light of the emergence of the modern media. Although there is no requirement in the Bill of Rights that criminal offences should be certain, still less that they should exist in statutory form, it is the fact, as noted above, that contempt is the only offence in respect of which there are no maximum penalties prescribed by statute. We would regard it as unsatisfactory for a person to become liable to criminal penalties without appreciating that he has done anything wrong. The absence of any need to establish a mental element makes it all the more important that the prescribed conduct should be expressed with all the certainty which the subject matter permits.

38. **Should a core definition of contempt by publication be introduced by legislation?**

Public interest

39. This is one of a number of discreet topics which affect the scope of the offence of contempt by publication. There is no general public interest defence to a charge of contempt and it is difficult to see how there could be given that the law seeks to achieve a proper balance between two competing public interests, freedom of expression and the need for a fair trial. If such a defence were added to the qualifications of the strict liability rule introduced in the UK by the 1981 Act it would mean that a publication could be justified notwithstanding that it created a serious risk of substantially prejudicing a fair trial since, if it was not of that character, there would be no need for the defence. The existence of a public interest defence seems first to have been recognized in Australia in Ex Parte Bread Manufacturers Ltd (1937) SR (NSW) 242. Section 5 of the 1981 Act provides that "a publication made as or 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". Unlike the position in Australia, section 5 is not simply a defence. If the alleged contemnor contends that the section applies, it is for the prosecution to show that it does not. However, the limited scope of the provision should be noted. It does not apply where the particular proceedings

have prompted the publication. It only applies where the risk of prejudice can be seen as an unintended by-product of the publication, the rationale being that the mere existence of the particular proceedings should not stifle discussion which would in any event have taken place absent those proceedings. On the other hand, it can be said that it is of no concern to the person whose trial might, by definition, be prejudiced that the risk of such prejudice is merely incidental to the public debate. Section 5 adjusts the balance in favour of freedom of expression.

40. **Should a provision similar to section 5 of the 1981 Act be introduced whether by way of defence or as a matter which, if raised, the prosecution must rebut?**

Reporting proceedings held in public

41. At common law, the publication in good faith and contemporaneously of fair and accurate reports of proceedings in open court does not constitute contempt notwithstanding that there may be a risk of prejudice to the current or future proceedings. In the UK, this principle has been codified by section 4(1) of the 1981 Act which provides that "a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith". It is likely that, as with the common law, this provision will not extend to those parts of the proceedings, whether the giving of evidence or the making of legal submissions, which take place in the absence of the jury. In addition there are certain statutory restrictions on reporting depending on either the nature of the information to be published or the nature of the relevant proceedings. Thus, section 31 of the Criminal Procedure Code (2011 Revision) restricts publications which may lead to the identification of rape victims while section 112 of the Code provides for the postponed publication of reports of committal proceedings unless the accused applies for an order disapplying the section. Reference should also be made to the Criminal Evidence (Witness Anonymity) Law, 2010 ("the 2010 Law"), which, amongst other things, abolishes the common law rules relating to the making of orders for securing that the identity of a witness in criminal proceedings is withheld from the defendant and replaces them with a statutory regime. However, the Islands has no equivalent to the UK Judicial Proceedings (Regulation of Reports) Act 1926 which makes it an offence to print or publish in relation to any judicial proceedings "any indecent matter or indecent medical, surgical or physiological details the publication of which would be calculated to injure public morals". The 1926 Act also severely restricts the reporting of matrimonial proceedings. The Islands do not have any legislation restricting the reporting of proceedings involving minors although most, but not all, of such proceedings will not be in open court. Our tentative view is that, if any part of the law of contempt by publication is to be codified, there can be no harm in introducing a provision along the lines of section 4(1) of the 1981 Act.

42. **Should a provision identical or similar to section 4(1) of the 1981 Act be introduced by legislation?**

Postponement Orders

43. There is no doubt that at common law the court can delay the publication of reports of the proceedings for a defined time. The occasion for exercising such power will most likely be where there are several related criminal proceedings or related civil and criminal proceedings and it is established that there is a risk that the reporting of the current proceedings might prejudice the pending, invariably criminal, proceedings. We are aware of a case in the Islands involving related criminal and civil proceedings where the Grand Court made an order postponing any report of the civil proceedings, which appeared likely to come to trial first, until the conclusion of the criminal proceedings. Section 4(2) of the 1981 Act expressly confers upon the court the power to make postponement orders "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent". It would seem that anyone who, having knowledge of a postponement order, disobeys it is automatically guilty of contempt whether or not the breach itself constitutes a substantial risk of serious prejudice to the relevant proceedings. If something similar to section 4(1) of the 1981 Act is to be introduced by legislation, it is clear to us that something similar to section 4(2) should also be introduced since the latter represents an exception to the former.

44. **If something similar to section 4(1) of the 1981 Act is introduced by legislation, should the power to make postponement orders also be put on a statutory footing?**

Suppression Orders.

