ISSUES PAPER

CONTEMPT OF COURT AND OTHER OFFENCES AND TORTS INVOLVING THE ADMINISTRATION OF JUSTICE

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Background to this Issues Paper and the questions raised

1. This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.[1] It examines contempt of court, and also 3 other offences and torts concerning the administration of justice, maintenance, champerty and embracery.

Contempt of Court

2. Because of the breadth of scope of contempt of court, much of the Issues Paper is devoted to that aspect of the project. The law of contempt of court developed at common law to ensure that the courts are able to operate effectively and that there are appropriate means to ensure this. Currently, there are two categories of contempt of court, criminal and civil.

3. Criminal contempt can take the form of: contempt in the face of the court (where a person deliberately disrupts court proceedings), scandalising the court (where a person makes untrue allegations about a court or judge) and *sub judice* contempt (where a person publishes prejudicial material about a pending court case). This form of contempt can be dealt with like any other criminal offence through a punitive sanction, such as a fine or by sentencing the person to a definite term of imprisonment. The sentence of imprisonment is intended to deal with the criminal offence that has already occurred.

4. Civil contempt occurs when, for example, a person refuses to comply with a court order and also states that he or she will refuse to comply into the future. In that case, the court will commit the person to prison for contempt not for a definite term but for an indefinite period, which will end when, and only when, the person agrees to comply with the court order. The purpose of imprisonment in civil contempt is not punitive, but rather coercive: to coerce or compel the person to comply with the court order.

5. In 1994 the Commission, in its *Report on Contempt of Court*,[2] made a number of recommendations for reform of the law in this area, including that some statutory offences should be introduced to replace the existing common law of contempt. Those recommendations have not been implemented, but since then the courts have reiterated that contempt of court law is in need of reform. They have noted, for example, that the boundary between criminal and civil contempt is difficult to draw and has become blurred. Thus, in *Irish Bank Resolution Corp Ltd v Quinn and Ors*[3] the Supreme Court drew attention to the "amorphous" nature of the current law. In that case a definitive, punitive, sentence had been imposed for past refusal to comply with a court order, combined with an indefinite committal to imprisonment to coerce the

[1] Law Reform Commission, *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 4.
[2] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994).
[3] [2012] IESC 51.

person to comply in the future. The Supreme Court held that, in the circumstances, the definite sentence was justified but should not have been combined with the indefinite coercive committal.

6. Apart from the blurred distinction between criminal and civil contempt, the current law creates the difficulty that a person committed to prison for civil contempt may be deprived of liberty without the procedures that would apply in a criminal trial. Further difficulties arise because the law of contempt of court is almost entirely common law, so that there are no statutory rules setting out precisely what that law is. As a result, the law is open to the challenge that it is unclear and difficult to understand.

Maintenance, Champerty and Embracery

7. The Issues Paper also examines the crimes and torts of maintenance (where a third party supports litigation without just cause) and champerty (where a third party supports litigation without just cause in return for a share of the proceeds). These crimes and torts operate in Ireland under three pre-1922 statutes: the *Statute of Conspiracy (Maintenance and Champerty)* of unknown date (in the 14th century), the *Maintenance and Embracery Act 1540* and the *Maintenance and Embracery Act 1634*. The retention of these crimes and torts affects a number of different areas ranging from the validity of so-called "heir-locator" agreements[4] to the legitimacy of professional third party funding of litigation.[5] The Issues Paper considers whether it is appropriate to retain these crimes and torts in Ireland in the 21st Century and, if not, whether the affected activities should be regulated in some way.

8. Finally, the Issues Paper examines the offence of embracery (influencing or attempting to influence a juror). Embracery was examined in detail by the Commission in its 2013 *Report on Jury Service*.[6] In that Report, the Commission recommended the introduction of a single offence of juror interference. The Issues Paper reiterates that recommendation.

Views Sought on 7 Issues

9. The Issues Paper seeks views on 7 issues:

- **Issue 1** examines some general questions concerning contempt of court and asks if legislation should be introduced to address those areas (the questions are at page 15).
- **Issue 2** considers the distinction between civil and criminal contempt and asks whether that distinction should be maintained or abolished (the questions are at page 25).

[4] *McElroy v Flynn* [1991] ILRM 294; *Fraser v Buckle* [1996] 2 ILRM 34.
[5] *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187.
[6] Law Reform Commission, *Report on Jury Service* (LRC 107-2013).

- **Issue 3** examines the law concerning contempt in the face of the court (the questions are at page 39).
- **Issue 4** examines the law concerning scandalising the court (the questions are at page 51).
- **Issue 5** examines the law concerning contempt in connection with pending proceedings, *sub judice* contempt (the questions are at page 65).
- **Issue 6** examines the law relating to the offences and torts of maintenance and champerty (the questions are at page 77).
- **Issue 7** examines the law concerning the offence of embracery (the questions are at page 80).

ISSUE 1

OVERVIEW AND GENERAL QUESTIONS CONCERNING CRIMINAL CONTEMPT OF COURT

1.1. Overview of Contempt of Court

1.01 It is fundamental to the rule of law that the courts must be able to operate effectively and that there are appropriate means to ensure this. The law of contempt of court thus developed to allow the administration of justice to operate without undue obstruction or interference.[1] There are currently two types of contempt of court, criminal and civil.

1.02 Criminal contempt can take the form of:

- contempt in the face of the court (contempt *in facie curiae*), which comprises conduct that deliberately disrupts or obstructs court proceedings and is prejudicial to the course of justice;
- scandalising the court, making or publishing untrue allegations about a court or judge that would undermine public confidence in the judiciary; and
- *sub judice* contempt, publishing prejudicial material about pending court proceedings that would interfere with the administration of justice.

1.03 Criminal contempt can be dealt with like any other criminal offence through a punitive sanction, such as a fine or by sentencing the person to a definite term of imprisonment. The sentence of imprisonment is intended to deal with the criminal offence that has already occurred.

1.04 Civil contempt occurs when, for example, a person refuses to comply with a court order and also states that he or she will continue to do so into the future. Where a person states that he or she will not comply with a court order, the law of civil contempt operates by committing him or her to prison, not for a definite term but for an indefinite or uncertain period, because it is subject to the condition that the person will be released when, and only when, he or she agrees to comply with the court order.

[1] Henchy, "Contempt of Court and Freedom of Expression" (1982) 33 NILQ 326, at 326.

1.05 The purpose of imprisonment in civil contempt is not punitive, but rather coercive: to coerce or compel the person to comply with the court order. Unlike criminal contempt, which deals with past behaviour, civil contempt addresses behaviour that has a future element: the continuing refusal to comply with a court order.

1.06 The law of contempt is governed almost entirely by common law. This gives courts and judges a large amount of discretion when exercising their contempt jurisdiction. On the one hand, the absence of clearly defined parameters in respect of the law of contempt could be seen as serving a useful purpose because this allows for flexibility and it means that the courts are not unduly restrained in terms of what steps they can take to uphold their authority. On the other hand, the lack of clear guidelines governing contempt may be criticised (as it often is) for the vagueness and uncertainty that this presents. As McDermott notes, the absence of clear principles means that contempt of court is an area "where almost no two lawyers or commentators can agree on many of the most fundamental aspects."[2]

1.07 In 1994 the Commission, in its *Report on Contempt of Court*,[3] made a number of recommendations for reform of the law in this area. These included that some statutory offences should be introduced to replace the existing common law of contempt. Those recommendations have not been implemented, but since then the courts have reiterated that contempt of court law is in need of reform. They have noted, for example, that the boundary between criminal and civil contempt is difficult to draw and has become blurred. Thus, in the Supreme Court decision in *Irish Bank Resolution Corp Ltd v Quinn and Ors*[4] Hardiman J noted that the Irish law on contempt of court is "amorphous" and difficult to understand even among lawyers and judges themselves. In that case a definitive, punitive, sentence had been imposed for past refusal to comply with a court order, combined with an indefinite committal to imprisonment to coerce the person to comply in the future. The Supreme Court held that, in the circumstances, the definite sentence was justified but should not have been combined with the indefinite coercive committal.

1.08 The absence of clarity in the law of contempt in its current form may run contrary to the individual's right to a fair trial under both the Constitution of Ireland and the European Convention on Human Rights. These considerations suggest that a legislative scheme for contempt is required. A number of judges and commentators have also noted this need for legislation.[5]

1.09 A general question that arises is whether the terminology of "contempt of court" is itself in need of review. That phrase may be criticised as being misleading and

[2] McDermott, "Contempt of Court and the Need for Legislation" (2004) 4(1) JSIJ 185, at 188.
[3] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994).
[4] [2012] IESC 51.
[5] See, for example: *Kelly v O'Neill* [1999] IESC 81, [2000] 1 IR 354 (Keane J); *DPP v Independent Newspapers (Irl) Ltd* [2003] IEHC 624, [2003] 2 IR 367 at 395 (Kelly J); *DPP v Independent Newspapers (Irl) Ltd and Ors* [2008] IESC 8, [2009] 2 ILRM 199 at 210 (Hardiman J); McDermott, "Contempt of Court and the Need for Legislation" (2004) 4(1) JSIJ 185; O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2(2) JSIJ 87.

difficult to understand. In the Scottish case *Johnson v Grant*,[6] for example, the Court of Session (Lord President Clyde) stated that the phrase "contempt of court" did not accurately describe the nature of the offence. The Court considered that the phrase suggests that it is the dignity of the court that may be offended and therefore needs to be protected, when in fact the offence exists to protect the administration of justice.

1.10 In England, the Phillimore Committee noted in 1974 that the phrase "contempt of court" is often criticised "with some justification" as being inaccurate and misleading.[7] The Committee noted, however, that the phrase has been in use in England since the 13th century and therefore has the advantage of long use and familiarity. Ultimately, the Committee was unable to identify any suitable alternative label for this area of law and so recommended that the current phrase be retained.[8]

1.2. General Aspects of Criminal Contempt

1.2.1 Fault element (*mens rea*)

1.11 There is a lack of clarity as to whether a fault element (*mens rea*), that is intention, knowledge or recklessness, is required for the different forms of criminal contempt or indeed whether a fault element is required at all. At common law, it appears that no fault element was required in respect of most criminal contempts of court, so that they involved strict or absolute liability.[9] Judicial authorities now appear, however, to be divided on the question of the fault element. There is no clear statement of the law in this area in respect of contempt in the face of the court and there are few authorities to provide guidance.[10] There are conflicting authorities concerning the fault element for scandalising the court. In *Re Kennedy and McCann*,[11] for example, the Supreme Court found that scandalising occurs when the publication "intentionally or recklessly" alleges improper conduct by a judge, but in the later case *Re KAS (an infant)*,[12] the High Court (Budd J) held that intention or recklessness is not required for the offence of scandalising the court. *Sub judice* contempt was originally thought to be an offence of strict liability. However, in the Supreme Court decision *Kelly v O'Neill*,[13] Keane J held that *mens rea* was "a necessary ingredient of the offence." In *Health Service Executive v LN and JQ*,[14] the High Court (Birmingham J) held that the strict liability rule applied in a case concerning breach of the *in camera* rule, which the Court considered was a category of criminal contempt constituted by words or conduct calculated to interfere with the administration of justice.

[6] *Johnson v Grant* [1923] SC 789 at 790.
[7] Phillimore Committee, *Report of the Committee on Contempt of Court* (Cmnd 5794, 1974) at paragraph 12.
[8] *Ibid.*
[9] *Health Service Executive v LN and JQ* [2012] IEHC 611, [2012] 4 IR 49 at paragraph 27.
[10] McDermott, "Contempt of Court and the Need for Legislation" (2004) 4(1) JSIJ 185, at 192.
[11] [1976] IR 382.
[12] *Re KAS (an infant)* High Court 22 May 1995.
[13] [1999] IESC 81, [2000] 1 IR 354 at 380.
[14] [2012] IEHC 611, [2012] 4 IR 49 at paragraphs 26 and 41.

1.12 It would appear, therefore, that clarity is required as to the issue of the fault element (*mens rea*) in respect of each area of contempt. In this respect, it would be necessary to ask whether, if the offence involves a fault element, it should comprise "intentionally, knowingly or recklessly," the formula suggested by the Criminal Law Codification Advisory Committee.[15] It would also be necessary to address the question as to whether, if contempt of court should not involve any fault element, it should involve strict liability (that is, liability subject to a defence of due diligence or reasonable precautions) or absolute liability (without any defence of due diligence or reasonable precautions).

1.2.2 Sentencing

1.13 Because criminal contempt is a common law offence (formerly an indictable misdemeanour), it is currently punishable by any amount of fine and any sentence of imprisonment. It is thus possible that a court could impose an unlimited fine and a sentence of life imprisonment for criminal contempt of court, although in recent years the courts often impose a sentence of a period of months, rather than years. Nonetheless, the question arises as to whether there should be a stated, statutory, maximum penalty for criminal contempt as applies for virtually all other criminal offences.

1.2.3 Jurisdiction of Circuit Court and District Court

1.14 The High Court has full jurisdiction to deal with all forms of contempt and may exercise jurisdiction concerning contempt of the Circuit Court and the District Court. The Circuit Court and District Court have the power to deal summarily with contempt in the face of the court but "beyond that the position is less clear."[16] In its *Consultation Paper on Contempt of Court*, the Commission noted that "it is particularly doubtful whether the District Court's jurisdiction extends to such matters as the *sub judice* rule."[17] The Commission recommended in its subsequent *Report on Contempt of Court* that the Circuit Court and District Court should have the same jurisdiction as the High Court in contempt proceedings, but where the punishment involves the imposition of a fine, this should be subject to monetary limits.[18] This recommendation (along with the other recommendations in the 1994 Report) has not been implemented and so there is still uncertainty in this area.

[15] Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (2010), paragraphs 28-34, available at www.criminalcode.ie.
[16] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 413.
[17] *Ibid.*
[18] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 7-8.

QUESTION 1

1(a) Should the law on contempt of court be placed on a statutory footing and should the term "contempt of court" be retained or is it in need of modification?

1(b) What fault element (*mens rea*), if any, should be required for each form of criminal contempt?

i. If a fault element should apply, should such fault element comprise "intentionally, knowingly or recklessly"?

ii. If a fault element should not apply, should contempt of court be a strict liability offence (subject to a defence of due diligence or reasonable precautions) or an offence of absolute liability (without any defence of due diligence or reasonable precautions)?

1(c) Should there be a statutory maximum penalty for criminal contempt?

1(d) Should the Circuit Court and District Court have the same jurisdiction in contempt as the High Court?

Please type your comments (if any)

ISSUE 2

DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

2.1 Overview of the distinction between civil and criminal contempt

2.01 There are two categories of contempt of court: civil contempt and criminal contempt. In *Keegan v de Burca*,[1] the Supreme Court (Ó Dalaigh CJ) emphasised the distinction between the two types of contempt. The Court explained that the object of criminal contempt is punitive, whereas civil contempt is designed to be coercive, that is, its object is to compel the person to comply with the order of the court and the period of committal is until such time as the order is complied with.[2] Therefore, the sentence of imprisonment must be definite in criminal contempt but an indefinite period of imprisonment is imposed in cases of civil contempt.

Case Study 1: *Keegan v de Burca* [1973] IR 223

In this case, the plaintiffs sought an injunction to remove and prevent the defendant, Máirín deBurca, and other persons, from occupying a house in Gardiner Street, Dublin (the occupation involved part of an organised campaign of squatting by the Dublin Housing Action Committee, of which Máirín deBurca was a member, aimed at highlighting poor standards in rented accommodation). The High Court (Pringle J) granted an interlocutory injunction restraining the defendant from entering the premises. The plaintiffs claimed that the defendant breached this order and applied to have her found in contempt of court. During this contempt of court hearing, which was conducted by another High Court judge (O'Keeffe P), the defendant was called as a witness and refused to answer certain questions (about the names of the squatters in the house). The High Court found that this refusal was contempt in the face of the court and the Court ordered that the defendant should be imprisoned for an indefinite period until she purged the contempt, that is, until she agreed to answer the question. On appeal, the Supreme Court held that the defendant had been guilty of a criminal contempt in the face of the court and so the court should have ordered that she be imprisoned for a definite term. The case was remitted to the High Court to consider the appropriate definite term.

2.02 The distinction drawn between civil and criminal contempt in *Keegan v de Burca* has been endorsed in a number of subsequent cases[3] although, as discussed below, the

[1] [1973] IR 223.
[2] *Ibid* at 227.
[3] See for example *The State (Commins) v McRann* [1977] IR 78.

courts have at times struggled to apply the distinction. O'Donnell has commented that the objective behind the distinction was to avoid the argument that "in truth, civil contempt was so criminal in nature that the safeguards provided for under the Constitution for criminal trials should apply."[4] Rather than focusing on the nature of the divide between the classes of contempt, O'Donnell suggests that a better solution would be to seek to identify sufficiently fair safeguards to apply to both types.[5]

2.03 Many jurisdictions have struggled with the boundary between civil and criminal contempt. The Australian Law Reform Commission noted that the traditional distinction between civil and criminal contempt has been "whittled away" in England since the 1960s and more recently in Australia.[6] The courts in those jurisdictions have become increasingly focused on the public interest involved in such proceedings with the result that purely punitive sanctions, such as fines, have been imposed in cases of civil contempt.[7] The Law Reform Commission of Western Australia has noted that sanctions in civil contempt proceedings can sometimes be more severe than those applicable in cases of criminal contempt but yet the person accused of civil contempt is denied the same procedural safeguards.[8] As a result, the courts have increasingly incorporated criminal law procedural safeguards into the laws governing civil contempt, blurring the distinction between civil and criminal contempt in Western Australia.[9] In England and Wales, Arlidge, Ealy and Smith note that the courts often apply criminal safeguards in cases of civil contempt because of the severity of the sanctions applicable in those cases.[10]

2.04 The Irish courts have found it difficult in practice to distinguish between civil and criminal contempt. In *Keegan v de Burca*, as outlined above, the Supreme Court stated that civil contempt is designed to be coercive and not punitive. However, in the later case *Flood v Lawlor*, the Supreme Court (Keane CJ) expressed the view that the decision in *Keegan* suggested that "there may be some room for a difference of view" as to whether a sentence imposed in civil contempt proceedings is exclusively coercive in nature.[11] In that case, the defendant had refused to comply with an order for discovery and refused to answer relevant questions put to him at a tribunal hearing. He was found guilty of contempt of court and was sentenced to 3 months imprisonment. The first 7 days of the sentence were to be served and the remainder of the sentence was suspended to allow for compliance with the order for discovery. When the defendant subsequently made discovery, the High Court (Smyth J) found that it was inadequate and amounted to serious non-compliance with the court order. The Court ordered the defendant to serve a further 7 days of the sentence and pay a fine of £5000. The Supreme Court noted that that section 4 of the *Tribunals of Inquiry*

[4] O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2 JSIJ 87, at 116.
[5] *Ibid.*
[6] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 292.
[7] *Ibid.*
[8] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 94.
[9] *Ibid* at 84.
[10] Arlidge, Ealy and Smith, *Arlidge, Ealy and Smith on Contempt*, 4th ed (Thomson Reuters, 2011) at 169.
[11] [2001] IESC 100, [2002] 3 IR 67 at 79.

(Evidence) (Amendment) Act 1997 empowered the High Court to secure compliance with the orders of a tribunal and it held that a sentence imposed for disregard of the orders of a tribunal need not be coercive only in its nature. The Court held that the public interest requires that tribunal matters are investigated properly; that persons who are required to give evidence must comply with their obligations; and that the sentence imposed by the trial judge was not excessive or disproportionate.[12]

2.05 In *Ross Co Ltd v Swan and Ors*[13] the High Court (O'Hanlon J) considered that there could be a criminal or punitive element in a civil contempt order. In that case, the defendants had deliberately disobeyed an order of the court restraining them from trespassing on the plaintiff's factory premises. The Court held that, in certain civil contempt cases, the court must exercise its jurisdiction in order to uphold the authority of the court whose order has been disobeyed. In such cases, the court could make a punitive order sending the person in contempt to prison for a fixed period.[14] On the facts of the present case, however, the High Court was satisfied that an alternative remedy was available under the *Prohibition of Forcible Entry and Occupation Act 1971* to deal with the unlawful occupation of land by the defendants. As such, although the Court found that the defendants had "clearly been in contempt of court", it refused the application to imprison them for this contempt.[15]

2.06 In *Shell EP Ltd v McGrath and Ors*,[16] the High Court (MacMenamin J) ordered the imprisonment of the defendants for civil contempt for having failed to comply with an interlocutory injunction restraining them from interfering with the entry of the plaintiff on to certain lands on which a gas pipeline was to be constructed. The injunction was discharged on the 94th day of the imprisonment and the defendants applied to be released. The defendants were released but remained unwilling to purge their contempt or to comply with further court orders. The High Court (Finnegan P) reviewed a number of earlier cases and concluded that, in cases of serious misconduct, the court has jurisdiction to punish the person found guilty of civil contempt and to impose a definite term of imprisonment.[17] The Court acknowledged, however, that imprisonment for civil contempt is primarily coercive and that punitive imprisonment should only be used as a last resort in cases where there has been serious misconduct in order to protect the authority of the court.[18] In the present case, the Court was satisfied that the period of 94 days imprisonment already served by the defendants was sufficient punishment for the contempt and so it did not impose any further penalty.[19]

[12] [2001] IESC 100, [2002] 3 IR 67 at 80.
[13] [1981] ILRM 416.
[14] *Ibid* at 417.
[15] *Ibid* at 418.
[16] [2006] IEHC 108, [2007] 1 IR 671.
[17] *Ibid* at paragraph 37.
[18] *Ibid* at paragraph 39.
[19] *Shell EP Ltd v McGrath and Ors* [2006] IEHC 108, [2007] 1 IR 671 at paragraph 42.

2.07 In the Supreme Court decision *Irish Bank Resolution Corp Ltd v Quinn and Ors*,[20] Fennelly J considered that the classic statement of the distinction as set out in *Keegan* was an "over-simplification" and that there may sometimes be a punitive element in cases of civil contempt. Hardiman J, in a dissenting judgment, took a different view: he was of the opinion that *Keegan* continued to represent the law in this area and that the other cases cited above had not overruled it. Hardiman J noted that *Flood v Lawlor* was a case concerning proceedings before a tribunal of inquiry to which the *Tribunals of Inquiry (Evidence) Act 1921* applied, while the *Ross* and *Shell EP* cases were decisions of the High Court.[21] Hardiman J endorsed the finding in *Keegan* as the authoritative statement of the law until reversed by the Supreme Court or legislation, and he adhered to the traditional distinction between criminal contempt and civil contempt.[22]

Case Study 2: *Irish Bank Resolution Corp Ltd v Quinn and Ors* [2012] IESC 51

This case arose as part of extensive litigation between Irish Bank Resolution Corporation (IBRC), formerly Anglo Irish Bank, and various members of the Quinn family and their companies. In 2011, IBRC sought an interim injunction to prevent members of the Quinn family from intentionally causing loss to IBRC by unlawful means. The High Court (Clarke J) granted the order restraining the Quinns from, among other things, taking any step directly or indirectly that may have the effect of transferring any of the assets of the Quinn companies to any third party except to the extent that this may be done in the ordinary course of business.

The High Court (Dunne J) later found that Sean Quinn Jr had breached that order and was guilty of contempt of court following the transfer of a sum of $500,000 out of Quinn Properties Ukraine to the personal bank account of the director general of that company. The Court imposed a number of coercive measures in respect of this contempt. The Court subsequently found that Sean Quinn Jr had failed to take adequate steps to comply with the coercive measures and had committed an "outrageous" contempt of court. The Court imposed a fixed period of 3 months imprisonment on Sean Quinn Jr by way of punishment for this contempt. In addition, the Court imprisoned Sean Quinn Jr indefinitely until he purged his contempt by complying with all of the coercive orders. The contempt-related orders therefore comprised both punitive (3 months definite) and coercive (indefinite) elements.

On appeal, the Supreme Court upheld the finding of contempt and the punitive sentence of 3 months imprisonment. It held, however, that the indefinite coercive orders went beyond the subject-matter of the single finding of contempt against Sean Quinn Jr and could not be justified by reference to the original finding of contempt.

[20] [2012] IESC 51. The somewhat blurred distinction between criminal and civil contempt was also discussed by the Supreme Court in *Laois County Council v Hanrahan* [2014] IESC 36, [2014] 3 IR 143.
[21] [2012] IESC 51, judgment of Hardiman J at paragraph 33.
[22] *Ibid.*

2.08 The cases outlined above demonstrate that there is some disagreement in the Irish courts about the distinction between civil and criminal contempt. This confusion seems to extend to the orders that were at the centre of the litigation in the *Quinn* case. As Hardiman J noted, those orders were based "on an unfortunate degree of confusion" between civil and criminal contempt.[23] It would seem, therefore, that clarification is required as to whether the distinction continues to apply.

2.09 In its 1994 *Report on Contempt of Court*, the Commission recommended that the distinction between civil and criminal contempt should be retained but that the law on contempt should be placed on a statutory footing. By contrast, in England and Wales, the Phillimore Committee recommended that the distinction between civil and criminal contempt should be abolished since many cases of civil contempt have elements of a criminal nature. This reduced the practical importance of the distinction.[24] Similarly, in recognition of the severity of the penalties available for civil contempt, the Law Reform Commission of Western Australia recommended that civil contempt should be abolished in Western Australia and replaced with a criminal offence of "disobedience contempt."[25]

2.2 Fair procedures

2.10 In considering whether the distinction between civil and criminal contempt should be abolished, a number of considerations arise:

- Should civil contempt have a punitive function?
- What sanctions should apply in cases of civil contempt? Should imprisonment be possible?
- Should criminal safeguards apply in cases of civil contempt?

2.2.1 Should civil contempt have a punitive element?

2.11 In the 1991 *Consultation Paper on Contempt of Court*, the Commission considered that it was "beyond argument" that there should be some element of coercion in the enforcement of orders of the court.[26] The Australian Law Reform Commission noted that the coercive power to compel obedience to orders of courts by means of attachment or committal for contempt originated in the Court of Chancery in England, probably as early as the 16th century, as a means to secure the rights of the disadvantaged party and to ensure that the defendant performed his or her "moral obligations."[27] Although there may not be any moral or religious imperative to obey

[23] [2012] IESC 51, judgment of Hardiman J at paragraph 33.
[24] Phillimore Committee, *Report of the Committee on Contempt of Court* (Cmnd 1974) at 75-76.
[25] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 84.
[26] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 378.
[27] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 301.

court orders in modern times, the Australian Law Reform Commission noted that the imposition of coercive sanctions may still be justified as a way of upholding the rights of the injured party.[28] According to the Australian Law Reform Commission, however, the existence of just one remaining justification for coercive sanctions in civil contempt means that such sanctions should only be imposed when they are the only means of enforcing an order and only in circumstances where that coercive order will be effective. If an alternative method of enforcement is available, the Australian Law Reform Commission did not feel that coercive contempt sanctions should be used.[29]

2.12 In addition to coercive sanctions, some jurisdictions allow punitive sanctions to be imposed for civil contempt.[30] The Commission noted that the availability of punitive sanctions would deter future litigants from defying court orders as they would be aware that such sanctions exist.[31] The Commission also noted that punitive sanctions may be justified based on the need to preserve the dignity of the courts and to uphold public confidence in the legal system.[32]

2.13 Although the Commission was satisfied that both of these arguments held "much force",[33] other law reform bodies have expressed different views. The Australian Law Reform Commission, for example, took issue with the imposition of punitive sanctions as a way to preserve the dignity of the courts. It questioned whether even highly publicised disobedience is, in reality, likely to affect public confidence in the legal system. It noted that non-compliance with court orders is not common and it is rarer still that such non-compliance would be accompanied by "overt and deliberate defiance of the court."[34] The Australian Law Reform Commission did, however, accept that punitive sanctions should be available to the court to the extent that they are necessary to uphold the effectiveness of court orders.[35]

2.2.2 Should imprisonment be available as a sanction for civil contempt?

2.14 In its 1994 Report, the Commission concluded that imprisonment as a coercive sanction should be retained in cases of civil contempt and felt that the term of imprisonment should continue to be open-ended but that it should also be possible to impose fines for civil contempt. In its 1991 Consultation Paper, the Commission explained that the sanction of imprisonment for civil contempt had a necessary role in "bending the will" of those persons who will not adhere to lesser sanctions.[36] In that Paper, the Commission also rejected the proposition that a fixed term of imprisonment should apply in cases of civil contempt. The Commission felt that a

[28] *Ibid.*
[29] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 302.
[30] For example, England and Wales and Australia allow for punitive sanctions in cases of civil contempt.
[31] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 378.
[32] *Ibid* at 379. The Australian Law Reform Commission presents similar arguments: Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 306.
[33] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 380.
[34] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 306.
[35] *Ibid* at 307.
[36] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 381.

fixed term would reduce the coercive aims of such imprisonment; that it would not protect the court's standing and authority;[37] and that a fixed term would not be fair to the person in contempt because he or she would remain in prison even if the contempt is purged.[38]

2.15 In 1987, the Australian Law Reform Commission also recommended that imprisonment should be retained as a sanction for civil contempt but felt that a court should first consider alternatives to imprisonment (such as fines and other sanctions). The Australian Law Reform Commission also recommended that, even if a sentence of imprisonment was deemed appropriate, the court should consider suspending it.[39] In contrast to the Commission's approach in the 1994 Report, the Australian Law Reform Commission was of the view that open-ended imprisonment for civil contempt should be abolished and that there should be an upper limit to any sentence imposed. It recommended, however, that the court should retain the power to order the earlier discharge of the person in contempt in the event of compliance with the order.[40]

2.16 In England and Wales, the Phillimore Committee also recommended the abolition of open-ended imprisonment for civil contempt and suggested that imprisonment should be subject to a maximum period of 2 years.[41] The only argument identified by the Committee which could be used in favour of retaining open-ended imprisonment was that "contempts can vary greatly in seriousness, and a bad case can be very serious indeed."[42] The Committee's proposal to abolish open-ended imprisonment was subsequently implemented by section 14 of *Contempt of Court Act 1981* which provides for a maximum period of 2 years imprisonment for contempt.

2.2.3 Should criminal safeguards apply in cases of civil contempt?

2.17 If punitive sanctions are to apply in cases of civil contempt, it is arguable that the safeguards that exist in respect of criminal prosecutions should apply equally to civil contempt. A number of jurisdictions now apply such safeguards in cases of civil contempt.[43]

2.18 In Ireland, Article 38 of the Constitution provides that criminal matters must be tried "in due course of law." In other words, the accused has a constitutional right a fair trial. The elements of the right to a fair trial are non-exhaustive. Included is that:

- The accused must benefit from a presumption of innocence,
- The burden of proof is placed on the prosecution,

[37] It was noted that if the contemnor does not purge his contempt during the course of the fixed term and is released simply because the fixed period has elapsed this would undermine the coercive objective.
[38] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 381-386.
[39] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 315.
[40] *Ibid* at 318.
[41] Phillimore Committee, *Report of the Committee on Contempt of Court* (Cmnd 5794 1974) at paragraphs 172, 201.
[42] *Ibid* at paragraph 199.
[43] See above at 18.

- The standard of proof is applied beyond a reasonable doubt,
- There should be no punishment without law: legislation should not be retroactive; there should be maximum certainty and clarity in the law; and penal statues should be strictly construed.[44]
- The accused must be adequately informed of the charge and have it tried by an impartial and independent court,
- The accused must have the opportunity to prepare a defence,
- The trial must be conducted with reasonable expedition,
- There is a right to legal representation and legal aid if required,
- There is a right to an interpreter, if required,
- There is a right to pre-trial disclosure.[45]

2.19 Imprisonment and the imposition of substantial fines are usually deemed to be criminal sanctions. If such sanctions can be imposed in cases of civil contempt, it is arguable that the person accused of civil contempt should enjoy the same safeguards as those enjoyed by persons charged with criminal contempt.

2.20 The ECHR requires that criminal trial safeguards apply to civil proceedings in circumstances where those civil proceedings can be classified as criminal under the criteria developed by the European Court of Human Rights (ECtHR).[46] In *Engel and Others v Netherlands*,[47] the ECtHR identified 3 criteria for the purposes of this classification: the domestic categorisation of the offence; the nature of the offence; and the severity of the penalty. The domestic categorisation will not be determinative of the matter, but rather the Court will take into account the punitive or deterrent purpose of the offence, the nature of the possible punishment and whether this would involve a period of imprisonment, the classification of the offence in other States, whether the legal rule applies to a particular group or has general application, whether a finding of guilt is required before the penalty is imposed and whether a criminal record will attach for the offence.[48]

2.21 In *Hammerton v United Kingdom*,[49] the ECtHR found that civil contempt proceedings that can result in detention should be considered "criminal" for the purposes of Article 6 ECHR and so the fair trial rights provided under that Article should be available in cases of civil contempt. In this case, the applicant had been sentenced to 3 months imprisonment for contempt for breaching an undertaking and injunction.

[44] Ashworth, *Principles of Criminal Law*, 5th ed (Oxford University Press 2006) cited in McIntyre, McMullan and Ó'Toghda, *Criminal Law* (Thomson Reuters (Professional) Ireland 2012) at 45.
[45] *The State (Healy) v Donoghue* [1975] IR 325 at 335; O'Malley, *The Criminal Process* (Round Hall 2009) at 61.
[46] McIntyre, McMullan and Ó'Toghda, *Criminal Law* (Thomson Reuters (Professional) Ireland, 2012) at 17.
[47] *Engel and Others v Netherlands* (1979-80) 1 EHRR 647.
[48] McIntyre, McMullan and Ó'Toghda, *Criminal Law* (Thomson Reuters (Professional) Ireland, 2012) at 17.
[49] *Hammerton v United Kingdom*, app no 6287/10, 17 March 2016.

The applicant was unrepresented at the contempt hearing. On appeal, the Court of Appeal quashed both the finding of contempt and the sentence imposed. The Court held that civil contempt proceedings constituted a criminal charge for the purpose of Article 6 of the ECHR and the defendant was therefore entitled to the protections afforded by the Article, including the right to legal assistance, the right to silence, and the right against self incrimination. The applicant subsequently commenced proceedings for damages for wrongful imprisonment but this claim was dismissed. Thereafter, the applicant brought a claim to the European Court of Human Rights claiming that his imprisonment violated Articles 5 and 6 of the ECHR. The ECtHR found that proceedings for civil contempt of court equated to the "determination of a criminal charge" under Article 6 ECHR and that determination amounted to a finding of guilt for the purposes of the application of Article 5 ECHR.[50] The ECtHR held that there was no violation of Article 5 ECHR in this case, but Article 6 was breached because the applicant had been unrepresented during the contempt proceedings. This finding indicates that since civil contempt may result in imprisonment in Ireland, the person in contempt should benefit from criminal due process rights so as to comply with the ECHR.