45. Postponement orders, as the name suggests, are concerned only to delay for a limited period of time the publication of reports of, usually, the whole of particular proceedings. A question has also arisen as to the extent to which a court can prohibit, in theory indefinitely, the publication of certain information forming part of the proceedings. Most frequently, the information in question relates to the name or identity of a witness, for example, the victim in blackmail cases or a police informant. Suppression orders will not be made simply to save a person from embarrassment. Section 11 of the 1981 Act recognizes that the power to make suppression orders exists although it confers no jurisdiction to make them. It simply provides that, where the power is properly exercised, the court can give directions prohibiting the publication of the relevant name or other information. Given the provisions of the Criminal Evidence (Witness Anonymity) Law, 2010 ("the 2010 Law"), we see no need for the introduction by legislation of anything similar to

section 11 of the 1981 Act. To the extent that it may be appropriate to prohibit the publication of information relating to matters other than the identity of particular witnesses, the common law power, whatever its extent, will continue to exist. It is true that the 2010 Law only applies to criminal proceedings but we cannot conceive of circumstances where it would be appropriate to conceal the identity of witnesses in civil proceedings but, should such circumstances occur, the question can be dealt with by reference to the continuing common law power.

46. **Is the 2010 Law all that is required to deal with the making of suppression orders?**

Reporting proceedings held in private

47. The use of the expression "in private" is intended to include not only the situation where the court is sitting in chambers but also those rare instances where the court is sitting in open court but in camera: see Scott v Scott [1913] A. C. 417. The expression most naturally refers to civil proceedings since, even where a criminal court is sitting in the absence of the jury, it would not be appropriate to describe that court as sitting "in private". As to when the court is entitled to sit in chambers, section 23 of the Grand Court Law (2008 Revision) permits a judge to sit in chambers to determine all matters brought before him on summons or motion but, if he considers it expedient, to direct any motion to be heard in open court. It is thought that this provision supports the generally accepted distinction between trials, which are held in open court, and interlocutory applications, which are held in chambers, although the distinction cannot always be satisfactorily applied to proceedings of a domestic character like family proceedings.

48. When the court is sitting in private, whether in camera or in chambers, the public, including the press, will necessarily be excluded. But information about the hearing could be supplied to the media or directly to the public by the parties or their lawyers. At common law, it is arguable that a distinction must be drawn between hearings where the court is properly sitting in camera and those where it is properly sitting in chambers. In the case of the former, the publication of information concerning what transpired at the hearing will amount to contempt if the publisher is aware that an order has been made that the hearing should take place in camera. This is because the publisher must be taken to appreciate that such orders are only made when necessary to prevent prejudice to the administration of justice in that particular case. That cannot be said of hearings of interlocutory applications which are held in chambers not because of any danger to the administration of justice if they are held in open court but because the vast majority of such applications are procedural in character and of no interest to the media or the public. In such cases, it may be that publication will not constitute contempt unless the publisher knows that the hearing was in chambers and that such publication of the relevant

information creates a substantial risk that the future conduct of the proceedings will be prejudiced. Section 111(1)(e) of the Penal Code (2010 Revision) makes it an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The reference to a direction would suggest that the offence is limited to proceedings where the court is properly sitting in camera or where, sitting in chambers, a specific direction has been made that they be held in private. However, it is possible that conduct which does not amount to the offence created by section 111(1)(e) of the Penal Code may amount to a common law contempt.

49. In the UK, the circumstances in which publication of information relating to proceedings in private can amount to contempt is governed by section 12 of the Administration of Justice Act 1960 ("the 1960 Act") which provides that the publication of information relating to proceedings before a court sitting in private shall not "of itself" be contempt of court save in certain instances. Those instances relate to proceedings concerning minors or patients, those involving national security or secret processes and finally "where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published": see section 12(1)(e). In the absence of local legislation, Grand Court Practice Direction No. 3/97 adopts section 12 and institutes a procedure, presumably by reference to section 12(1)(e), for obtaining orders restricting the publication of rulings, orders or judgments given in private. Section 12(4) preserves common law defences and, accordingly, the UK authorities establish that section 12 does not create a new instance of contempt and that publication of information covered by the five defined exceptions will not necessarily constitute contempt. The converse of this, arising from the use of the words "of itself" in section 12(1) is that the publication of information not covered by the five exceptions may still constitute a contempt if it creates a serious risk of prejudice to the instant proceedings or other pending proceedings. However, given that section 12 is concerned with civil proceedings, the risk of such prejudice would seem unlikely.

50. We are firmly of the view that legislation is required to put what Practice Direction 3/97 sought to achieve on a sounder footing. Apart from anything else, section 12 of the 1960 Act refers to UK legislation which may be expressed in different terms to the equivalent Islands legislation. There is also an inconsistency between the Practice Direction and section 111(1)(e) of the Penal Code: see paragraph 48 above. The starting point should be that the publication of information as to what transpires at a hearing in private is permitted subject to certain specified exceptions, that is, the section 12 approach. A general prohibition with exceptions permitting publication would not be practicable since the publication of most information concerning such hearings could not conceivably prejudice the future conduct of those or any other proceedings. Generally, we would favour the introduction of a

provision which mirrors section 12 with the substitution for the references to other UK legislation of references to the equivalent Cayman legislation and, possibly, with the deletion of the words "of itself". Section 12(1)(e) represents a problem since it is unclear when a court sitting in chambers does have power to order an express prohibiton on publication. The provision itself certainly confers no such power. We would have supposed that such a power would only exist, pursuant to the court's inherent jurisdiction, where publication of the information would either defeat the object of the proceedings or otherwise create a risk of serious prejudice to the instant proceedings or some other pending proceedings.

51. **Should a provision along the lines of section 12 of the UK 1960 be introduced?**

If so, should the words "of itself" be omitted so that a publication not covered by the defined exceptions could not amount to contempt?