[50] *Ibid* at paragraph 85.

QUESTION 2

2(a) Should the distinction between civil and criminal contempt be maintained?

2(b) What remedies should the law provide for civil contempt? Should imprisonment remain as a remedy or sanction?

2(c) Should civil contempt remain coercive in purpose or should it involve a punitive element?

2(d) If civil contempt is to involve a punitive element, should a person alleged to be in civil contempt be entitled to the same procedural rights as a person alleged to be in criminal contempt?

Please type your comments (if any)

ISSUE 3

CONTEMPT IN THE FACE OF THE COURT

3.1 Overview

3.01 Contempt in the face of the court (*in facie curiae*) occurs where words are spoken or an act is committed that obstructs or interferes with the due administration of justice. This could include an assault on a judge or judicial officer, threatening behaviour or a refusal by a witness to answer questions. The act of contempt does not have to take place in the courtroom for it to fall within contempt in the face of the court—misconduct in the vicinity of the court may also amount to such contempt.[1]

3.02 In its 1991 *Consultation Paper on Contempt of Court*, the Commission expressed the view that the existing law of contempt in the face of the court "works very satisfactorily in practice."[2] It noted that the Irish courts generally exercise restraint when confronted with such conduct and seek to avoid unnecessary sanctions of imprisonment in such cases. In general, the Commission was satisfied that there was "not the slightest indication that there is anything wrong with the way in which the law operates."[3] The Commission noted, however, that a theoretically unsound law cannot be saved simply because it is applied in moderation. It observed that the current law on contempt in the face of the court is imprecise and uncertain—so much so that it may be seen as "inherently unfair and constitutionally questionable."[4] The uncertainty of the law makes it difficult for persons to know what sort of conduct will place them in contempt and so arguably deprives them of standard due process rights.

3.03 The Commission also noted that the judge has "conflicting responsibilities" in cases of contempt in the face of the court which may breach basic principles of constitutional and natural justice. As discussed below, in cases of contempt in the face of the court, the judge must "police" the courtroom while also acting as complainant, prosecutor, witness and decision-maker in the case.[5] The Commission also noted that there are other legal remedies available to deal with conduct amounting to contempt in the face of the court, such as warning the offender; adjournment of proceedings; physical restraint; and, where appropriate, charging the offender with a specific statutory offence. The existence of these alternative

[1] *Halsbury's Laws of England* 5th ed, Vol.22, paragraph 6; McIntyre, McMullan and Ó'Toghda, *Criminal Law* (Thomson Reuters, 2012) at 226.
[2] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 225.
[3] *Ibid* at 226.
[4] *Ibid* at 228.
[5] *Ibid* at 232.

remedies may mean that there is no longer a need for a separate offence of contempt in the face of the court. Some recently reported instances of disruption in court demonstrate that prosecution for public order offences has been used instead of prosecution for contempt in some cases. For example, in 2016, an individual who "mooned" at a judge was charged with an offence under section 6 of the *Criminal Justice (Public Order) Act 1994* (threatening, abusive or insulting behavior in a public place), rather than under the law of contempt in the face of the court.[6] In another case in 2016, a defendant who called the presiding judge a "turkey" and yelled expletives at him was also charged with an offence under section 6, rather than with contempt.[7]

3.04 The main difficulties with the current law on contempt in the face of the court include the following:

3.1.1 Power to attach summarily/ prosecute immediately for contempt

3.05 In Ireland, it has been held that a trial judge has an inherent constitutional power to summarily and immediately try an offence of contempt where this is necessary in the interests of the proper administration of justice.[8] The immediate and summary nature of proceedings serves an important purpose in that it helps to maintain the authority and legitimacy of the courts. In addition, as O'Donnell notes, the court's power to try cases of contempt in the face of the court immediately "encourages good behaviour by litigants and lawyers if it is known that there is some immediate sanction."[9]

3.06 Where, however, it is not absolutely necessary for the proper administration of justice to try the person in contempt immediately, any conviction for contempt that is secured during the trial may be overturned upon appeal.[10] In England and Wales, the courts appear to have acknowledged that a "cooling off" period is desirable and that a decision to imprison for contempt in the face of the court should not be taken too quickly and only after the judge has had time for reflection.[11] The accused must also have time to prepare his or her defence and to take legal advice.

3.07 The main problem with the power to try a person immediately for contempt in the face of the court is the fact that this may deprive the accused of his or her right to fair procedures. As Young notes, through this procedure the accused "is dealt with immediately and thus has no time to prepare his defence; moreover he is dealt with by a judge who may find himself in the heat of the moment inclined to confuse defence of his personal dignity with the protection of orderly justice."[12] Young also questions the necessity for the immediate prosecution, asking why exclusion from

[6] Deegan, "Judge will not be called to testify over 'mooning'." *Irish Examiner*, 21 January 2016
[7] Deegan, "Man jailed over 'turkey' taunt" *Irish Examiner*, 18 February 2016.
[8] *The State (DPP) v Walsh and Conneely* [1981] IR 412.
[9] O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2 JSIJ 87, at 119.
[10] *In re Kelly* [1984] ILRM 424; O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2 JSIJ 87, at 117.
[11] *R v Moran* (1985) 81 Cr App R 51, at 53; Arlidge, Ealy and Smith, *Arlidge, Ealy and Smith on Contempt*, 4th ed (Thomson Reuters, 2011) at 803-805.
[12] Young, "The Contempt of Court Act 1981" (1981) 8(2) BJLS 243, at 244.

the courtroom is not sufficient to maintain order. In his mind, "if the conduct is sufficient to constitute some criminal offence it can then be dealt with later according to the ordinary criminal process."[13]

3.08 The English Law Commission raised similar concerns. It noted that the immediate procedure may lack the basic features of justice that apply to criminal proceedings and so could be seen to undermine, rather than enhance, the rule of law.[14] The English Law Commission felt that a court should be "very wary of proceeding too summarily" because this may undermine the defendant's right under Article 6(3)(b) of the ECHR to be given adequate time and facilities for the preparation of a defence.[15] There is also the potential for bias, or at least the appearance of bias, in the use of the immediate prosecution as the presumption of innocence may be undermined where the judge who has been the victim of the contempt, witness to it and prosecutor of it, then determines the guilt of the accused.[16] These difficulties suggest that cases of contempt should be referred to a different judge in a different court. As discussed below, such a referral may be required under the ECHR. This may not always be an adequate solution, however, because such a referral would cause delay and possible disruption and the other court may be "seen as pre-disposed to believe the evidence of the judge or bench in whose court the contempt was said to have happened."[17]

3.09 The Australian Law Reform Commission and Law Reform Commission of Western Australia identified equivalent difficulties in the summary nature of contempt proceedings. The Law Reform Commission of Western Australia noted that the use of the immediate prosecution lacks safeguards such as the presumption of innocence, the rule against bias, and the right to a fair hearing.[18] The Australian Law Reform Commission highlighted the same issues and went so far as to say that there is, in effect, a "presumption of guilt" in cases where the presiding judge determines the guilt of the person alleged to have committed contempt in the face of the court.[19] In order to address these difficulties, the Australian Law Reform Commission recommended that the immediate prosecution by the presiding judge should be retained, but that it should only be possible where the accused consents and where proper procedural safeguards are in place.[20] The Law Reform Commission of Western Australia did not agree with this recommendation on the basis that it would fail to accommodate situations where an immediate response to the contempt is required. Instead, the Law Reform Commission of Western Australia recommended that trial before the presiding judge should be retained only as an exceptional procedure to be used where the contempt occurs in the actual presence of the judge

[13] *Ibid.*
[14] Law Commission for England and Wales, *Contempt of Court. A Consultation Paper* (No. 209 2012) at paragraph 5.72.
[15] *Ibid* at paragraph 5.75.
[16] *Ibid* at paragraph 5.78.
[17] *Ibid* at paragraph 5.79.
[18] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 72.
[19] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 68-69.
[20] *Ibid* at 71, 79-80.

and where the contempt gives rise to an immediate threat to the authority of the court or the integrity of the proceedings. It also recommended that statutory procedural safeguards should exist for the benefit of the accused.[21]

3.10 In Ireland, the Constitution has a significant impact on the law of contempt of court. The Constitution requires that the exercise of the contempt jurisdiction respects the fundamental rights of the citizen such as the right to a fair trial, freedom of expression and personal liberty. Prior to the foundation of the Irish Free State, the Courts in Ireland exercised a summary jurisdiction in respect of all forms of criminal contempt. In *The Attorney General v. O'Kelly*,[22] the High Court (Sullivan P) held that a similar jurisdiction was exercisable under Article 72 of the Constitution of the Irish Free State, 1922. In *The Attorney General v. Connolly*,[23] the High Court (Gavin Duffy P) confirmed that a summary jurisdiction in relation to criminal contempt was exercisable by the Courts notwithstanding Article 38.5 of the Constitution of Ireland 1937.

3.11 The jurisdiction of the courts in matters of contempt derives from Article 34 of the Constitution which provides that justice shall be administered by the courts. This provision has been found to authorise the courts to deal with contempt by the summary procedure of attachment.[24] The courts' power to try summarily for contempt has also been found to derive from Article 35 of the Constitution which guarantees the independence of the judiciary.[25] As the Supreme Court (O'Higgins CJ) noted in *The State (DPP) v Walsh and Conneely*,[26] if the court did not have the power to try summarily for contempt, this would mean that every case of contempt would have to be referred to the Director of Public Prosecutions to decide whether or not a prosecution should follow. This would mean that the courts would not have authority to protect their own proceedings. In these circumstances, the Court questioned how the independence of the judiciary could be maintained.

3.12 The Supreme Court in *Walsh and Conneely* concluded that, notwithstanding Article 38.5 of the Constitution (which establishes a right to a jury trial in non-minor criminal proceedings), the courts have the power to try allegations of contempt summarily and that persons charged with contempt have no right to a jury trial unless disputed issues of fact arise in a particular case. This reasoning was endorsed by the High Court in *Murphy v British Broadcasting Corporation*,[27] where, applying *Walsh and Conneely*, it was held that no right to a jury trial arises in cases of contempt unless the case is non-minor and there are issues of fact to be determined.

[21] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 73-74.
[22] [1928] IR 308.
[23] [1947] IR 213.
[24] *Ibid.*
[25] *The State (DPP) v Walsh and Conneely* [1981] IR 412.
[26] *Ibid* at 425.
[27] [2004] IEHC 420, [2005] 3 IR 336 at paragraph 71.

Case Study 3: *The State (DPP) v Walsh and Conneely* [1981] IR 412

The two defendants had been convicted of contempt, in the form of scandalising the court, based on the content of a press release they had authorised, which was published by *The Irish Times* newspaper. The press release attacked the legitimacy of the Special Criminal Court and alleged that the Court had "so abused the rules of evidence as to make the court akin to a sentencing tribunal." The defendants did not dispute that the statement amounted to scandalising the court. They argued, however, that this meant that they were charged with a serious crime and so were entitled to a trial with a jury under Article 38.5 of the Constitution. The defendants conceded that some contempt cases could be dealt with summarily, that is, without a jury, where it was necessary for the court to act quickly in the interests of justice, but that this was not necessary in cases of scandalising. The Supreme Court concluded that the courts can deal with contempt cases summarily where the facts are not in dispute, such as in this case, and that the defendants were therefore not entitled to a jury trial. The Court, by a 3-2 majority, also decided that if the facts were in dispute, a person charged with contempt has a right to a jury trial under Article 38.5 of the Constitution.

3.13 In its 1994 Report, the Commission concluded that contempt is an offence of a special category (*sui generis*) that is within the inherent jurisdiction of the courts. It noted that the courts have the function of ensuring that the administration of justice in the courts is properly protected. This function, it said, can only be exercised effectively where the courts retain their full powers to respond to and punish contempt in the face of the court.[28] The Commission was not aware of any decision which would suggest that the Oireachtas would be able to restrict the inherent power of the courts to exercise a summary power to deal with contempt in the face of the court.[29] The Commission concluded that legislative regulation of this area would be permissible so long as the legislation did not interfere with the power of attachment.[30] It noted, however, that legislation could be largely academic if it could not affect the courts' inherent powers and so the majority of the Commission did not recommend any new legislation in respect of contempt in the face of the court.[31]

3.14 The minority of the Commission considered that the court's power to try summarily for contempt should be retained but that the present law on contempt in the face of the court is defective because it goes beyond what is necessary in order to maintain control in proceedings. The minority argued that the present law "incorporates no principle of proportionality in respect of measures taken, and its scope is imprecise." The minority acknowledged that judges do not abuse their powers in this area and only do as much as is absolutely necessary to maintain order. Nonetheless, the minority recommended that legislation should be enacted to identify the judicial

[28] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 10-11.
[29] *Ibid* at 11.
[30] *Ibid* at 8 [emphasis in original].
[31] *Ibid* at 11-12.

powers available to deal with contempt in the face of the court. It considered that this would improve the legitimacy of such powers. Accordingly, the minority recommended that the common law offence of contempt in the face of the court should be replaced by a statutory offence containing the following elements:

- it should embrace any disruptive or other conduct which threatens the orderly, efficient and dignified conduct of the court's proceedings,
- the procedure should be summary,
- the court should have the power to order the removal and/or detention in custody of the offender for a period of not more than one month, subject to the general principle that any sanction should be no more than is necessary to enable the court to continue proceedings in an orderly manner.[32]

3.1.2 Summary mode of trial: ECHR Considerations

3.15 In *Kyprianou v Cyprus (No.2)*,[33] the ECtHR examined the summary mode of trial for contempt in the face of the court. In this case, the applicant had made a number of insulting statements and gestures to the Cypriot court while acting as defence counsel and was sentenced to 5 days imprisonment for contempt. The ECtHR found that the practice whereby judges who had witnessed and experienced the contempt in question also convicted and sentenced the applicant was contrary to the right to a fair trial guaranteed by Article 6 of the ECHR. The ECtHR noted that, in this situation, the judge acted as complainant, witness, prosecutor and judge. This raised concerns as to the impartiality of the judge and about the conformity of the proceedings with the principle that no one should be a judge in his or her own cause.[34] The ECtHR noted that the judges in this case had acknowledged that they had been "deeply insulted" by the applicant which demonstrated that they had been personally offended by the conduct. The ECtHR was also satisfied that the language used by the judges during the proceedings conveyed "a sense of indignation and shock" that was contrary to the objective approach expected of judges.[35] The ECtHR also found that the judges had pre-judged the issue of the applicant's guilt. Overall, the judges were deemed not to have been impartial, contrary to Article 6 of the ECHR.

3.16 In *Kyprianou*, the ECtHR also found that there had been a violation of the applicant's rights under Article 10 of the ECHR. The Court was satisfied that the penalty imposed on the applicant, although "not a harsh sentence", was not proportionate to the seriousness of the offence. The Court found that the penalty was severe and could have a "chilling effect" on how defence counsel performed their duties. The Court

[32] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 12-13.
[33] (2007) 44 EHRR 27.
[34] *Ibid* at paragraph 127.
[35] *Ibid* at paragraph 130.

also held that the lack of procedural fairness in the proceedings compounded the disproportionality of the sanction.[36]

3.17 This decision in *Kyprianou* establishes that, in order to be ECHR compliant, a judge who has been personally affected by an incident of contempt should not also determine the guilt of the accused. This has implications for the Irish law on contempt in the face of the court where the guilt of the person accused of contempt is generally determined by the judge who has experienced and witnessed the contempt in question.

3.18 In *Robertson and Gough v HM Advocate*,[37] the Scottish High Court of Justiciary considered the implications of the *Kyprianou* decision. The Court accepted that where contempt was committed in the face of the court, the judge may be personally affected and in such circumstances should refer the matter to another court for determination.[38] However, the Court considered that where the conduct is directed at the administration of justice, different considerations apply such that it is "positively the duty" of the presiding judge to decide the guilt of the person accused of contempt.[39] The Court was satisfied that because the contempt in question is not directed at the judge personally, the judge would not be "a judge in his own cause" in dealing with the contempt.[40]

3.1.3 Uncertainty

3.19 In its 1994 Report, the Commission noted that the current law of contempt in the face of the court is uncertain and difficult to understand. The minority of the Commission recommended that a statutory offence of contempt in the face of the court should be introduced to address this uncertainty. It recommended that the statutory offence should "embrace any disruptive or other conduct which threatens the orderly, efficient and dignified conduct of the court's proceedings."[41]

3.20 A difficulty with the Commission's proposal is that it appears to cover a vast range of conduct and so might still be uncertain. In Western Australia, liability for contempt in the face of the court is based on the general concept of interference with the due administration of justice and this has been criticised for its vague nature. The Law Reform Commission of Western Australia, for example, has noted that "[s]uch a broad and potentially discretionary test can no longer be justified in light of contemporary demands to make the application of the law more certain and

[36] *Ibid* at paragraph 181.
[37] [2007] HCJAC 63.
[38] *Ibid* at paragraph 79.
[39] *Ibid* at paragraph 80.
[40] *Ibid* at paragraph 81.
[41] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 12-13.

consistent."[42] A similar argument could be made in respect of the Commission's proposed test in the 1994 Report.