Should any such provision attempt to define when, outside the defined exceptions, the court has power to prohibit the publication of information?

Liability of publishers and distributors

52. Thus far we have assumed that the alleged contemnor is the author of the offending publication. But in the case of media publications any prosecution is most likely to be directed at publishers which, for present purposes, would include newspaper proprietors, editors, television and radio stations and the producers of their particular programmes together with distributors. But the position has become more complicated with the emergence of the modern media. The transmission of information which is accessible to the public may involve a number of intermediaries in different countries. However, since the Court's jurisdiction in contempt, as with its criminal jurisdiction generally, is territorial, we are only concerned with those publishers, in the widest sense of the term, who are resident or based in the Islands. This will include the publishers of the traditional media together with local service providers but most notably what have been referred to as "citizen journalists". Of course, most newspapers have letter columns but we would hazard a guess that the introduction of online editions with the facility to comment, instantaneously and anonymously, on issues of the day has increased reader response significantly. Apart from anything else, the letter columns are constrained by space whereas the facility to respond online is not.

53. At common law, provided the defendant could be regarded as having published the offending material, liability is strict. It was no defence for the defendant to claim that he was unaware that his newspaper contained the offending article or letter or unaware that there were proceedings in existence which might be prejudiced by its publication. The service provider, including newspapers which provide online editions with reader response facilities, is responsible for monitoring those

responses just as the publishers of hard copy newspapers are responsible for the content of letters which they choose to print. Both the offending reader and the publisher will be strictly liable although it is unlikely that the reader will be prosecuted. That remains the position in the Islands: see, for example, R v Stewart [2003] CILR 8.

54. In the UK, the position of publishers and distributors has been ameliorated by section 3 of the 1981 Act replacing section 11 of the Administration of Justice Act 1960. A publisher is not guilty under the strict liability rule if, having taken all reasonable care, he does not know and has no reason to suspect that relevant proceedings are active. A distributor is not liable under that rule if, at the time of distribution, having taken all reasonable care, he does not know and has no reason to suspect that the publication contains material to which the strict liability rule applies. A publisher is assumed to know the contents of his publication so, unlike the distributor, he cannot plead ignorance of those contents. If the distributor, although aware of the contents, does not know that the relevant proceedings are active, he will have a defence since the strict liability rule only applies if the proceedings are active. Contrary to the general rule the burden of proof is expressed to be on the defendant presumably on the balance of probabilities..

55. We would favour some relaxation of the strict liability rule in its application to publishers and distributors. The reported instances of contempts committed by the local media are few in number although that may partly be due to the fears expressed by some of them as to the uncertain application of the law to any given factual situation. It may be that the fear of prosecution has deterred them from publishing material that, if published, would or ought not to be regarded as constituting contempt, the so-called "chilling effect".

56. **To what extent, if at all, should section 3 of the 1981 Act be adopted in the Islands?**

Intentional prejudice

57. As we have seen, contempt at common law was an offence of strict liability. Provided that the defendant could be regarded as responsible for the relevant publication, whether as author, publisher or distributor, it was no defence for him to plead that he did not intend to interfere with the administration of justice. His intention was relevant, if at all, to sentence. In the UK, in the case of publications tending to interfere with the administration of justice in relation to particular proceedings, sections 1-5 of the 1981 Act perpetuate the strict liability rule but with the qualifications referred to above. However, section 6(c) provides that nothing in sections 1-5 restricts liability for contempt in respect of conduct intended to impede or prejudice the administration of justice. "Intended" means having the specific

object of and does not include mere recklessness. But, subject to that, intentional contempt continues to be governed by the common law which is not altogether certain in particular areas.

58. We question whether it is either satisfactory or necessary to have two regimes co-existing, the one dealing with the strict liability rule as modified by the 1981 Act and the other dealing with intentional contempt in accordance with the common law. If the evidence establishes that the alleged contemnor intended to impede or prejudice particular proceedings it is unlikely that sections 3 (innocent publication), 4 (good faith reporting) or 5 (good faith discussion) will help him. That leaves the person who has the relevant intention but the circumstances are such that, although the risk of serious prejudice is more than minimal, it is not substantial. If, as we recommend below, the penalties for contempt are restricted by legislation and, as under the 1981 Act, those restrictions apply equally to intentional contempt, we can see no basis for preserving the common law in this respect. We also doubt whether the preserved common law offence is compliant with section 11 of the Bill of Rights.

59. **Should intentional contempt be preserved as a separate category or, as we favour, remain a matter for sentencing rather than liability?**

Procedure

60. Contempts by publication, other than those which can be regarded, constructively, as taking place in the face of the court, are triable only by the Grand Court pursuant to the provisions of GCR Order 52. (In the case of civil proceedings, it is possible to apply for a committal order in those proceedings not only in respect of the breach of an order – as to which see Section VIII below – but also in respect of a prejudicial publication: see Vine Products Ltd v Green [1966] Ch 484.) Order 52 provides that an application for a committal order is to be made by a notice of motion stating the grounds of the application and supported by an affidavit. The notice of motion and affidavit must be served personally on the alleged contemnor although the Court has power to dispense with personal service. Subject to certain defined exceptions, the hearing takes place in open court. If he wishes, the alleged contemnor is entitled to give oral evidence on his own behalf. The Court has power to make suspended committal orders and, on the application of a person committed, to discharge him. This procedure is expressed to be without prejudice to the Court's power to make a committal order of its own motion although it is inconceivable that the Court would exercise this power after the introduction of the Bill of Rights save in a case where the contempt can be regarded as having taken place, at least constructively, in the face of the court. Most usually, in the case of contempt by publication, the applicant will be the Attorney General although Order 52 does not address the question of

who is entitled to apply. It is unclear whether, to the extent to which they differ, the criminal or civil rules of evidence apply. Legal aid is available.