3.21 On the other hand, the Law Reform Commission of Western Australia noted that a potential benefit of having a broad test for liability for contempt in the face of the court is that this offers flexibility and can be "adjusted to suit contemporary values and attitudes to the judicial process."[43] The Law Reform Commission of Western Australia also noted, however, that codification of other areas of law has been achieved without adverse effect and so there is no reason to believe that the codification of contempt would be more difficult. As such, it recommended that the existing offence of contempt in the face of the court in that jurisdiction should be replaced with a number of specific statutory offences.[44] The Australian Law Reform Commission had made a similar recommendation in 1987.[45]

3.22 In England and Wales, the courts may punish contempt in the face of the court where a person "wilfully insults" a judge, witness or counsel during proceedings or where they are going to or from the court, or where the person "wilfully interrupts the proceedings of the court or otherwise misbehaves in court."[46]

3.1.4 Fault element (*mens rea*)

3.23 The fault element (*mens rea*) applicable to the offence of contempt in the face of the court in Ireland is unclear.[47] In the 1991 Consultation Paper, the Commission recommended that intention or recklessness should be required for a prosecution for contempt in the face of the court. The Commission did not think it desirable that such elements should be included in the statutory definition because this would unnecessarily complicate the offence.[48]

3.24 In England and Wales, Arlidge, Ealy and Smith note that it is also difficult to identify the applicable fault element (*mens rea*) in cases of contempt in the face of the court.[49] There is no definitive statement in the case law but, if intention is required, it seems that this may be inferred from the act itself.[50] According to Arlidge, Ealy and Smith, "recklessness" has not been considered sufficient in cases of contempt in the face of the court—the offence is grounded in an intention to interfere with the administration of justice which may be inferred by the court.

[42] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 57.
[43] *Ibid* at 61.
[44] *Ibid.*
[45] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 71.
[46] Section 12(1) of the *Contempt of Court Act 1981*.
[47] McDermott, "Contempt of Court and the Need for Legislation" (2004) 4(1) JSIJ 185, at 192.
[48] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 234.
[49] Arlidge, Ealy and Smith, *Arlidge, Ealy and Smith on Contempt*, 4th ed (Thomson Reuters 2011) at 861.
[50] *Ibid* at 864-865.

3.1.5 The Protection of Journalists' Sources

3.25 As noted above, the refusal by a witness to answer a relevant question can constitute contempt in the face of the court. For journalists, the issue can arise in a variety of court-related settings where they may be asked to reveal the sources of their published material. This often raises a direct conflict between, on the one hand, the legal duty of all persons to assist a court, breach of which may give rise to contempt, and on the other hand, the professional code of journalists which requires them not to reveal confidential sources of information, breach of which may risk loss of access to future confidential information that may be in the public interest. For the individual journalist, there is also the risk of loss of livelihood through losing membership of the National Union of Journalist for breach of its professional code. An example of this conflict is *In re O'Kelly.*[51]

Case Study 4: *In re O'Kelly* (1974) 108 ILTR 97

In this case, Kevin O'Kelly (then political correspondent for RTÉ) was called to give evidence in the trial of a person, Seán MacStiofáin, who was charged with membership of an illegal organisation, the IRA. The prosecution contended that MacStiofáin was the person who had given a taped interview to O'Kelly where the person on the tape claimed to be the chief of staff of the IRA. In his evidence, O'Kelly confirmed that the recording was an accurate record of the interview but he refused, on the ground that he was obliged by his professional code of conduct to refuse to reveal the source of information given in confidence, to answer a question asking him to disclose the identity of the person whose voice was recorded. The trial Court (the Special Criminal Court) found O'Kelly guilty of contempt in the face of the court and sentenced him to 3 months imprisonment. The trial against MacStiofáin then proceeded, and other prosecution evidence identified him as the voice on the tape and he was convicted of IRA membership. On appeal by O'Kelly (which was limited to an appeal against the severity of the sentence of 3 months imprisonment), the Court of Criminal Appeal held that journalists do not enjoy a constitutional immunity from disclosing information received in confidence and so the Court upheld the finding of contempt. The Court held, however, that although the refusal to answer the question had created "some little extra difficulty" in the case, it had not ultimately prevented the conviction for IRA membership. Therefore, the sentence of 3 months imprisonment was not justified and the Court imposed a fine instead.

3.26 In its 1994 Report, the Commission noted that *In re O'Kelly* established that journalists in Ireland do not enjoy absolute protection against disclosure of their sources. The Commission noted that the observations in that case suggested that an absolute privilege for journalists would not be constitutionally valid because such a privilege would hinder the proper administration of justice if the Court could not obtain all relevant evidence.[52] The minority of the Commission recommended that legislation should be introduced, along the lines of section 10 of the English *Contempt*

[51] (1974) 108 ILTR 97.
[52] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 17.

of Court Act 1981, to allow a journalist to refuse to disclose his or her source in certain circumstances.[53] Section 10 of the 1981 Act provides that a person is not guilty of contempt of court for refusing to disclose his or her source of information "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." The minority of the Commission favoured this approach but considered that a stricter test of "necessity" was required to protect the source "unless it is established that disclosure is clearly necessary to prevent injustice, or in the interests of national security or to prevent disorder to crime."[54] The minority considered that this approach would recognise the public interest in the protection of journalistic sources.

3.27 By contrast, the majority of the Commission were satisfied that the constitutional power of the courts to protect the administration of justice should not and could not be restricted and so did not recommend that journalists should be permitted to refuse to disclose their sources.[55]

3.28 The protection of journalist's sources in Ireland must now be considered in light of the European Court of Human Rights decision in *Goodwin v United Kingdom*.[56] In that case, the journalist, Goodwin, received information about the financial problems of a company from a source who wished to remain anonymous. The company in question obtained an injunction preventing publication of the information and obtained an order requiring the applicant to reveal his source. The applicant refused to do so and was fined £5,000 for contempt.

3.29 The ECtHR held that the disclosure order violated Article 10 of the ECHR. The Court noted that the protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources could be deterred from assisting the press in informing the public on matters of public interest. The Court was satisfied that an order requiring the disclosure of a source could only be justified by "an overriding requirement in the public interest."[57] In the present case, the Court found that the injunction had been effective in stopping dissemination of the confidential information by the media and so a vital component of the threat of damage to the company had already been largely neutralised. The Court held that there was no reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order (protecting the company) and the means deployed to achieve that aim (disclosure of the source).

3.30 The *Goodwin* decision was considered by the Circuit Court in *In re Barry O'Kelly*.[58] In this case, Barry O'Kelly had published an article in the *Daily Star* which had discussed the contents of a confidential unfair dismissals settlement between a former staff member of the Garda Representative Association (GRA) and the GRA.

[53] *Ibid* at 21.
[54] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 21.
[55] *Ibid* at 22.
[56] (1996) 22 EHRR 123.
[57] *Ibid* at paragraph 39.
[58] Circuit Court, 16 January 1997, *The Irish Times* 17 January 1997.

The former GRA employee brought proceedings in the Circuit Court against the GRA for breach of her right to privacy and for breach of confidence, arguing that a member of the GRA executive must have leaked the settlement to Barry O'Kelly. He was called to give evidence in the case, but refused to reveal his source for the story. In the Circuit Court, Judge Carroll warned him that he could be found in contempt of court, but having heard legal submissions on the contempt issue, in which the *Kevin O'Kelly* case and the *Goodwin* case were cited, Judge Carroll adjourned consideration of the contempt matter and proceeded to hear the rest of the evidence in the privacy case. At the conclusion of the case, he held that on the balance of probabilities, a member of the GRA executive had indeed leaked the settlement terms to Barry O'Kelly and he therefore found in the plaintiff's favour and awarded her damages for breach of her right to privacy and for breach of confidence. Because of this result, Judge Carroll concluded that Barry O'Kelly's evidence was not essential to the outcome of the case and so the issue of contempt did not arise. Judge Carroll reiterated that complete journalistic privilege does not exist in Ireland, but he noted that a Court retains a discretion as to whether to order disclosure of a source. In the present proceedings, disclosure was not necessary to determine the case.

3.31 The Supreme Court considered the implications of the *Goodwin* decision in *Mahon v Keena and Kennedy*.[59] This case involved an *Irish Times* journalist, Colm Keena, and the then editor of *The Irish Times*, Geraldine Kennedy, who were charged with contempt after Mr Keena had written an article based on information received from a confidential, and unsolicited, source. This had included a letter written by a statutory tribunal of inquiry that had been established under the *Tribunals of Inquiry (Evidence) Act 1921* to inquire into payments to politicians in connection with planning matters and which had been sent to a tribunal witness. The letter and the article on which it was based revealed information about evidence that might contradict evidence given by the then Taoiseach, who was also a witness at the tribunal. After the article was published, the letter on which the article was based was destroyed by the journalists. The tribunal of inquiry considered that publication of the letter might constitute an offence under the 1921 Act and requested the journalist and the editor to disclose the information and the source of it. They refused and the High Court ordered the journalists to appear before the tribunal to answer questions concerning the source of the information.

3.32 On appeal by the two journalists, the Supreme Court held that the *Goodwin* decision does not give journalists a right to have their sources protected in all circumstances. The Court noted that the ECtHR had held that an order compelling the defendants to answer questions for the purpose of identifying their source could only be "justified by an overriding requirement in the public interest." However, the Court emphasised that no citizen has the right to "claim immunity from the processes of the law."[60] Where the information is required for the proper administration of justice, the court must decide whether the source should be revealed. In doing so, the Court will allow

[59] [2009] IESC 64, [2010] 1 IR 336.
[60] [2009] IESC 64, [2010] 1 IR 336, at paragraph 92.

all due respect to the principle of journalistic privilege. In the present case, the document sought had been destroyed by the defendants and so the Court could not identify "any sufficiently clear benefit" to the Tribunal that would justify the making of a disclosure order. The Court therefore dismissed the application for disclosure. It noted, however, that the destruction of the document by the defendants was "calculated and deliberate" and was performed to prevent the Tribunal from conducting its inquiry. That act of destruction had determined the outcome of the case. In these "exceptional" circumstances, although the defendants had succeeded in their appeal, they were ordered to pay the plaintiff's costs for both the High Court and Supreme Court proceedings.[61]

3.33 It is clear from the above that, in considering whether the refusal to disclose a source will amount to contempt in the face of the court, the courts will carefully balance the interests of journalists in protecting their sources on the one hand and the interests of the courts in the proper administration of justice on the other hand. Journalists do not enjoy absolute privilege from non-disclosure. Instead, the court has discretion whether or not to order disclosure based on consideration of the public interest in the matter. In these circumstances, it may be questioned whether legislative guidance would be useful to assist the courts in conducting the balancing exercise.

3.34 In New Zealand, section 68 of the *Evidence Act 2006* provides that the court may require the disclosure of the identity of a journalist's source where the public interest in the disclosure outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

3.35 In Australia, the common law traditionally did not recognise a journalistic privilege which would allow journalists to refuse to reveal their sources.[62] In 2005, a Report jointly compiled by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission recommended that the Uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege.[63] The Report recommended that this privilege "should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given."[64] This recommendation was implemented in the Australian Commonwealth *Evidence*

[61] [2009] IESC 78, [2010] 1 IR 336, at paragraph 13. In their subsequent application to the European Court of Human Rights, the applicants complained that the costs award had interfered with their right to protect their journalistic sources. The ECtHR held that the Supreme Court's ruling on costs did not violate the applicants' right to freedom of expression under Article 10 ECHR. See *Keena and Kennedy v Ireland*, app no 29804/10, 30 September 2014.

[62] Law Reform Commission of Australia, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report 2005) at 503.

[63] *Ibid* at 510.

[64] *Ibid* at 511.

Amendment (Journalists' Privilege) Act 2007, later amended by the *Evidence Amendment (Journalists' Privilege) Act 2011*. Section 126H of the 2011 Act is expressed in the same manner as the New Zealand 2006 Act, above.

QUESTION 3

3(a) Does the summary mode of trial for contempt of court remain appropriate? Should there be a separate trial or is it appropriate to allow the contempt issue to be heard during the course of the principal trial?

3(b) Should there be a right to a jury trial in cases of contempt?

3(c) Can or should the court's power to try summarily and immediately for contempt be altered by legislation?

3(d) Should there be a statutory definition of contempt in the face of the court? If so, how should this be defined?

3(e) What fault element (*mens rea*), if any, is required in cases of contempt in the face of the court?

i. If a fault element should appply, should such fault element comprise "intentionally, knowingly or recklessly"?

ii. If a fault element should not apply, should contempt of court be a strict liability offence (subject to a defence of due diligence or reasonable precautions) or an offence of absolute liability (without any defence of due diligence or reasonable precautions)?

3(f) Should legislation be introduced to allow journalists to refuse to disclose their sources, subject to a specific test such as whether disclosure is "necessary" in the interests of justice? If so, how should necessity be defined? Should a test other than "necessary" be applied?

Please type your comments (if any)

ISSUE 4

SCANDALISING THE COURT

4.1 Overview

4.01 "Scandalising the court" is a type of contempt that occurs where something is said or done that is of such a nature as to undermine public confidence in the court that is attacked. Mere criticism of judges does not amount to scandalising. Instead, the offence is committed where unsupported allegations of corruption or malpractice are made against a court.[1]

4.02 The classic description of the contempt of scandalising is set out in the English case of *R v Gray*.[2]

Case Study 5: *R v Gray* [1900] 2 QB 36

In this case, Darling J was presiding over a case concerning the publication of certain obscene words and the publication and sale of an indecent book. Before the trial, the judge issued a warning to the press not to publish any of the indecent details of the case and indicated that such publication would not necessarily be protected as a fair and accurate report of court proceedings. After the trial in question had concluded, the editor of a Birmingham newspaper published an article which referred to Darling J as an "impudent little man in horse-hair, a microcosm of conceit and empty-headedness."

The English High Court held that any act done or writing published that is intended to lower the authority of a court or judge amounts to contempt of court by scandalising. The Court added that reasonable criticism of the courts is legitimate, but the article in this case was found to go beyond acceptable criticism—the comments were "personal scurrilous abuse of a judge as a judge." The editor of the newspaper apologised and was fined and also ordered to pay the costs of the contempt prosecution.

4.03 In Ireland, the Supreme Court decision in *The State (DPP) v Walsh and Conneely*[3] is the leading authority on the contempt of scandalising the court. In that case, the two accused were convicted of scandalising following the publication of a newspaper article that attacked the legitimacy of the Special Criminal Court and alleged that the Court had "so abused the rules of evidence as to make the court akin to a sentencing

[1] *The State (DPP) v Walsh and Conneely* [1981] IR 412, at 421.
[2] [1900] 2 QB 36
[3] [1981] IR 412. See Case Study above at 31.

tribunal." A serious misrepresentation of court proceedings may also amount to scandalising, particularly if the misrepresentation is due to negligent recklessness. In the High Court decision *PSS v JAS and Independent Newspapers (Irl) Ltd*,[4] for example, Budd J held that the defendant had scandalised the court by deliberately circulating a false and damaging impression of a court judgment with reckless disregard for the truth.

4.04 In England and Wales, the offence of scandalising was abolished by section 33 of the *Crime and Courts Act 2013*. The last successful prosecution in England for scandalising occurred in 1931 when the accused had criticised a judge's interpretation of legislation.[5]

4.05 The first potential problem with the current law on scandalising is the use of term "scandalising" itself. That phrase is an "archaic description" of the offence in question[6] and is not widely understood. The New Zealand Law Commission has noted that the expression "harks back to a bygone era and no longer reflects the nature of the harm caused by the offence or what the punishment is meant to achieve."[7] For this reason, the New Zealand Law Commission considered that, if an offence equivalent to scandalising is to be retained in New Zealand law, a different expression should be used to refer to it. The New Zealand Law Commission did not, however, present suggestions for an alternative expression.[8] In Ireland, the Commission also considered using a new phrase to replace "scandalising." The Commission concluded that the current term (although "inappropriate" and "dated") had become "a familiar and well entrenched mode" of describing the particular form of contempt and that there was no other satisfactory expression available.[9]

4.06 In its 1991 Consultation Paper, the Commission considered the arguments for and against the retention of the offence of scandalising. It identified 3 main arguments for retaining the offence:

- The offence is necessary to protect the administration of justice and to maintain the rule of law in society;
- The offence is required to preserve public confidence in the administration of justice;
- The offence helps to deter future attacks on the judiciary by early preventative action.[10]

The Commission then noted 5 arguments for abolishing the offence:

- The offence limits freedom of expression;

[4] High Court 22 May 1995.
[5] *R v Colsey, ex parte Director of Public Prosecutions*, *The Times* 9 May 1931.
[6] *The State (DPP) v Walsh and Conneely* [1981] IR 412, at 421.
[7] New Zealand Law Commission, *Issues Paper on Contempt in Modern New Zealand* (IP36 2014) at paragraph 6.29.
[8] *Ibid.*
[9] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 30.
[10] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 256-258.

- The offence is not properly defined;
- Liability for scandalising is often imposed without proof of the fault element (*mens rea*);
- The law is discriminatory;
- The offence is unnecessary as other remedies are available in civil and criminal law to deal with the behaviour in question.[11]

4.07 Similar arguments for and against the retention of the offence of scandalising have been noted in other countries. In England and Wales, the English Law Commission noted that the main arguments in favour of abolishing the offence are that it is rarely enforced (as noted above, the last successful prosecution for scandalising in England and Wales had been in 1931); it is a "counter-productive" offence as it gives the impression that the judges "are protecting their own"; it has been argued that judges do not need a special protection not given to any other public officials; and it impedes the freedom of expression.[12]

4.08 The Australian Law Reform Commission and New Zealand Law Commission identified comparable arguments.[13] The New Zealand Law Commission's preliminary view was that retention of the common law offence of scandalising is untenable in light of issues arising in respect of freedom of expression, the rule of law (due to the uncertainty of the offence) and the views of modern New Zealand society.[14]

4.09 The main arguments for and against the retention of the offence of scandalising are as follows:

4.2 Argument for retaining the offence of scandalising

4.2.1 Protection of the administration of justice and rule of law

4.10 The main argument for retaining the offence of scandalising is that it is necessary to protect the administration of justice and to uphold the rule of law. As the Commission noted in 1991, "[i]f judges could be criticised freely without the strong sanctions provided by the law of scandalising... the scandalous comments would have the more direct effect of suggesting to all those disposed to defy the law in other ways that they might get away with it."[15] The Commission also noted that the law of scandalising may be required to uphold public confidence in the legal system.[16] Similarly, the High Court of Australia has found that the authority of the law rests on

[11] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 259-274.
[12] Law Commission for England and Wales, *Report on Contempt of Court: Scandalising the Court* (No 335 2012) at paragraph 16.
[13] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 244-245; New Zealand Law Commission, *Issues Paper on Contempt in Modern New Zealand* (IP36 2014) at paragraph 6.62.
[14] New Zealand Law Commission, *Issues Paper on Contempt in Modern New Zealand* (IP36 2014) at paragraph 6.62.
[15] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 257.
[16] *Ibid.*

public confidence which must not, therefore, "be shaken by baseless attacks on the integrity or impartiality of courts or judges."[17]

4.11 It could, of course, be suggested that the common law offence of scandalising is not the only means through which the operation of, and public confidence in, the administration of justice can be maintained. The English Law Commission, for example, considered that the offence of scandalising was unnecessary because most allegedly scandalous conduct will fall within the scope of various statutory offences, such as offences under sections 4A and 5 of the *Public Order Act 1986* (threatening, abusive or insulting words or behavior in a public place), section 1 of the *Communications Act 1988* (sending offensive or false communications), the *Protection from Harassment Act 1997* (harassment) or assisting and encouraging an offence under the *Offences Against the Person Act 1861*.

4.12 A similar argument could be presented in Ireland because existing legislation covers the same range of offences that the English Law Commission noted come within scandalising: section 6 of the *Criminal Justice (Public Order) Act 1994* (threatening, abusive or insulting behavior in a public place), section 13 of the *Post Office (Amendment) Act 1951*(sending offensive or false communications) and section 10 of the *Non-Fatal Offences Against the Person Act 1997* (harassment). In addition, section 4 of the *Offences Against the State (Amendment) Act 1972* provides that a public statement which interferes with the course of justice is unlawful. A judge would also, of course, have recourse to a civil remedy under the *Defamation Act 2009* for insults that might otherwise have fallen under the law of scandalising, although this avenue would only address damage to the judge's personal reputation, not damage to the administration of justice.

4.13 The English Law Commission also raised a significant point in respect of the utility of prosecuting allegedly scandalising behavior, namely that this prosecution could potentially attract more publicity than the original publication, which would otherwise fade from public memory.[18] In these circumstances, it could be argued that a prosecution for scandalising would serve to undermine further the administration of justice, by reminding the public of what had occurred, rather than preserve it.

4.3 Arguments for abolishing the offence of scandalising

4.3.1 Freedom of Expression

4.14 One of the arguments for abolishing the offence of scandalising is that the offence restricts the right to freedom of expression. This right is protected under Article 40.6.1° of the Irish Constitution and under Article 10 of the ECHR. In the Supreme Court decision *Kelly v O'Neill*,[19] a case concerning *sub judice* contempt, Keane J noted that the court should be slow to use its contempt jurisdiction in cases of

[17] *Gallagher v Durack* (1983) 152 CLR 238 at 234.
[18] Law Commission for England and Wales, *Report on Contempt of Court: Scandalising the Court* (No 335 2012) at paragraph 65.
[19] [1999] IESC 81, [2000] 1 IR 354, at 374.

scandalising because the freedom of expression guaranteed by Article 40.6.1° of the Constitution should only be restricted where this is necessary to protect the administration of justice. He also noted, however, that the protection of freedom of expression is not absolute and may, in accordance with Article 40.6.1°, be subject to limitation in line with public order and the common good, which applies to cases concerning contempt.[20] Similarly, the right to freedom of expression under Article 10 of the ECHR may be restricted, in line with Article 10(2) ECHR, where the aim is to maintain the authority and impartiality of the judiciary.

4.15 The offence of scandalising inhibits expressions that undermine the authority of the courts. This may be said to have a negative "chilling effect" on freedom of expression. This argument may be reduced, however, where a defence of truth exists to counter an allegation of scandalising. The applicable defences are considered later. On the other hand, O'Donnell suggests that this chilling effect may be beneficial as it "creates some sense of limit on the extent to which newspapers and other media may comment upon judicial decisions and forces some modicum of accuracy and restraint upon them, which otherwise would either be absent or provided by increased resort to libel proceedings."[21]

Case Study 6: *In re Kennedy and McCann* [1976] IR 382

In this case, the *Sunday World* newspaper published a story in 1976 about a custody case between a husband and wife which was at that time pending in the Supreme Court. Custody proceedings are heard in private (*in camera*) and the names of the parties and children are anonymised. In breach of the court order, the newspaper article published the names of the parents and the children and details of the breakdown of the parent's marriage, as well as photographs. The article also alleged that in custody cases in the Irish courts, contrary to the statutory requirement that the welfare of the child is the paramount consideration, the welfare of the child was not treated as the paramount consideration, but instead money and lifestyle were regarded as the most important criteria applied by the courts. The article also implied that justice could not be obtained in the Irish courts and that, in this respect, Ireland was "a sick society" which was "hypocritical about motherhood, morality and the family." The Supreme Court accepted that free speech and the free expression of opinions are valued rights, but that Article 40.6.1° of the Constitution also provided that they are subject to limits, in particular that they "shall not be used to undermine public order or morality or the authority of the State." The Court found that legitimate criticism of the courts is permissible, but in this case the article had gone beyond the acceptable limits. The Court held that the article amounted to contempt of court on two counts: publication in breach of the order prohibiting publication and publication of material intended to scandalise judges by accusing them of having corrupt and improper motives.

[20] *Ibid* at 382.
[21] O'Donnell, "Some Reflections on the Law of Contempt" (2002) 2 JSIJ 87, at 124.

4.3.2 Uncertainty

4.16 It is a fundamental aspect of fair procedures that an offence should be sufficiently precise to enable an individual to know, in advance, whether his or her proposed conduct is criminal. This requirement is recognised under the Constitution and it is also protected by Article 7 of the ECHR. In its 1991 Consultation Paper, the Commission noted that the current law on scandalising may be criticised for its imprecision. It noted that uncertainty in the offence could be seen in the decision of the Supreme Court in *The State (DPP) v Walsh and Conneely*.[22] In that case, the Court found that the offence of scandalising was unsuitable for "untrained and inexperienced" jurors to determine because of the "varying standards and values" they would apply.[23] The Court found that judges, and judges alone, were constitutionally qualified to maintain the standards necessary for the due administration of justice. According to the Commission, this finding implies that the offence of scandalising lacks sufficient coherence and certainty. It noted that if the offence is not sufficiently clear for a jury of ordinary men and women to understand, it cannot be sufficiently clear to allow other ordinary men and women to regulate their conduct.[24]

4.17 Uncertainty in the offence of scandalising does not necessarily mean that the offence should be abolished, but it may instead be viewed as a reason to reform the law, and to "redefine it so as to remove the uncertainty."[25] In 1987, the Australian Law Reform Commission noted that there may be some practical advantages to the uncertain nature of the offence of scandalising. It observed that the broad nature of the offence "does not call for detailed proof of what in many instances will be unprovable", namely that public confidence in the administration of justice has been impaired.[26] It also noted that the broad nature of the offence enables the court to intervene before the impairment of public confidence has actually occurred as the commencement of proceedings usually prevents further publication. On the other hand, the Australian Law Reform Commission noted that the broad nature of the offence inhibits freedom of expression and it means that liability is imposed without the offence being defined in sufficiently precise terms so as to give the individual fair warning as to what types of statements are prohibited.

4.18 The uncertainty of the law of scandalising may also run contrary to the "prescribed by law" requirement that arises under the ECHR. The ECtHR has held that for a law to be "prescribed by law", it must satisfy two elements: it must be accessible and foreseeable. In *Sunday Times Ltd v United Kingdom*,[27] the ECtHR found that the "prejudgment test" within the English law of contempt was sufficiently clear so as to be "prescribed by law." The Court was satisfied that the applicants were able to

[22] [1981] IR 412.
[23] *Ibid* at 440.
[24] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 265.
[25] Law Commission for England and Wales, *Report on Contempt of Court: Scandalising the Court* (No 335 2012) at paragraph 51.
[26] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 247.
[27] (1979-80) 2 EHRR 245.

foresee, to a degree that was reasonable in the circumstances, a risk that publication of a proposed newspaper article might fall foul of the principle.

4.19 The Australian Law Reform Commission argued that the uncertainties arising in the law of scandalising are no greater than those which were the subject of the *Sunday Times* case and so it assumed that the law of scandalising would similarly meet the requirement of being "prescribed by law." Whether or not this is in fact the case is open to debate but if the law is not sufficiently accessible and foreseeable, it will clearly run contrary to the ECHR. Arguably, the fact that the offence of scandalising is not pursued very often adds to its uncertainty because it is more difficult to know what types of statements will be classified as scandalising.

4.20 Another uncertainty that arises in discussion of the law of scandalising is whether and what fault element (*mens rea*) is required for the offence. In the 1991 Consultation Paper, the Commission noted that the authorities were divided on the question of the fault element[28] and it would seem that the question remains unresolved. As noted by McDermott, the absence of clear guidance concerning the applicable fault element renders the law uncertain and runs contrary to fair procedures, and he suggests that contempt of court legislation would provide clarity.[29]

4.3.3 Self-serving

4.21 The English Law Commission noted that the offence of scandalising may be regarded as "self-serving" because there is "something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges."[30] The English Law Commission felt that this concern could be reduced if the offence was to be set out in statute (as it would then no longer be "judge-made"). It also noted, however, that it appeared anomalous that judges should enjoy protection from scandalising when other prominent persons, such as members of Parliament, do not.[31]

4.22 The English Law Commission also pointed to a change in public attitude that suggested that the offence of scandalising should be abolished. It noted that the offence "arose in an era where deferential respect to authority figures was the norm" but that the same situation did not arise today. Therefore, the question posed by the English Law Commission was whether it was justifiable or effective to criminalise behaviour that society did not regard as wrong.[32]

4.23 Similarly, the Law Reform Commission of Western Australia noted that one of the main considerations with the law of scandalising is whether judges should be

[28] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 61.
[29] McDermott, "Contempt of Court and the Need for Legislation" (2004) 4(1) JSIJ 185, at 193.
[30] Law Commission for England and Wales, *Report on Contempt of Court: Scandalising the Court* (No 335 2012) at paragraph 63.
[31] *Ibid* at paragraph 64.
[32] *Ibid* at paragraphs 66-67.

afforded "special treatment" in terms of being protected from public criticism.[33] In Western Australia, however, members of Parliament are afforded equivalent protection from criticism.[34] As such, the Law Reform Commission of Western Australia found "no apparent reason" why members of Parliament should be afforded greater protection than the judiciary in the event that the offence of scandalising was abolished.

4.4 Should the offence of scandalising be retained?

4.24 In its review, the English Law Commission put forward a number of suggestions for replacing the existing offence of scandalising in the event that the offence was retained. It suggested that a civil process, along the lines of an injunction or restraining order, could be introduced and it discussed the possibility of introducing a narrow targeted offence consisting of publishing false allegations of judicial corruption.[35] On balance, the English Law Commission concluded that the offence of scandalising was redundant and that its abolition would leave no gap in the law. As previously noted, the offence has now been abolished in England and Wales by section 33 of the *Crime and Courts Act 2013.*

4.25 The Australian Law Reform Commission also considered that the offence of scandalising should be abolished. At the time of that Report, however, no other common law country had abolished the offence and so the Australian Law Reform Commission concluded that the retention of a limited and statutorily based offence was justified.[36] It recommended that it should be an offence "to publish an allegation imputing misconduct to a judge or magistrate in circumstances where the publication is likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity."[37]

4.26 The Law Reform Commission of Western Australia was in favour of retaining the offence of scandalising but in a modified form. It recommended that "it should be an indictable offence to publish an allegation imputing misconduct to a judge or magistrate in circumstances where the publication is likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity."[38] The Law Reform Commission of Western Australia also recommended that there should be clear defences applying to this offence so as to protect fair comment and freedom of communication. Currently, scandalising the court continues to amount to contempt of

[33] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 116.
[34] Section 361 of the *Criminal Code*.
[35] The Law Commission for England and Wales in its earlier *Report on Offences Relating to Interference with the Course of Justice*, recommended that, in place of scandalising, there should be a criminal offence focussing on imputations of "corrupt judicial conduct" on the part of a judge.
[36] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 263, 266-267.
[37] *Ibid* at 266.
[38] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 116.

court in Australia. It applies where there is a real risk that the material will undermine public confidence in the administration of justice.[39]

4.27 In its 1994 Report, the Commission concluded that the offence of scandalising should be retained but that it should modified by legislation to provide that such contempt consists of:

(i) imputing corrupt conduct to a judge or court, or

(ii) publishing to the public a false account of legal proceedings.

4.28 It was further suggested by the Commission that:

- a person should only be guilty of the offence where he or she knew that there was a substantial risk, or was recklessly indifferent of the fact, that the publication would bring the administration of justice, the judiciary, or any particular judge or judges into serious disrepute or where he or she intended to publish, or was recklessly indifferent as to the publication of a false account,
- the truth of a communication should render it lawful,
- abuse of the judiciary, even if scurrilous, should not constitute an offence, and
- there should be no legislative interference with the court's power to attach summarily for contempt by scandalising.[40]

4.5 If the offence is retained, what, if any, justifications/ defences should apply?

4.29 In *Re Kennedy and McCann*,[41] the Supreme Court held that "reasonable criticism" of the courts would not amount to contempt. In that case, the Court found that the article in question, which contained offensive comments about the treatment of custody cases by the Irish courts, had gone beyond the limits of acceptable criticism. Similarly, in *Re Hibernia National Review Ltd*,[42] the Supreme Court accepted that it is not contempt to subject the courts to legitimate discussion and criticism. In that case, however, the Court held that letters published by *Hibernia* newspaper that alleged improper conduct and bias on the part of judges of the Special Criminal Court exceeded the bounds of legitimate discussion.

[39] *Halsbury's Laws of Australia* at paragraph 227.
[40] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 31-32.
[41] [1976] IR 382. See Case Study above at 45.
[42] [1976] IR 388.

4.30 It is not clear whether the truth of a statement, in itself, would amount to a defence to a charge of scandalising the court. In England and Wales, the English Law Commission noted that there is some disagreement as to whether truth is a sufficient defence to an allegation of scandalising.[43] The English Law Commission noted that if truth was acknowledged as a formal defence, this "would tend to turn the proceedings for scandalising the court into a trial of the conduct of the judge who has been criticised."[44] Under English law, it is a defence where the allegations form part of a fair discussion on a question of public interest that allows a person to criticise, in good faith, matters of public concern.[45]

4.31 In Australia, it is not clear whether the truth of a statement currently provides a defence.[46] The Australian Law Reform Commission noted that the main argument for introducing a defence of truth or justification in scandalising cases is that "so long as it does not exist, well-founded allegations of judicial misconduct may be punished" and therefore evidence of such misconduct may not be brought to the attention of the public.[47]

4.32 On the other hand, as noted by the English Law Commission, the Australian Law Reform Commission suggested that one of the arguments against introducing a defence of justification in scandalising cases is that this would lead to a "prolonged and ultimately inconclusive factual investigation."[48] Ultimately, the Australian Law Reform Commission concluded that three defences should operate in scandalising cases: fair, accurate and reasonably contemporaneous reporting of legal proceedings; fair, accurate and reasonably contemporaneous reporting of Parliamentary proceedings; and truth or honest and reasonable belief in truth.[49]

4.33 The New Zealand Law Commission noted that one of the problems with adopting a defence of truth in cases of scandalising is that it would "put the judge on trial and subject the judge's conduct to scrutiny outside the statutory process for dealing with complaints about the judiciary."[50] Notwithstanding this concern, the New Zealand Law Commission went on to question "how could truth not be a defence?"[51]

4.34 In its 1994 Report, the Commission also addressed the question of whether a defence of truth should apply in cases of scandalising. It dismissed the suggestion that a defence of truth would enable a defendant to use contempt proceedings as a public platform or as a way to have their case reheard. The Commission felt that this would only arise in a minority of cases and should not prohibit a defence of truth.[52] The Commission was not convinced that the existence of a defence of truth would have

[43] Law Commission for England and Wales, *Contempt of Court: Scandalising the Court. A Consultation Paper* (No 209 2012) at paragraph 38.
[44] *Ibid* at paragraph 39.
[45] *Ahnee v DPP* [1999] 2 AC 294.
[46] *Halsbury's Laws of Australia* at paragraph 230.
[47] Law Reform Commission of Australia, *Report on Contempt* (No 35 1987) at 255.
[48] *Ibid* at 254.
[49] *Ibid* at 266.
[50] New Zealand Law Commission, *Issues Paper on Contempt in Modern New Zealand* (IP36 2014) at paragraph 6.62.
[51] *Ibid.*
[52] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 285.

any distinctive influence on the choice of a person to make a potentially scandalising statement.[53] It recommended that the truth of a communication should provide a defence to an allegation of scandalising.