61. Although we are not aware of any private Order 52 applications in the Islands in respect of contempts by publication, we would favour the introduction of a provision which requires that Order 52 applications be initiated by, or with the consent of, the Attorney General. Section 7 of the 1981 Act makes similar provision in respect of prosecutions under the strict liability rule although it preserves the power of the court to act of its own motion. We have already expressed reservations concerning the preservation of this power in the case of contempts which are truly "in the face of the court". Our concerns are greater in the case of contempts by publication where the ill-defined summary process would not seem to comply with section 7 (fair trial) of the Bill of Rights.

62. **What restrictions, if any, should be placed on the right to apply for a committal order pursuant to Order 52?**

Should the court's power to initiate of its own motion proceedings for contempt by publication be preserved?

63. The most extreme recommendation for reform in this area is that contempt by publication should, once again, be triable on indictment. Such was the recommendation of the Western Australian Law Reform Commission in its 2003 Report. This particular topic has been more recently discussed by the UK Law Commission. Our tentative view is that such a radical change is unnecessary and that there is no reason why the Order 52 procedure should not adequately protect the rights of alleged contemnors. In particular, we do not consider that Order 52, if properly operated, is not compliant with section 7 (fair trial) of the Bill of Rights. When we say "properly operated", we mean that, for example, the notice of motion is framed with the same particularity as an indictment and that it should be issued and served on the alleged contemnor as soon as practicable after the alleged contempt has come to the notice of the prosecuting authorities. It may be that Order 52 can be improved in other ways by, for example, expressly applying the criminal, to the exclusion of the civil, rules of evidence. Although Order 52 does not cover this possibility, we see no reason why the Attorney General should not apply, ex parte if necessary, for an injunction to restrain further publication pending the hearing of the committal motion or, if earlier, until the relevant proceedings have ceased to be active or pending. Such an application is more easily accommodated in the context of an Order 52 application than in proceedings on indictment. Another disadvantage of treating contempt by publication as an indictable offence is that the decision to prosecute would then pass to the DPP whom, it might be suggested, would not be seen to be impartial since the proceedings alleged to have been prejudiced will have been prosecuted by the DPP. If this is thought to be a concern,

the Attorney General would have to remain the prosecuting authority as, generally, he currently is under the Order 52 procedure.

64. **Should contempt by publication be made a separate criminal offence triable only on indictment?**

65. One suggested variant of the trial by indictment recommendation is that the trial should be by judge alone. This variant is less radical in the Islands than in other common law jurisdictions where trial on indictment by judge alone is, as far as our current researches go, unheard of. Here, an accused can elect for trial by judge alone and such trials are by no means uncommon. The variant was suggested in response to those who argued that juries are likely to be biased in favour of the media on the ground that they might resent attempts to restrict the access of other jurors, whether by way of a judge's direction or subsequent contempt proceedings, to information which they would have liked to have had had they been on the jury in question. On the other hand, it has been argued that an issue as to whether there has been a substantial risk of serious prejudice is best answered by a jury rather than by a judge who is assumed to be incorruptible.

66. **If contempt by publication is to be triable on indictment should the trial be by a judge and jury or a judge alone or, as with other indictable offences, at the option of the alleged contemnor?**

Section IV: Juror Contempt

67. This section is concerned with two issues which arise out of the jury process. The first arises where a juror, despite his oath and the judge's directions, accesses information outside the evidence presented in court. This inevitably involves a substantial risk of serious prejudice in the instant proceedings although it may not come to light until after their conclusion. In any event, it does not fall within the strict liability rule since no publication is involved. The second issue concerns the disclosure of jury deliberations. Any such disclosure will invariably take place after verdict and, save in respect of any possible appeal, could not be regarded as coming within the strict liability rule since it will not of itself have impeded or prejudiced the process by which that verdict was reached. There are other aspects of contempt involving either misconduct by, or directed at, jurors which we do not consider in this section but elsewhere.

Jurors seeking information

68. The possibility of jurors seeking information about the accused or concerning other matters relevant to the trial additional to the evidence adduced in open court has increased with the emergence of, in particular, the internet. Previous to that, few jurors would go to the trouble of visiting the offices of their local newspapers to