4.35 The introduction of a defence of truth would bring any future contempt legislation into line with Irish defamation law. Under section 16 of the *Defamation Act 2009*, the truth of a statement provides an absolute defence to an allegation of defamation. As McMahon and Binchy note, if a statement is shown to be true "then there is no wrong done to the plaintiff because, even if people do think less of him or her after the statement has been made, it is because the plaintiff had a false reputation at the outset; and the law will not protect a false reputation."[54] The *Defamation Act 2009* also provides for a defence of fair and reasonable publication on a matter of public interest.[55] This defence applies where the statement is made in good faith and during the course of, or for the purpose of, a discussion of a matter of public interest which is made in the public benefit. Section 26(2) of the 2009 Act directs the court, in determining whether a publication is "fair and reasonable", to take into account a list of factors, such as the seriousness of any allegations made in the statement; the context and content (including the language used) of the statement; and the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

4.36 A defence of truth may also be required under the ECHR.[56] In *Castells v Spain*,[57] the applicant had published an article critical of the Spanish Government and was convicted and sentenced for insulting the Government. During the domestic proceedings, the Spanish court held that evidence of the truth of allegations made by the applicant was inadmissible. The ECtHR held that the inadmissibility of evidence of truth violated Article 10 of the ECHR. This suggests that a defence of truth is required in order to comply with Article 10 of the ECHR.

[53] *Ibid.*
[54] McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional Limited 2013) at 1296.
[55] Section 26 of the *Defamation Act 2009*.
[56] Cram (ed), *Borrie and Lowe: The Law of Contempt*, 4th ed (LexisNexis 2010) at paragraphs 11-22-11-23 cited in Law Commission for England and Wales, *Contempt of Court: Scandalising the Court. A Consultation Paper* (No 209 2012) at paragraph 38.
[57] (1992) 14 EHRR 445.

QUESTION 4

4(a) Should the offence of scandalising the court be retained or abolished?

4(b) If retained, how should the offence be defined?

4(c) If retained, what fault element (*mens rea*), if any, should apply?

i. If a fault element should apply, should such fault element comprise "intentionally, knowingly or recklessly"?

ii. If a fault element should not apply, should contempt of court be a strict liability offence (subject to a defence of due diligence or reasonable precautions) or an offence of absolute liability (without any defence of due diligence or reasonable precautions)?

4(d) If retained, what statutory defences, if any, should apply?

Please type your comments (if any)

ISSUE 5

SUB JUDICE CONTEMPT/ CONTEMPT IN CONNECTION WITH PENDING PROCEEDINGS

5.1 Overview

5.01 "*Sub judice* contempt", or contempt in connection with pending proceedings, relates to publications concerning pending proceedings that are intended to interfere with the administration of justice. In *DPP v Independent Newspapers (Irl) Ltd*,[1] the Supreme Court (Dunne J) explained that the test for *sub judice* contempt is whether the material published was intended to interfere with the administration of justice, or created the perception of such interference. It is not necessary to show that this interference has actually occurred.[2] The question is whether there is a real risk that the accused will not receive a fair trial following the publication in question.[3]

5.02 *Sub judice* contempt developed as another means to protect the administration of justice, by preventing a "trial by media". The media should not attempt to "prejudge" the issues in a certain case in a way that would influence would-be witnesses or jurors.[4] Fair procedures must be applied in criminal proceedings and this means that the jury should reach its verdict on the basis of the evidence admitted at the trial and not by reference to statements or opinions published by the media.[5]

5.03 As with other areas of the law of contempt, the law of *sub judice* contempt is entirely common law. Therefore, the same types of difficulties arise under this heading as were noted in earlier sections, such as uncertainty as to the nature of the offence and issues concerning freedom of expression. The main difficulties with the current Irish law on *sub judice* contempt are as follows:

[1] [2005] IEHC 353, [2006] 1 IR 366 at paragraph 34.
[2] *Kelly v O'Neill* [1999] IESC 81, [2000] 1 IR 354, at 374-375.
[3] *Ibid* at 367.
[4] *Attorney-General for England and Wales v Times Newspapers Ltd* [1974] AC 273 at 300.
[5] *Kelly v O'Neill* [1999] IESC 81, [2000] 1 IR 354, at 367.

5.2 Problems with the law on *sub judice* contempt

5.2.1 Freedom of Expression

5.04 Concern is often expressed that the imposition of liability for *sub judice* contempt infringes the right to freedom of expression. In *Sunday Times Ltd v United Kingdom*,[6] the ECtHR held that an injunction granted to prevent an asserted *sub judice* contempt and which restricted freedom of expression did not correspond to a sufficiently pressing social need to outweigh the public interest in freedom of expression. The *Sunday Times* newspaper had published an article concerning the drug Thalidomide, which strongly asserted that its manufacturers were aware of the risks it posed to pregnant women (and their unborn children) to whom it might be prescribed for morning sickness. At the time the article was published, multiple civil claims in negligence for product liability related to Thalidomide were pending before the English courts (these were later settled by the manufacturer). The Attorney-General for England and Wales applied for, and obtained, injunctions preventing publication of further articles by the *Sunday Times*, its editor and the journalists who had written the article. The Attorney-General also prosecuted the newspapers and its editor and journalists for *sub judice* contempt. On appeal, the UK House of Lords held, by a 3-2 majority that the articles were in contempt of court and that their publication was not justified by a defence referable to freedom of expression (the minority considered that publication was justified on these grounds). The ECtHR disagreed and held that the injunction comprised a violation of Article 10 of the ECHR.[7] The ECtHR noted that Article 10 ECHR not only guarantees the freedom of the press to inform the public of certain matters but also the right of the public to be properly informed.

5.05 The right to freedom of expression is also protected by Article 40.6.1° of the Constitution of Ireland. This right is not absolute, however, and is subject to limitation. For example, the right may be restricted so as to uphold the right to a fair trial of an accused person and to protect the administration of justice. In cases where a prejudicial publication has been made, this clearly has the potential to impede an accused person's right to a fair trial. Therefore, it may be necessary to restrict the right to freedom of expression so as to protect the right to a fair trial and to maintain the administration of justice. Freedom of the press can, however, only be restricted where this is necessary for the administration of justice.[8]

[6] (1979-80) 2 EHRR 245.
[7] *Ibid* at paragraphs 65-66.
[8] *Cullen v Toibín* [1984] ILRM 577 at 582.

Case Study 7: *Cullen v Toibín* [1984] ILRM 577

In this case, the Supreme Court allowed *Magill* magazine to publish an article about a woman called Lyn Madden who had been a witness in the murder trial of a man, John Cullen. At the time of the proposed publication, John Cullen had lodged an appeal against his conviction for murder but the appeal had not yet been heard by the Court of Criminal Appeal. The Supreme Court held that the publication of the article was unlikely to prejudice judges of the Court of Criminal Appeal in their determination of pure issues of law. Although the Court was critical of the decision to publish the article, it noted that freedom of the press is guaranteed by the Constitution and so should only be curtailed where such action is necessary for the administration of justice.

5.06 In its 1991 Consultation Paper, the Commission considered that there was substantial empirical evidence to support the view that pre-trial publicity can cause significant prejudice among would-be jurors.[9] Against this, it could be argued that the "fade factor" may mitigate any such prejudice. As Smith notes, there is usually a significant lapse of time between the commission of an offence and the subsequent trial. This means that "any prejudicial publicity that might have surrounded the apprehension of offenders or the charging of named suspects will have been forgotten by those likely to have been affected by it, the potential members of a jury."[10] In *DPP v Independent Newspapers (Irl) Ltd*,[11] however, the Supreme Court held that the question of whether or not a contempt has been committed must be determined at the time of the publication and so the "fade factor" is not relevant in contempt cases. In that case, a man had appeared before the District Court on a charge of murder. The following day the *Evening Herald* published a story concerning the accused. The High Court (Dunne J) found that there was insufficient evidence to find the respondents guilty of contempt and the case was dismissed. The High Court found that the DPP had not shown that the articles gave rise to a real risk - as opposed to a mere possibility of a risk - of prejudice to the administration of justice. In so finding, the Court considered that the timing of the publication was an important factor. The Supreme Court held that the respondents were guilty of contempt. It held that the trial judge had erred in attaching significance to the "fade factor." The Supreme Court noted that the fade factor might be relevant in an application to prohibit a trial because of adverse publicity but it is not relevant factor in cases of contempt.

[9] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 295.
[10] Smith, "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 *Hong Kong Law Journal* 593, at 602.
[11] [2008] IESC 8, [2009] 2 ILRM 199, at 208, 210.

5.07 The finding in *DPP v Independent Newspapers (Irl) Ltd* accommodates the fact that material posted on the internet will remain accessible long after first published and so may not "fade" from public memory for very long.[12] On the other hand though, it could be argued that the risk arising from the existence of any such internet publications could be countered by appropriate judicial direction to the jury. Internet publications are addressed further later in this section.

5.08 Liability for *sub judice* contempt may also arise after a person has been convicted of an offence but prior to sentencing. In *Kelly v O'Neill*,[13] the Supreme Court held that, although the applicant had been found guilty of drugs related offences, he was still entitled to a trial in due course of law under Article 38.1 of the Constitution, and this included the sentencing stage of the trial.

Case Study 8: *Kelly v O'Neill* [2000] 1 IR 354

The applicant in this case had been convicted of drugs related offences but sentencing was postponed by the trial judge in order to examine probation reports. Prior to the sentencing hearing, *The Irish Times* newspaper published an article containing material that was not admissible in evidence before the court and that was prejudicial to the applicant. The Supreme Court held that *sub judice* contempt could be committed between the time a person is convicted of a crime and when they are sentenced by the trial judge. In these circumstances, the trial had not yet been concluded and so the administration of justice was continuing. The trial judge had stated that he had not, in fact, been influenced by the article but the Supreme Court noted that the accused may nonetheless have felt that the trial was unfair and might question the impartiality of the judge in these circumstances. In addition, the Supreme Court noted that *sub judice* contempt occurs where the material is intended to interfere with the administration of justice—it does not actually have to result in such interference. The Court therefore upheld the view that this constituted contempt and that any such publication should be prohibited until sentencing had concluded.

5.09 In *DPP v Independent Newspapers (Irl) Ltd*,[14] the Irish Independent published articles relating to a case concerning rape and sexual assault which contained matters which were not put in evidence before the trial court. At the time of the publication, the accused had been found guilty but had not yet been sentenced. The High Court (Dunne J) held that the publication of the material prejudicial to the accused after conviction but prior to sentencing amounted to *sub judice* contempt.

[12] See *Byrne v DPP* [2010] IEHC 382, [2010] 2 IR 461.
[13] [2000] 1 IR 354.
[14] [2005] IEHC 353, [2006] 1 IR 366.

5.2.2 Other remedies available

5.10 The court has a number of powers available to it to counteract adverse pre-trial publicity. The existence of these alternative powers may mean that there is no need to maintain the separate offence of *sub judice* contempt. For example, in order to mitigate prejudice to a trial, a court may change the venue of the trial or postpone or adjourn proceedings. The court also has the power to discharge a jury or individual juror if he or she considers this necessary in the interests of justice.[15] The court may also impose restrictions on contemporaneous reporting of proceedings. In addition, it will sometimes be possible to counter the prejudice caused by a certain publication through judicial direction to the jury.[16] Some of these alternative remedies are discussed later.

5.3 Commission Recommendations in 1994

5.11 In its 1994 Report, the Commission considered that the offence of *sub judice* contempt should be retained in order to protect the interests of justice but that improvements could be made to the existing offence. It recommended that the meaning of "publication" in the context of *sub judice* contempt should be defined in legislation to cover any speech, writing, broadcast, or other communication which is addressed to the public at large or to a section of the public or to a judge or juror who is involved in the legal proceedings to which the publication relates.[17]

5.12 The Commission also recommended that a statutory offence of *sub judice* contempt should be created to apply to any publication that creates a substantial risk that the course of justice in the proceedings in question may be impeded or prejudiced. It recommended that the relevant legislation should include a list of statements that are capable of constituting such a substantial risk. The Commission recommended that liability should apply to publications concerning both "active" and (in certain circumstances) "imminent" proceedings. The Commission also recommended that negligence should form the basis of liability, that a defence of reasonable necessity to publish should exist, and that the courts should have the power to order the postponement of publication of any report of proceedings where this appears necessary to avoid a substantial risk of prejudice to the administration of justice.[18]

5.13 The suitability of each element of this proposed statutory offence is considered below.

5.3.1 Definition of "Publication"

5.14 The definition of "publication" put forward by the Commission in its 1994 Report was modelled on section 2(1) of the English *Contempt of Court Act 1981*. It is, therefore, useful to examine the review of this definition conducted in 2013 by the English Law

[15] Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC CP4-1991) at 295-303.
[16] *Irish Times Ltd v Ireland* [1998] 1 IR 359.
[17] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 33, 35.
[18] *Ibid* at 35-37.

Commission.[19] The English Law Commission was satisfied that the definition of "publication" was not in need of any modification. It felt that that the definition was wide enough to cover digital and online media (including social media posts) and that there was no need for a separate statutory definition of whether a communication is "addressed to the public at large or any section of the public" as this should be determined on a case-by-case basis. The English Law Commission endorsed the decision of the English Court of Appeal in *R v Sheppard*[20] that making material generally accessible to the public was sufficient to satisfy the definition in section 2(1) of the English 1981 Act.

5.3.2 Test: Substantial risk of prejudice with list of illustrative statements capable of amounting to *sub judice* contempt

5.15 As noted above, the Commission recommended in 1994 that the test for *sub judice* contempt should be whether the publication creates a substantial risk that the course of justice in the proceedings in question may be impeded or prejudiced. It also recommended that the proposed contempt of court legislation should contain a list of illustrative statements capable of amounting to *sub judice* contempt to act as a guide for the media.[21] The Commission recommended that that this list should include statements to the effect that, or from which it could be reasonably inferred that:

- the accused is innocent or is guilty of the offence, or that the jury should acquit or should convict;
- the accused has one or more prior criminal convictions;
- the accused has committed or has been charged or is about to be charged with another offence, or is or has been suspected of committing another offence, or was or was not involved in an act, omission or event relating to the commission of the offence, or in conduct similar to the conduct involved in the offence;
- the accused has confessed to having committed the offence or has made an admission in relation to the offence;
- the accused has a good or bad character, either generally or in a particular respect;
- the accused, during the investigation into the offence, behaved in a manner from which it might be inferred that he or she was innocent or guilty of the offence;
- the accused, or any person likely to provide evidence at the trial (whether for the prosecution or the defence), is or is not likely to be a credible witness;

[19] Law Commission for England and Wales, *Report on Contempt of Court (1): Juror Misconduct and Internet Publications* (No 340 2013) at paragraphs 2.30-2.45.
[20] [2010] EWCA Crim 65, [2010] 1 WLR 2779.
[21] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 36.

- a document or thing to be adduced in evidence at the trial of the accused should or should not be accepted as being reliable;
- the prosecution has been undertaken for an improper motive.[22]

5.16 In England and Wales, the test for *sub judice* contempt in section 2(2) of the *Contempt of Court Act 1981* is that there is "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." Some commentators, such as Smith, have criticised this test on the basis that it sets too high a threshold.[23]

5.17 The 1981 Act also applies in Scotland and Northern Ireland. In Scotland, the term "substantial risk" has been interpreted to mean some risk, greater than a minimal one, that the proceedings will be seriously prejudiced.[24] This interpretation does not impose a very high threshold.[25]

5.18 In New Zealand, the test for "publication contempt"[26] is whether there is "a real risk" that the publication will interfere with the right to a fair trial.[27] In Australia, the common law test for contempt by publication is whether the publication has a "real and definite tendency to prejudice or embarrass" the proceedings.[28] This tendency is assessed objectively at the time of the publication but, similar to the current Irish approach, it does not matter whether the publication actually has this effect.

5.19 The New South Wales Law Reform Commission considered that an illustrative list of the types of statements that may give rise to liability for *sub judice* contempt would provide an educative function and would provide guidance to the media on the types of statements that are typically considered to be prejudicial. Ultimately, however, the New South Wales Law Reform Commission concluded that such a list would not be desirable. It felt that such a list would be inflexible and would complicate the assessment of liability unnecessarily.[29]

5.3.3 Time of publication: "active" and "imminent" proceedings

(i) "Active" and "imminent" proceedings

5.20 In *DPP v Independent Newspapers (Irl) Ltd*,[30] the *Irish Daily Star* and other newspapers run by the respondents published articles concerning a motor collision resulting in the death of the driver of the other vehicle. The newspaper articles made reference to the fact that the child defendants in this case were on bail on other

[22] *Ibid.* The Commission considered that it would be too difficult to draw up a similar list for publications concerning civil proceedings.
[23] Smith, "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 *Hong Kong Law Journal* 593, at 598.
[24] *HM Advocate v News Group Newspapers Ltd* 1989 SCCR 156 at 161F.
[25] *Stair Memorial Encyclopaedia*, "Contempt of Court" at paragraph 61.
[26] "Publication contempt" concerns publications that interfere in some way with the administration of justice. Publications interfering with the right to a fair trial are just one aspect of publication contempt.
[27] New Zealand Law Commission, *Issues Paper on Contempt in Modern New Zealand* (IP36 2014) at paragraph 4.9.
[28] *John Fairfax and Sons Pty Ltd v McRae* [1955] HCA 12, (1955) 93 CLR 351 at paragraph 25.
[29] New South Wales Law Reform Commission, *Report on Contempt by Publication* (No 100 2003) at paragraph 4.45.
[30] [2003] IEHC 624, [2003] 2 IR 367.

charges pending before the courts and variously gave details of their criminal records, published photographs of them and/or identified them by name. Some of the articles were published after the defendants had been arrested and detained, but before charges had been brought against them. Some articles were published after the charges had been brought. The DPP applied to the High Court for an order for the attachment of the respondents for contempt of court and for an injunction restraining them from further interfering with the integrity of the trial process. The High Court (Kelly J) held that the publication of material prejudicial to a fair trial prior to charges being brought against an accused person could not amount to a contempt of court. The Court found that, in order for liability for contempt to attach to publications made in respect of "imminent" proceedings, this would need to be set out in legislation.[31] Therefore, the newspapers were only guilty of contempt in respect of the articles published after the charges were brought.