search their archives for such information. But now we would suppose that in the Islands, as elsewhere, most jurors will have home access to the internet either themselves or through family members. Unlike in former times, ease of access to a vastly increased information base going back long before the trial has increased the risk of this type of jury misconduct prejudicing the accused's right to a fair trial. A number of steps are taken to reduce the risk of a juror obtaining information which does not form part of the evidence. On arrival at court, those summoned for jury service will receive a short address from the Clerk of the Court which will, amongst other things, tell them they should rely simply on the evidence presented in court and not undertake their own researches whether on the internet or otherwise. Those empanelled will then take the oath which draws attention to the fact that their verdict must be based on the evidence presented to them in open court. In addition to the oath that each member will have taken, immediately after the jury is sworn, the presiding judge will give, in less formal language, a similar warning and, in addition, instruct jury members that they must not attempt to obtain information from outside sources including the internet. The jurors' attention will also be drawn to their collective responsibility since the problem of internet use usually only comes to light when the errant juror discloses the results of his or her research to other jurors. There is no standardized set of directions, either here or in the UK, although guidance can be found in the UK Crown Court Bench Book. In the case of lengthy trials, the judge's directions may be repeated in summary form from time to time. There can be no doubt that a juror acting in contravention of such directions is guilty of common law contempt although it is not the practice here for the presiding judge to warn the jury of the possible consequences of a failure to comply with his directions. All of this notwithstanding, there is evidence from other jurisdictions that the message in not getting through. Orders directing the relevant service provider to delete the offending material may reduce the risk of prejudice but the existence of such material may not become apparent until the damage has been done.

69. **Are consultees aware of any instances where it has come to light, whether before or after verdict, that a juror has obtained, or attempted to obtain, online information relevant to the case being tried? If so, with what result?**

Should the initial directions given by the judge be standardised?

Other than a successful prosecution is there anything else that can be done to prevent such behavior in the future, for example, drawing the jury's attention at the outset to the possible consequences of not complying with the Judge's directions?

Jurors disclosing information

70. At common law, it seems to be established that publication of a jury's deliberations is not of itself a contempt of court although it may become so if the material published imperils the finality of jury verdicts or adversely affects the attitude of future jurors to the proper discharge of their duties. In the UK, the position is now governed by statute, namely, section 8 of the 1981 Act, a provision introduced when the Bill was in the House of Lords and was not supported either by the Lord Chancellor or the Attorney General although the government did not seek its removal when the Bill returned to the House of Commons. Section 8 makes it a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. It is apparent that the offence is one of strict liability not because it falls within the statutory definition of the strict liability rule – it does not – but because no mental element is referred to in the section. The offence can be committed without disclosing the identity of the case or of the particular juror.

71. So far as we are aware, the publication of jury deliberations is not an issue in the Islands. Even if there have been attempts to obtain details of what transpired in the jury room, the local media seem wisely to have refrained from publishing any such details. Section 8 has been subject to considerable academic criticism in the UK on various grounds but, in particular, because it stifles genuine research into the workings of the jury system. We would not support the introduction of any similar provision here. Indeed, subject to the views of, in particular, the local media, we are generally disinclined to recommend any legislation on this topic.

72. **Do consultees consider there is any need for legislation to restrict the disclosure of jury deliberations and, if so, what form should it take?**

Section V: Scandalising the court

73. Despite the use of the phrase "scandalising the court", this branch of the law of contempt is not concerned to preserve the dignity of judges or to protect them from criticism but to maintain public confidence in the administration of justice as a continuing process. The offence has been judicially defined as "any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority". The most common examples are scurrilous abuse or unfounded accusations of impartiality. Criticism of a judge or court is no contempt and nor does it become so for being expressed in strong language. It seems to be accepted that the offending material must be such as to create a real risk that public confidence in the administration of justice will be undermined. It is tolerably clear

that this kind of contempt is an offence of strict liability and that, in the UK, the 1981 Act has not affected the position since the conduct complained of, even if it is by way of a publication, is not directed at any particular proceedings. Whether defences of fair comment or justification are or should be available is less clear. The last successful prosecution in the UK was in 1931 although there are more recent instances in Commonwealth jurisdictions, in particular, Canada. Scandalising the court as a form of contempt of court at common law has been abolished in the UK by section 33 of the Crime Courts Act 2013. It has not been replaced by any other statutory offence.

74. In the Islands, although section 27 of the Grand Court Law (2008 Revision) confers power on the Grand Court to arrest and try summarily a person guilty of, among other things, "scandalising the Court", the section does not attempt any definition of the offence: see R v Ebanks ex parte Henderson [2009] CILR 57. The penalty is imprisonment for six months and a fine of CI$500 which, we would suggest, sets maxima for this offence whether it be prosecuted under section 27 or at common law. We are not aware of any prosecutions in the Islands for this offence although it obviously still exists as a statutory offence if not also at common law.

75. We do not favour the wholesale abolition of the offences, statutory and at common law, of scandalising the court. We do not consider the fact of its abolition in the UK has much relevance in the Islands. Here, the Grand Court consists of six permanent judges (of whom two deal exclusively with financial services business) together with a number of visiting judges who sit from time to time. There are also three permanent magistrates (again with occasional part-timers) who sit in the Summary Court. Although it is difficult to assess the number of non-appellate judges in the UK, there are presently 92 Crown Court Centres (some of which also accommodate County Courts) which on any sitting day may have anything between one and six judges sitting ranging from a High Court Judge to an Assistant Recorder. Another distinguishing feature is that in the Islands the local media will report in detail on cases, particularly criminal cases, which in the UK, even in local newspapers, would merit at best a few lines. These differences indicate to us that in the Islands judicial officers are more exposed not just to public criticism, which is permissible, but to public abuse which is not. Some recent online comments from anonymous members of the public concerning what the writers thought to be too lenient sentences for sexual offences have come very close to the red line if they have not actually crossed it. We do not believe the UK argument that the judges need no greater protection than other public figures, such as MPs, and that the defamation laws are sufficient for that purpose necessarily holds good in the Islands. Accordingly, we would favour retaining it as a purely statutory offence, replacing its common law equivalent, but shorn of the summary element currently incorporated in section 27. (We use the word "summary" in the sense that it is used

in section 27 and not to signify that we consider it should be triable only on indictment.)