5.21 In its 1994 Report, the Commission recommended that liability for *sub judice* contempt should apply to "active" proceedings. It recommended that criminal proceedings should be considered "active" from the time that "an initial step" has been taken until the conclusion of the matter. An "initial step" would be: arrest without warrant, the issue of a warrant for arrest, the issue of summons to appear, the service of an indictment or oral charge. The Commission also recommended that liability should extend to publications made where proceedings are "imminent." In making this recommendation, the Commission emphasised that it would only apply where "the publisher was actually aware of facts which, to the publisher's knowledge, render the publication certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in civil or criminal proceedings was certain or virtually certain."[32]

5.22 There are some potential dangers in imposing liability in respect of "imminent" proceedings. As the High Court noted in *DPP v Independent Newspapers (Irl) Ltd*,[33] extending liability to imminent proceedings would give rise to "huge uncertainty" and "undue cramping" of the freedom of the press. Similarly, the New South Wales Law Reform Commission noted that it would be difficult for the media to determine when proceedings would be considered "imminent" and this "would impose too severe a restriction on freedom of discussion."[34] In New South Wales, the publication of prejudicial material attracts liability for *sub judice* contempt if it has a tendency to prejudice legal proceedings that are "current" or "pending" at the time of publication. Proceedings are deemed to be "pending" from the time that a person is arrested for, or charged with, an offence.[35]

[31] *DPP v Independent Newspapers (Irl) Ltd* [2003] IEHC 624, [2003] 2 IR 367 at 395.
[32] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 37.
[33] [2003] IEHC 624, [2003] 2 IR 367 at 394.
[34] New South Wales Law Reform Commission, *Report on Contempt by Publication* (No 100 2003) at paragraph 7.9.
[35] *Ibid* at paragraph 3.10.

5.23 In England and Wales, Scotland, and Northern Ireland, contempt by publication arises where the proceedings in question are "active" at the time of the publication.[36] Section 6(c) of the *Contempt of Court Act 1981*, however, sets out that nothing in the 1981 Act "restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice." The English (Divisional) High Court applied section 6(c) in *Attorney-General for England and Wales v News Group Newspaper Plc*[37] to impose liability for a publication published in respect of "imminent" proceedings. Similarly, in *Attorney-General for England and Wales v Sport Newspapers Ltd*,[38] the (Divisional) High Court (Bingham LJ) was satisfied that liability for publication contempt could be imposed where proceedings were "imminent."

(ii) Publication as a continuing act

5.24 In its 1994 Report, the Commission did not consider whether the publication should be considered to be a continuing act. This is an important consideration because, if publication is a continuing act, a publisher could be found liable for *sub judice* contempt in circumstances where the material was first published lawfully—that is, prior to proceedings becoming active or imminent—but subsequently remains on the publisher's website or otherwise.[39]

5.25 In the Scottish case *HM Advocate v Beggs (No.2)*,[40] the High Court of Justiciary (Lord Osborne) held that a publication constitutes a continuing act that applies while the material is accessible on a website. Publication commences when the material first appears and ends when it is withdrawn. In that case, the Court was satisfied, however, that where material existed as part of an archive, it was less likely to come to the attention of a juror. The Court therefore found that contempt had not occurred in the case where the material had been published some time earlier (when proceedings were not active) but remained available on the internet.

5.26 In *R v Harwood*,[41] this approach was endorsed in England and Wales. Therefore, for the purpose of *sub judice* liability "it does not matter whether material was first published before or after proceedings became active."[42] Publication is also a continuing act in Australia. In *Digital News Media Pty Ltd v Mokbel*,[43] the Victoria Court of Appeal drew on the Scottish approach to find that, for the purpose of contempt of court, "publication" is a continuing act and so the material is published at every time and place that it is available to a juror or potential juror. The Court was satisfied, however, that an article which is stored in an archive and that can only be

[36] Section 2(3) of the *Contempt of Court Act 1981*.
[37] [1989] QB 110.
[38] [1992] 1 All ER 503.
[39] In Irish defamation law, "publication" in respect of internet publications has been interpreted to occur "each time the site in question is accessed by a party." McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional Limited 2013) at 1250.
[40] 2002 SLT 139.
[41] [2012] EW Misc 27 (CC) at paragraph 37.
[42] Law Commission for England and Wales, *Report on Contempt of Court (1): Juror Misconduct and Internet Publications* (No 340 2013) at paragraph 2.127.
[43] [2010] VSCA 51.

found through a specific search (as opposed to being linked from the homepage of a media site), will not normally cause prejudice to a trial (because juries are directed not to engage in internet searches).

5.27 In 2012, the English Law Commission examined the issue of whether a publication should constitute a continuing act. It considered that there was no sound basis for criminal liability to attach to conduct that was lawful when first undertaken.[44] It also noted that the continuing act concept would mean that publishers would have to "continuously monitor their internet archive in order to ensure that proceedings have not become active since first publication of the material." This could be an expensive and time consuming requirement and so may not be a proportionate restriction of publishers' rights under Article 10 of the ECHR. The English Law Commission recommended that publishers should not be liable for publications first appearing before proceedings were active unless put on formal notice by the Attorney-General for England and Wales that the publication poses a substantial risk of serious prejudice or impediment.[45]

5.3.4 Fault element (*mens rea*)

5.28 The Commission proposed that negligence should form the basis of liability for *sub judice* contempt. By contrast, in England and Wales, Scotland and Northern Ireland, the strict liability rule imposes liability for *sub judice* contempt on those who publish material that has the effect of creating a substantial risk of serious prejudice to active legal proceedings. As liability is strict, it arises irrespective of whether the publisher was aware that the publication would create a substantial risk of serious prejudice or whether she or he intended the publication to create such prejudice.

5.29 In New Zealand, liability for contempt by publication arises where the person intends to publish the material—there is no requirement that he or she must have intended to prejudice the proceedings in question nor does he or she have to have known that the publication contained offensive material.[46] Similarly, in Australia, "the prosecution need prove only intent to publish the material; there is no need to show that the defendant even knew the relevant proceedings were on foot, let alone harboured any intent or recklessness in relation to prejudicing them."[47]

5.3.5 Defences

5.30 In its 1994 Report, the Commission did not consider that a specific defence to a charge of *sub judice* contempt should arise simply because the publication is deemed to be in the public interest. Instead, it recommended that a defence of reasonable

[44] Law Commission for England and Wales, *Report on Contempt of Court (1): Juror Misconduct and Internet Publications* (No 340 2013) at paragraph 2.129.
[45] *Ibid* at paragraph 2.130.
[46] Law Commission for England and Wales, *Contempt of Court. Appendix C: Contempt in overseas jurisdictions* (No 209 2012) at paragraphs C 64-C 66.
[47] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 16.

necessity to publish should apply.[48] This defence would allow for discretion in its application to protect certain publications made in the public interest. The *Defamation Act 2009* provides for a defence of fair and reasonable publication on a matter of public interest in the context of defamation law.[49]

5.31 In England and Wales, Scotland, and Northern Ireland, section 3(1) of the *Contempt of Court Act 1981* provides a defence of innocent publication where a publisher, having taken reasonable care, did not know or have reason to believe that proceedings were active at the time of publication, or where a distributor, having taken reasonable care, did not know or have reason to believe that the publication contained matters creating the risk of serious prejudice. In addition, section 4(1) of the 1981 Act provides that a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith does not amount to a contempt of court under the strict liability rule. Under section 5 of the 1981 Act, the strict liability rule does not apply to a publication made as, or as part of, a discussion in good faith of public affairs where the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

5.32 In Western Australia, there are two existing common law defences to *sub judice* contempt: fair and accurate reporting of proceedings and discussion in the public interest. In its review of this area, the Law Reform Commission of Western Australia recommended that these defences should be placed on a statutory footing and also recommended that new defences to *sub judice* contempt should be developed.[50] It recommended that it should be a defence to a charge of *sub judice* contempt that a person did not know a fact that caused the publication to breach the *sub judice* rule and, prior to publication, took all reasonable steps to ascertain all such facts.[51]

5.33 In light of the decision of the ECtHR in *Sunday Times Ltd v United Kingdom*,[52] it could be argued that a defence of public interest is required in cases of *sub judice* contempt in order to comply with Article 10 of the ECHR. In that case, the ECtHR noted that the subject matter of the banned articles – the enormous damage to human health arising from thalidomide –was "of undisputed public concern."[53] The public was found to have "a vital interest" in knowing all of the underlying facts and in discovering where responsibility for this public health catastrophe should lie. In these circumstances, the Court could not identify a pressing social need sufficient to outweigh the public interest in freedom of expression. This emphasis on the public interest may require that a defence of public interest should apply in cases of *sub judice* contempt so as to comply with the ECHR. Publishers must be able to bring certain information to the attention of the public and so it could be argued that a

[48] Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) at 41.
[49] Section 26 of the *Defamation Act 2009*.
[50] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 37-41.
[51] *Ibid* at 37.
[52] (1979-80) 2 EHRR 245.
[53] *Ibid* at paragraph 66.

defence of public interest should exist to allow them to do so even where the potential publication would prejudice proceedings.

5.3.6 Power to postpone publication

5.34 There are many situations where it may be necessary to ban the publication of certain information in the interests of justice. For example, this may be required to protect the identity of a witness or to protect a trade secret.[54] In Ireland, the courts currently have the power to impose restrictions on contemporaneous reporting of proceedings by the media. The Supreme Court considered the extent of this power in *Irish Times Ltd v Ireland*.[55] In this case, a Circuit Court judge had made an order banning contemporaneous reporting of the criminal trial before him, which involved one of the largest ever prosecutions for importation of drugs. The applicants brought judicial review proceedings in respect of this order. This was dismissed by the High Court but allowed upon appeal to the Supreme Court.

5.35 The Supreme Court noted that Article 34.1 of the Constitution requires that justice is administered in public. This means that the public are entitled to be informed of proceedings and to be given a fair and accurate account of such proceedings. The Court observed that this right is not absolute, however, and may be limited by reference to the right of an accused person to receive a fair trial. The Court was satisfied that it was only in exceptional circumstances that the fair and accurate reporting in or by the media of proceedings would prejudice the accused's right to a fair trial or compromise the proper administration of justice.[56] It found that the correct test to be applied in deciding whether to impose a ban on reporting in a given case was to consider whether there is a real risk of an unfair trial if reporting is allowed and whether such risk could not be remedied though appropriate judicial direction to the jury. On the facts of the case before it, the Supreme Court held that there was no evidence before the Circuit Court Judge to suggest that that there was a real risk of an unfair trial if contemporaneous reporting of the trial was permitted. The Court therefore held that the trial judge was not entitled to assume that such reporting would be anything other than fair and accurate.[57]

5.36 In its 1994 Report, the Commission recommended that the courts should have a power, along the lines of section 4(2) of the English *Contempt of Court Act 1981*, to order the postponement of publication of any report of its proceedings where this is necessary to avoid a substantial risk of prejudice to the administration of justice.

5.37 In England and Wales, one problem noted as arising under section 4(2) of the 1981 Act is that it is difficult to know whether an order has been made under that section. This uncertainty creates a risk that the order will be breached simply because a publisher is not aware of it.[58] The English Law Commission considered that this may

[54] Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (No 93 2003) at 47.
[55] [1998] 1 IR 359.
[56] *Irish Times Ltd v Ireland* [1998] 1 IR 359 at 386.
[57] *Ibid* at 387.
[58] Law Commission for England and Wales, *Report on Contempt of Court (2): Court Reporting* (No 344 2014) at paragraph 2.51.

breach Article 7 of the ECHR, which provides that there can be no punishment arising from an unclear or unknown law, if the media are unable to regulate their conduct because they cannot find out what their legal obligations are.[59] The English Law Commission noted that this difficulty had been overcome in Scotland through the creation of an online list of all section 4(2) orders.[60] It recommended that a publicly accessible online list of section 4(2) orders in force should also be introduced in England and Wales to overcome the problems identified with the current system.[61] A similar recommendation was made by the New South Wales Law Reform Commission in 2003.[62]

5.3.7 Suppression orders/ Removal of content from a website

5.38 In the Australian case *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim*,[63] the New South Wales Court of Criminal Appeal held that the court has the power to make a suppression order directing a particular internet content host to remove content from a website, but stated that such an order will not be made where it will be ineffective such as in a situation where the content is accessible elsewhere. In *R v Perish*,[64] the New South Wales Supreme Court held that a suppression order could be made in circumstances where it is not possible to remove all offending material from the internet, but where the order will make access to the prejudicial material more difficult.

5.39 In Ireland, in *Byrne v DPP*,[65] the High Court held that there is no duty on the Director of Public Prosecutions to monitor the internet in order to deal with publications that may prejudice active proceedings. The Court noted that a trial may be prohibited where there is a real and substantial risk of an unfair trial due to either delay in prosecution or adverse publicity.[66] However, the Court found that juries can be trusted to exclude any prejudicial publications from their minds where appropriate directions are given to them. The Court noted that juries take their role seriously and regard it as "an important and elevated public function."[67]

[59] *Ibid* at paragraph 3.2.
[60] See: http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders (Last accessed: 18/04/2016).
[61] Law Commission for England and Wales, *Report on Contempt of Court (2): Court Reporting* (No 344 2014) at paragraph 6.1.
[62] The New South Wales Law Reform Commission recommended that when a court makes a suppression order, the terms of that order are to be posted on the court's web page within a specified period of time. New South Wales Law Reform Commission, *Report on Contempt by Publication* (No 100 2003) at 390.
[63] [2012] NSWCCA 125.
[64] [2011] NSWSC 1102.
[65] [2010] IEHC 382, [2010] 2 IR 461 at paragraph 37.
[66] *Ibid* at paragraph 12.
[67] *Ibid* at paragraph 35.

QUESTION 5

5(a) In respect of *sub judice* contempt, is the test of "substantial risk of prejudice" a suitable test to determine whether the offence has been committed?

5(b) Should the offence extend to "imminent" proceedings, that is before a charge has been brought against a person (see paragraph 5.3.3)?

5(c) Should publication be regarded as a continuing act (see paragraph 5.3.3)?

5(d) To what extent should *sub judice* apply, in respect of criminal proceedings, between the time of conviction and sentence, and in relation to a pending appeal?

5(e) What fault element (*mens rea*), if any, should apply in cases of *sub judice* contempt?

i. If a fault element should apply, should such fault element comprise "intentionally, knowingly or recklessly"?

ii. If a fault element should not apply, should contempt of court be a strict liability offence (subject to a defence of due diligence or reasonable precautions) or an offence of absolute liability (without any defence of due diligence or reasonable precautions)?

5(f) Should an online database be created setting out the cases which are subject to orders restricting reporting?

5(g) Should it be possible for a court to order that certain material is removed from an internet website?

Please type your comments (if any)

ISSUE 6

MAINTENANCE AND CchamperTY

6.1 Overview

6.01 The crime, and tort, of maintenance occurs where a third party supports litigation without just cause. Champerty is an "aggravated form" of maintenance where the third party supports litigation without just cause in return for a share of the proceeds.[1] It is difficult to identify the precise origins of maintenance and champerty but, as was noted by the UK House of Lords in *Giles v Thompson*,[2] the crimes were much used in medieval times to protect the administration of justice. In medieval times, "doubtful or fraudulent" claims were often assigned to royal officials, nobles or other persons of wealth and influence who would typically receive a very sympathetic hearing in the court proceedings. The person to whom the claim was assigned would bring a civil action at his own expense and the recovered damages would then be shared with the person who had assigned the claim.[3] The crimes and torts of maintenance and champerty developed to deal with this abuse.

6.02 In *Giles*, Lord Mustill noted that both maintenance and champerty had become "almost invisible" in the UK by the 1990s and, in practice, had been applied in only two respects: as a rule of professional conduct to preclude the use of contingency fee agreements and to prevent the assignment of a cause of action to a person with no legitimate interest in that action.[4]

6.03 In 1966, the English Law Commission had found that maintenance and champerty were a "dead letter" in English law. The English Law Commission considered that maintenance and champerty were "ancient and unused misdemeanours" and "ancient and virtually useless torts" which should be "consigned to the museum of legal history."[5] The English Law Commission considered, however, that champerty continued to play a necessary role in prohibiting contingency fee agreements.[6] Ultimately, it recommended that the crimes and torts of maintenance and champerty should be abolished but that champertous agreements (such as contingency fee arrangements between solicitor and client) should continue to be unlawful as contrary to public policy.[7]

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[1] *Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy & Co. Solicitors (No.2)* [2014] IEHC 314, [2014] 6 JIC 0503, at paragraph 10.
[2] [1994] 1 AC 142, at 153.
[3] *Ibid* at 328.
[4] *Ibid* at 153.
[5] Law Commission for England and Wales, *Proposals for the Reform of the Law Relating to Maintenance and Champerty (*No 7 1966) at paragraph 16.
[6] *Ibid.*
[7] *Ibid* at paragraph 20.