76. **Do consultees agree that an offence of "scandalising the court" should be retained?**

If so, should it be retained as a statutory offence, as in section 27 of the Grand Court Law, or a common law offence or both?

Do consultees agree that, if section 27 is retained, the offence should be subject to normal criminal procedures and not triable summarily (in the sense referred to above).

Section VI: Acts interfering with the course of justice

77. This type of contempt principally involves conduct by or (not amounting to a publication) directed at certain categories of person involved in the judicial process and which constitutes an interference with the due administration of justice either in relation to a particular case or as a continuing process. It embraces assaults on, threats to or intimidation of witnesses, jurors and court officers whether before, during or after proceedings and which are calculated, whether intentionally or not, to deter them from discharging their duties to the court in addition to breaches of duty by those categories of person. There is thus some overlap with contempt in the face of the court and juror contempt. It extends to judges and those court officers involved in the judicial process including, since they are officers of the court, attorneys. A private communication to a judge designed to influence his conduct of a case amounts to contempt. It also extends to parties although perhaps with less rigour since, at all events in civil proceedings, a party has a choice as to whether to sue or defend. Civil litigants may be expected to be subject to legitimate pressure which, in the case of a witness, may amount to contempt. This head also covers breaches of duty by court officers such as the failure of an attorney, acting as such, to honour an undertaking even if not given directly to the court.

78. Much of the conduct referred to above is covered by specific criminal offences: see Appendix 1.

79. We are not aware that this branch of the law of contempt causes any particular difficulties or that prosecutions for any of the various specific offences covering the same ground are particularly prevalent. We would be inclined to take this residual category out of the law of contempt altogether and attempt to impose some kind of consistency in the various existing statutory offences which give the courts power to impose a variety of disparate penalties for what is essentially the same conduct: see paragraph [ ] below.

80. **Do consultees agree or should this branch of contempt be left as it is?**

Section VII: Jurisdiction, procedure and penalties

Jurisdiction

81. The Grand Court, being a superior court of record, has an inherent jurisdiction to try alleged contemnors. This jurisdiction is confirmed by section 11 of the Grand Court Law (2008 Revision). The sentencing powers of the Grand Court are unlimited. Section 27, which is expressed to be without prejudice to section 11, provides that the Court has jurisdiction to arrest and to try summarily any person guilty of contempt and, if convicted "under this section", to sentence such person to six month's imprisonment and a $500.00 fine. (It is arguable that these restricted sentences apply when the Court proceeds summarily as opposed to referring the matter to the Attorney-General for him to consider applying for a committal order: see R v Stewart [2003] CILR 8 cf. A-G v Cayman Free Press & Ors [1984-5] CILR 60.) On the other hand, the summary courts only have such jurisdiction as is conferred upon them by statute: see Summary Jurisdiction Law (2006 Revision), sections 29, 39; Penal Code, section 111(2); Judicature Law, section 35. In effect, the Summary Court can only deal with contempts which are truly, and not merely constructively, "in the face of the court". That is not to say that other conduct amounting to contempt of the Summary Court goes unpunished. The Grand Court, in the exercise of its supervisory jurisdiction over the Summary Court, has the power to dispose of contempts of the Summary Court where the Summary Court lacks jurisdiction and, possibly, even where the Summary Court had jurisdiction. Where the Grand Court is exercising its supervisory jurisdiction the alleged contemnor will brought before the Grand Court invariably on the application of the Attorney General for a committal order pursuant to GCR Order 52. Although the various statutory provisions could benefit from being tidied up, we would not propose any alteration in the respective jurisdictions of the Grand Court and the Summary Court as described above.

Procedure

82. We have discussed above the summary procedure which can be employed in cases of contempt in the face of the court ranging from the rough justice of "on the spot" disposal to the more considered approach which section 7 of the Bill of Rights most likely now requires. Indeed, it may well be, that, with the introduction of the Bill of Rights, the continued use of the summary procedure can be justified only in those cases where the contempt has truly been "in the face of the court" or where immediate disposal is necessary to preserve the integrity of the trial process. In other cases, the matter will proceed either as a criminal prosecution, if some

statutory offence is available, or as a committal application pursuant to GCR Order 52.

83. However, the major peculiarity of the procedure for dealing with contempt cases is that despite their criminal nature trial by jury is not an option. The practice of proceeding by way of indictment has long since fallen into disuse although, as far as we are aware, there is nothing which would prevent its reintroduction. It should be noted that there are a number of separate criminal offences which cover part of the ground covered by the law of contempt and are triable "either way": see, for example, Penal Code, section 111 dealing with offences relating to judicial proceedings. We do not believe there is any contempt-like offence which is triable on indictment only. We are somewhat troubled that, leaving aside those cases which the Grand Court or the Summary Court can dispose of summarily, the same conduct can become subject to two alternative prosecuting regimes, the Attorney General in respect of contempt of court and the Director of Public Prosecutions in respect of the corresponding statutory offences, each with their respective penalties. While we would not favour the re-introduction of trial on indictment, we would favour a provision that, in respect of statutory offences penalizing conduct which might otherwise constitute contempt, that conduct shall not constitute contempt.

84. **Do consultees agree that duplication between statutory offences and common law contempt should be avoided and, if so, how?**

85. There is an issue as to who can apply for an order for committal? At common law, the applicant would normally be either the Attorney General or the person claiming to be prejudiced by the alleged contempt. However, potential applicants were encouraged to approach the Attorney General with a view to him initiating an application although whether he did so was entirely a matter for him. Although the UK Phillimore Committee did not recommend any change, section 7 of the 1981 Act provides that contempt proceedings "under the strict liability rule ….shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it." It will be recalled that "the strict liability rule" is concerned with "conduct" – not just "publications" – relating to particular proceedings so that section 7 has no application to conduct (including publications) which interferes with the administration of justice as a continuing process. It has been established in the UK that a refusal by the Attorney General to consent to a prosecution is not amenable to judicial review.

86. **Should the common law position be altered and, if so, in what way?**

In particular, if the Attorney General's consent is to be required, should it be required in all cases and, if not, in which cases?

Penalties

87. As noted above, the powers of the Grand Court and, where it has jurisdiction, the Summary Court to punish for contempt of court are unlimited. No statutory maxima exist whether in respect of a term of imprisonment or a fine notwithstanding that such maxima exist in respect of statutory offences some of which penalize the same conduct. Section 14 of the 1981 Act prescribes a maximum period of imprisonment of two years in the case of a superior court and one month in the case of an inferior court. The power of a UK superior court to fine remains unlimited although an inferior court is limited to GBP500. Both in the UK and the Islands the power to imprison entitles the court to impose a suspended sentence and to grant early release, for example, when the contemnor has "purged" his contempt: cp. Criminal Procedure Code, section 45 (Refractory witness). Frequently, in the case of less serious, unintentional contempts, it will be sufficient to order the contemnor to pay the costs of the application on an indemnity basis. Where criminal proceedings are aborted in consequence of some contempt, the court needs to have the power to order the contemnor to pay the costs of the aborted proceedings although we are not sure that the existing regime for dealing with costs in criminal cases permits this. However, other types of disposal, for example, community service orders, are not available. Obviously, if statutory maxima are to be introduced, they must encompass a worst case scenario, for example, a publication resulting in an aborted trial where it is proved that the publisher intended that result.

88. **Should statutory maxima be introduced and, if so, what should they be for the Grand Court and the Summary Court respectively?**

89. One other issue referred to above is the considerable disparity between permissible disposals of statutory contempt-like offences. The best example is the treatment of refractory witnesses. If a witness, having been summoned, fails to attend, he is liable to a fine of $40 or 15 days imprisonment in default: Criminal Procedure Code, section 42. If, having appeared, the witness refuses to be sworn or answer questions, he can be committed for 10 days or until he does what is required of him and, if he does not, for successive periods of 10 days until he does: ibid., section 45. Under section 111(1)(b) of the Penal Code, a witness who fails to answer a summons or to be sworn or answer questions is liable to imprisonment for four years. As we have seen, under section 26 of the Summary Jurisdiction Law, a person who attends as a witness in civil proceedings in the Summary Court and who refuses to be sworn or answer questions "shall, independently of any other liability, be guilty of contempt of the court", that is, there are no statutory maxima restricting the court's sentencing powers. Some coherence needs to be imposed in respect of such offences.

90. **Do consultees agree?**

Section VIII: Disobedience of court orders

91. This Section deals with what is sometimes referred to as "civil contempt". It is concerned with the consequences of a party failing to comply with an order, mandatory or prohibitive, made in civil proceedings. (Although the boundaries are somewhat fluid, failure to comply with an order regulating the conduct of particular criminal proceedings has always been regarded as a criminal contempt.) The principal distinguishing feature is that, while it is in the public interest that orders should be obeyed, the party who has obtained the order has a greater private interest in seeing that it is enforced. The pre-requisites for enforcing an order by way of committal or sequestration are set out in GCR Order 45, rules 5 – 7 and, save in certain cases involving prohibitive orders, require the relevant order to be served endorsed with a penal notice, that is, a notice drawing the attention of the party upon whom it is served to the possible consequences of a failure to comply. If, following these procedural steps, there is a failure to comply, the party in whose favour the order has been made can apply for an order for committal pursuant to GCR Order 52. The second distinguishing feature, following on from the first, is that the jurisdiction is coercive rather than punitive. Notwithstanding initial disobedience, the object is to ensure eventual compliance. In the UK, prior to the 1981 Act, it was not uncommon for the contemnor to be given an indefinite term of imprisonment being released when he had "purged" his contempt, that is, complied with the order. Following the introduction of a maximum term of imprisonment by section 14 of the 1981 Act, this is no longer possible in the UK although it still is in the Islands. Save that, for obvious reasons, the requirements for notice are less stringent, the above applies equally to the enforcement of undertakings.

92. One extension of this area should be noticed, namely, the circumstances in which a person who is not a party to the litigation in which the order was made and is therefore not named in the order, can be liable for conduct which that order was intended to prohibit. There is no problem in finding that those who aid or abet the enjoined party in disobeying the order are equally guilty of contempt. But it goes further than that. Even if the enjoined party is not in breach, a third party who frustrates the object of the order, at all events if that is his intention, is guilty of contempt. Thus, the Observer and the Guardian newspapers having been restrained from publishing material from Peter Wright's book, Spycatcher, on the basis of an arguable claim by the UK Government for breach of confidence, the Sunday Times newspaper, with the intention of undermining the litigation between the UK Government and Wright, published extracts from the book. The House of Lords held that the Sunday Times was in contempt: see A-G v Times Newspapers Ltd

[1992] 1 AC 191. We are not aware that any similar issue has arisen or is likely to arise in the Islands.

93. Generally, we have no reason to suppose that the procedures for dealing with disobedience of court orders or breaches of undertakings given to the court do not work perfectly satisfactorily and, subject to the introduction of something along the lines of section 14 of the 1981 Act fixing maximum penalties, we are not minded to recommend any changes.

94. **Do consultees agree?**

APPENDIX 1

[Note: This Appendix does not purport to be a comprehensive survey of statutory offences which might also constitute contempts of court.]

1. Grand Court Law (2008 Revision)

Section 11(1) vests in the Grand Court the like jurisdiction as is vested in England by what are now there referred to as the Senior Courts.
Section 27(1), which is expressed to be without prejudice to section 11(1) above, confers jurisdiction to order the arrest and to try summarily any person guilty of any contempt of the Court or any act insulting or scandalizing the Court or disturbing the proceedings thereof, any person convicted under this section being liable to imprisonment for 6 months and to a fine of CI$500.
Section 27(2) contains a comprehensive definition of contempt of court for the purposes of the section, namely, "any action or inaction amounting to interference with or obstruction of, or having a tendency to interfere with or obstruct, the due administration of justice".
[**Note:** This means that, subject to the limited penalties, any contempt, even one which could not be described as even constructively "in the face of the court", can be disposed of summarily.]

2. Summary Jurisdiction Law (2006 Revision)

Section 29 provides that if, in a civil cause or matter, any person required to give evidence refuses to be sworn, to answer lawful questions or to produce documents when required to do so, shall, absent some lawful excuse, be guilty of contempt of court.

Section 39 makes it an offence wilfully to insult the court or any magistrate when exercising his judicial functions or any legal practitioner or witness during his attendance at court. The offender may be taken into custody and detained until the rising of the court whereupon the court may also commit him to prison for 30 days or impose a fine of CI$50.

3. Judicature Law (2007 Revision)

Section 35(1) declares that the inherent powers of the Grand Court include powers:

(a) To exclude witnesses (other than parties or experts) until such time as they are called to give evidence unless, in a civil case, the parties agree otherwise; and
(b) To order and procure the removal from court of any person including counsel or an attorney who is guilty of misconduct, as therein defined, calculated to prejudice the just and fair trial of any cause or matter.
Section 35(2) extends those powers to the Summary Court.

4. Penal Code (2013 Revision)

[**Notes**: There are certain offences, such as perjury, which, although they may penalize conduct which might otherwise constitute contempt, are traditionally dealt with as discrete offences. We do not refer to them here.
Subject to any express provision to the contrary:
(a) The periods of imprisonment and the amounts of fines are maxima;
(b) Where the specified penalty is a term of imprisonment, a fine may be imposed in addition to or as an alternative to imprisonment;
(c) Where the amount of the fine is not fixed the amount is unlimited but should not be excessive;
(d) Where no penalty is specified for an offence, the penalty is 4 years imprisonment and a fine.]

Section 111 contains various disparate offences including:

(a) Showing disrespect in the court or its precincts to the proceedings or the person before whom the proceedings are being had or taken;
(b) Being a recalcitrant witness;
(c) Obstructing or disturbing proceedings;
(d) Making a speech or writing which misrepresents any proceedings, prejudices any person for or against any party or is calculated to lower the authority of the person before whom the proceedings are being had or taken;
(e) Publishing the evidence in any proceedings directed to be held in private;
(f) Attempting wrongfully to interfere with or influence a witness before or after he has given evidence;
(g) Dismissing a servant because he has given evidence on behalf of a certain party;
(h) Wrongfully retaking possession of land after execution of a writ of possession;
(i) Any other act of intentional disrespect to a proceeding or to any person before whom they are being had or take.

The penalty is 4 years' imprisonment. However, in respect of (a), (b), (c) or (i) – all typical examples of contempt in the face of the court – the offender can be taken into custody and, at any time before the rising of the court, can be sentenced to a fine of CI$200 with 6 months' imprisonment in default of payment.

5. Criminal Procedure Code (2011 Revision)

   Section 31 is concerned with the anonymity of victims of rape offences. Publishing material which may lead to their identification without the leave of the court is an offence for which the offender is liable on summary conviction, that is, before the Summary Court, to a fine of CI$1,000;
   Section 42 deals with the non-attendance of witnesses duly summoned imposing a fine of CI$40 with 15 days' imprisonment in default of payment;
   Section 45 deals with refractory witnesses, that is, those who attend but refuse to be sworn, answer questions, etc., imposing successive periods of imprisonment of up to 10 days until the witness complies;
   Section 112 imposes a ban on the reporting of committal proceedings save where the accused has made a successful application to disapply the section. A breach of the ban is an offence and the offender is liable on summary conviction to a fine of CI$5,000.

6. Criminal Evidence (Witness Anonymity) Law, 2010

   Section 25 creates an offence of disclosing information in breach of a witness anonymity order, the offender being liable on summary conviction to a fine of CI$100,000 or to 10 years' imprisonment or both.

Friday, January 10, 2014