6.04 Following these recommendations, sections 13 and 14 of the *Criminal Law Act 1967* abolished the crimes and torts of maintenance and champerty in England and Wales. The main purpose of the 1967 Act was to abolish the common law distinction between felony and misdemeanour and to replace felony with the concept of arrestable offence. In Ireland, the *Criminal Law Act 1997* also abolished the distinction between felony and misdemeanour and provided for the concept of arrestable offence, but the 1997 Act did not deal with maintenance or champerty.

6.05 Section 14(2) of the English 1967 Act provides that a contract may still be unenforceable on public policy grounds where maintenance or champerty is found. Conditional fee agreements are, however, permitted in certain circumstances by section 58 of the English *Courts and Legal Services Act 1990*, as amended by section 27 of the *Access to Justice Act 1999*. A conditional fee agreement is defined in the 1990 Act as an agreement with a person providing advocacy or litigation services which provides for his or her fees and expenses, or any part of them, to be payable only in specified circumstances.[8] Under this type of agreement, if a case is lost, the client will pay either no fee or a reduced fee, to the legal representative. The client may, however, still be liable for the other party's costs if the case is unsuccessful. The conditional fee cannot be set as a percentage of the damages to be recovered, but "success fees" are allowed in recognition of the risk of non-payment or under-payment which is taken by the lawyer. A success fee is one that is increased, in specified circumstances, above the amount that would normally be payable and is recoverable from the successful client.[9]

6.06 Conditional fee agreements are only permitted in circumstances where the statutory criteria are adhered to. Where those conditions are not met, the agreement is unenforceable. In *Awwad v Geraghty & Co*,[10] for example, the English Court of Appeal held that the conditional fee agreement in question was unenforceable as contrary to public policy because it set out that a normal hourly rate would apply if the client was successful but that a lower rate would apply if unsuccessful. This condition did not meet the statutory criteria.

6.07 However, in *Sibthorpe v Southwark London Borough Council*,[11] the English Court of Appeal held that an agreement by a solicitor to indemnify his client in the event of the case being lost, although falling outside of the section 58 criteria, did not constitute champerty. The Court found that no case had been cited to support the view that it was champertous for a person to risk making a loss if the action failed without making any gain if it succeeded.[12] It noted that champerty involves the making of a gain and so concluded that the Court would be extending the law of champerty if it

[8] Section 58 of the *Courts and Legal Services Act 1990*, as inserted by section 27 of the *Access to Justice Act 1999*.

[9] Sections 58 and 58A of the *Courts and Legal Services Act 1990*, as amended by section 44 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. The success fee is calculated in accordance with the *Conditional Fee Agreements Order 2013* (S.I. No. 689 of 2013) which sets the maximum success fee percentage at 100% of the lawyer's fee.

[10] [2001] QB 570; [2000] 1 All ER 608.

[11] [2011] 1 WLR 2111, [2011] EWCA Civ 25.

[12] *Sibthorpe v Southwark LBC*; *Morris v Southwark LBC* [2011] 1 WLR 2111, [2011] EWCA Civ 25 at paragraph 43.

was to find that the agreement before it was champertous.[13] The Court highlighted the need to make justice accessible to all and concluded that, by taking on the risk of a loss, the solicitor could not be said to have acted contrary to public policy.[14]

6.08 "Damages-based agreements" are also permitted in England and Wales under section 58AA of the *Courts and Legal Services Act 1990*, as amended by section 45 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. A damages-based agreement is a type of contingency fee agreement which allows the lawyer's fee to be determined as a percentage of the compensation recovered by the client. Such agreements were made possible in England and Wales following the recommendations of the *Jackson Report*.[15] The *Jackson Report*, however, recommended that clients should be required to receive independent legal advice before entering into a damages-based agreement,[16] but that recommendation was not implemented in the 2012 Act.

6.09 Many Australian States have also abolished the torts and crimes of maintenance and champerty. In Victoria, for example, maintenance and champerty were abolished as torts by the *Abolition of Obsolete Offences Act 1969*, but abolition was accompanied by a provision, copied from section 14(2) of the English *Criminal Law Act 1967*, setting out that champertous agreements remain contrary to public policy. In Victoria, the *Legal Practice Act 1996* allows for conditional costs agreements to be created in certain circumstances. These agreements allow for liability for some or all costs to be contingent on the success of litigation. Similar to England and Wales, fees calculated as a percentage of the recovered amount are not permitted and conditional costs agreements are not permitted in family law cases.[17]

6.10 In New South Wales, maintenance and champerty were abolished by the *Maintenance, Champerty and Barratry Abolition Act 1993*. Section 6 of the 1993 Act also replicated section 14(2) of the English *Criminal Law Act 1967*.[18]

6.11 In South Australia, the torts of maintenance and champerty were abolished in 1992.[19] Section 42(6)(c) of the *Legal Practitioners Act* permits contingency fees subject to certain limitations imposed by the Law Society of South Australia. Under section 42(7) of that Act, the Supreme Court may also rescind or vary a contingency fee agreement "if it considers that any term of the agreement is not fair and reasonable."[20] The crimes and torts of maintenance and champerty were abolished in the Australian Capital Territory by sections 68 and 69 of the *Law Reform (Miscellaneous Provisions) Act 2002*.

[13] *Ibid* at paragraphs 43-44.
[14] *Ibid* at paragraph 49.
[15] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationary Office, 2010), Chapter 12.
[16] *Ibid* at Chapter 12, paragraph 4.10.
[17] New Zealand Law Commission, *Subsidising Litigation. A discussion paper* (No 43 2000) at paragraph 6.
[18] *Ibid* at paragraph 7.
[19] Schedule 11 of the *Criminal Law Consolidation Act 1935*, as inserted by section 10 of 35/1992.
[20] New Zealand Law Commission, *Subsidising Litigation. A discussion paper* (No 43 2000) at paragraph 8.

6.12 By contrast, champerty and maintenance continue to operate in New Zealand. In its review of the area, the New Zealand Law Commission favoured the retention of the torts of maintenance and champerty. The New Zealand Law Commission concluded that the torts are useful in certain situations, such as where "unruly corporations… employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be."[21] In addition, the New Zealand Law Commission did not believe that the abolition of the torts in England and Wales, Victoria, New South Wales and South Australia, had resulted in any "great simplification" of the law in those States.[22]

6.13 In Ireland, both maintenance and champerty continue to operate under the *Statute of Conspiracy (Maintenance and Champerty)* of unknown date (in the 14th century), the *Maintenance and Embracery Act 1540* and the *Maintenance and Embracery Act 1634*.[23] These Acts were retained by the *Statute Law Revision Act 2007* which repealed all public Acts enacted prior to 1922 with the exception of 1, 364 pre-1922 Acts that were specifically retained in Schedule 1 to the 2007 Act.

6.14 The *Maintenance and Embracery Act 1634* was enacted in Ireland to give effect to all statutes in force in England at the time concerning maintenance, champerty and embracery. Section 3 of the 1634 Act provides:

> "That no manner of person or persons, of what esteate, degree or condition soever he or they be, doe hereafter unlawfully maintaine or cause or procure any unlawful maintenance in any action, demaund, suite or complaint in any of the Kings courts of the chancery, castle-chamber, or elsewhere within this his Highnesse realme of Ireland… and also, that no person or persons of what estate, degree, or condition soever he or they be, doe hereafter unlawfully retaine for maintenance of any suit or plea any person or persons, or embrace any free-holders or jurors, or suborne any witnesses by letters, rewards, promises, or any other sinister labour or means for to maintaine any matter or cause, or to the disturbance or hinderance of justice, or to the procurement or occasion of any manner of perjury by false verdict or otherwise in any manner of courts aforesaid."[24]

6.15 The *Statute Law Revision Act 2007* retained the 1634 Act because it was identified as forming part of the Commission's review of land law and conveyancing law.[25] The land law and conveyancing law project was, however, focused on the parts of the 1634 Act which restricted the buying, selling or otherwise obtaining of any "pretenced title" to land. The *Report on Reform and Modernisation of Land Law and Conveyancing Law 2005* recommended that sections 2, 4 and 6 of the 1634 Act be repealed without replacement and this was implemented by the *Land and*

[21] New Zealand Law Commission, *Subsidising Litigation* (No 72 2001) at 10.
[22] *Ibid* at 11.
[23] *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187.
[24] Section 3 of the *Maintenance and Embracery Act 1634*.
[25] Law Reform Commission, *Consultation Paper on the Reform and Modernisation of Irish Land Law and Conveyancing Law* (LRC CP34-2004); Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005)

Conveyancing Law Reform Act 2009. The Commission did not, however, examine the sections of the 1634 Act concerning maintenance and champerty.[26]

6.16 The appropriateness of retaining the 1634 Act in modern times has been addressed over the years. In *Browne v Fahy*,[27] for example, Kenny J criticised the continued operation of section 2 of the 1634 Act (which imposed restrictions on the buying and selling of title to lands) as being "totally inappropriate" to conditions in Ireland in 1975.[28] As noted above, that section was repealed by the *Land and Conveyancing Law Reform Act 2009.*

6.17 The retention of the torts and crimes of maintenance and champerty in Ireland affects a number of different areas ranging from the validity of so-called "heir-locator" agreements[29] to the legitimacy of professional third party funding of litigation.[30]

Case Study 9: *McElroy v Flynn* [1991] ILRM 294

The plaintiff in this case specialised in tracing next-of-kin in cases of intestacy (commonly called an "heir-locator"). He contacted the defendants to inform them that they might be entitled to a share in the estate of a woman who had died intestate in London. He offered to put forward a claim on their behalf in respect of this inheritance in return for a 25% share of the property recovered. The plaintiff lodged claims on behalf of the defendants but they subsequently discovered the identity of the deceased and informed the plaintiff that they were repudiating the agreements. They claimed that the agreements were champertous and therefore void. The High Court (Blayney J) held that the agreement was "in the nature of champerty" because it involved the plaintiff giving active assistance in the recovery of the defendants' claims and it gave the plaintiff a share of the property recovered. This was found to be contrary to public policy and void.

6.18 Conditional fee agreements, in the form of "deferred fee" agreements are, however, permitted under Irish law and the High Court has upheld the use of such agreements

[26] Law Reform Commission, *Consultation Paper on the Reform and Modernisation of Irish Land Law and Conveyancing Law* (LRC CP34-2004) at paragraph 8.26.
[27] High Court 24 October 1975.
[28] *Ibid* at 12-13.
[29] *McElroy v. Flynn* [1991] ILRM 294; *Fraser v Buckle* [1996] 2 ILRM 34.
[30] *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187.

on a number of occasions.[31] By contrast, *contingency fee* agreements (where the lawyer's fee is set as a percentage of the award of damages) are expressly prohibited in contentious business matters. Section 149 of the *Legal Services Regulation Act 2015* (replicating provisions in the *Solicitors Acts* which section 149 will replace) provides that a legal practitioner (defined to include both barristers and solicitors) shall not charge any amount in respect of legal costs if they are set as a specified percentage or proportion of any damages (or other moneys) that may be or become payable to his or her client.

6.19 Similar arguments can be made for and against the use of both conditional fee and contingency fee agreements.

6.2 Arguments for and against the use of conditional fee agreements and contingency fee agreements

6.20 In its *Discussion Paper on Subsidising Litigation*, the New Zealand Law Commission considered a number of arguments in favour of and against the use of deferred fee agreements.[32] The New Zealand Law Commission used the term "contingency fee agreement" to refer to all types of deferred fee agreement but it noted that there are various categories of such agreements and that the terminology in this area is not settled.[33] In the Report, the New Zealand Law Commission used the term "augmented fee arrangement." The main arguments identified by the New Zealand Law Commission are set out below:

6.21 "Contingency fee arrangements enable litigation that would not otherwise proceed."

The New Zealand Law Commission considered that this statement could be applied either in favour of or against the use of conditional fee agreements. On the one hand, an increase in litigation may be positive as it facilitates access to justice. On the other hand, the New Zealand Law Commission noted that an increase in litigation may not necessarily be in the public interest as the costs and time involved in litigation leads many defendants to settle claims, despite the availability of a good defence. Therefore, it could be claimed that "to allow contingency fees is to facilitate something akin to extortion by the institution of low merit claims against deep pocket clients."[34]

6.22 "An advocate's responsibility is to provide a client with disinterested advice"

If a lawyer's payment depends on the outcome of a claim, he or she may develop a personal interest in the litigation and it may be difficult to remain impartial. Even where the contingency fee agreement provides for no more than ordinary fees, this may lead to self-interest and bias. At the same time, the New Zealand Law Commission noted that lawyers regularly encounter and overcome conflicts between

[31] *McHugh v Keane* High Court 16 December 1994; *Synnott v Adekoya* [2010] IEHC 26.
[32] New Zealand Law Commission, *Subsidising Litigation. A discussion paper* (No 43 2000) at paragraph 15.
[33] *Ibid* at paragraph 1.
[34] *Ibid* at paragraph 15.

their personal interests and those of their client, for example, in advising on the acceptance or rejection of settlement proposals.[35] The lawyer's success in any matter will determine his or her future career prospects. The New Zealand Law Commission also noted that conflicts between duty and interest are common in other commercial contexts such as where a commission agent is entitled to a commission calculated as a percentage of the price.[36]

6.23 "There are situations in which an advocate's duty to the court and to the administration of justice overrides the advocate's duty to the advocate's client."

Lawyers are bound to adhere to an ethical code of conduct. It may be claimed that the lawyer would be tempted to breach such rules where he or she has a financial interest in the outcome of proceedings. Against this, the New Zealand Law Commission noted that there are many situations where a professional might be tempted to act improperly (insider trading, for example) in the hope of personal gain. It saw no reason to believe that a lawyer would be more likely to act improperly than persons in other professions.

6.24 "Contingency fees shift certain financial risks from litigant to lawyer. The lawyer is likely to increase the lawyer's fees to balance the assumption of such risks."

In response to this claim, the New Zealand Law Commission noted that the proportion of work done on a contingency basis is likely to be low such that "the feared economic consequences are unlikely."[37]

6.25 Ultimately, the New Zealand Law Commission recommended that "augmented fee agreements" should be permissible in certain circumstances.[38] The New Zealand Law Commission's recommendation for an augmented fee regime was subsequently implemented in New Zealand in section 334 of the *Lawyers and Conveyancers Act 2006.*

6.26 In the English case *Awwad v Geraghty & Co*,[39] the English Court of Appeal (Schiemann LJ) noted similar arguments for and against the use of conditional fee agreements. Some of the arguments noted in favour of such agreements were that:

- A conditional normal fee arrangement is of advantage to the client.
- The temptation to the lawyer to act improperly is less than it would be if the agreement was a contingent fee or conditional uplift agreement.
- A conditional fee agreement facilitates access to the courts by members of the public.

6.27 Against this, the Court noted that:

[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] New Zealand Law Commission, *Subsidising Litigation* (No 72 2001) at 23-24.
[39] [2001] QB 570, [2000] 1 All ER 608 at 588-589.

- The agreement may tempt the lawyer to act improperly.
- It is difficult to identify what would constitute a "normal fee" as some lawyers charge more than others as a matter of course.
- The use of conditional fees may lead lawyers to charge higher fees than normal to cover the costs of unsuccessful clients.

6.3 After-the-Event Insurance

6.28 After-the-event (ATE) insurance is a type of insurance policy taken out after a legal dispute has arisen that provides cover for the legal costs incurred in bringing or defending civil claims. ATE insurance premiums tend to be quite expensive. There is no statutory basis for this type of insurance in Ireland but the courts have upheld the use of such insurance. In *Greenclean Waste Management Ltd v Leahy (No.2)*,[40] for example, the High Court (Hogan J) upheld the validity of an ATE policy and found that such insurance does not constitute maintenance or champerty. In that case, the plaintiff, Greenclean, issued proceedings against the defendant solicitors for professional negligence. Following Greenclean's liquidation, the defendants brought an application for security for costs. Greenclean submitted that the Court should have regard to the fact that it held a policy of ATE insurance and treat that policy as sufficient security. The Court held that, subject to an undertaking by the insurer not to repudiate the contract under the prospects clause, the policy amounted to sufficient security. The defendant appealed to the Supreme Court and the matter was remitted to Hogan J to determine whether, as a matter of principle, ATE insurance is champertous, illegal or otherwise unenforceable in law.

6.29 The High Court observed that ATE is a relatively new form of insurance in Ireland. It noted that that this type of insurance involves some features of champerty as it allows the insurer to invest in litigation in return for a significant premium.[41] The Court found, however, that ATE insurance serves an important role in facilitating access to justice.[42] The Court was satisfied that ATE insurers do not simply invest or traffic in litigation—they also provide a legitimate service in facilitating access to justice and it held that ATE insurance is not on the whole champertous nor does it amount to maintenance.[43]

6.30 ATE insurance is also permitted in England and Wales. Following the *Jackson Report*, the ATE insurance premium is payable by the client and is no longer recoverable from the losing party.[44] The England and Wales Civil Justice Council has noted that it is sometimes necessary to combine a conditional fee agreement with ATE

[40] [2014] IEHC 314.
[41] *Ibid* at paragraph 26.
[42] *Ibid.*
[43] *Ibid* at paragraph 27.
[44] Section 58C of the *Courts and Legal Services Act 1990*, as inserted by section 46 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

insurance.[45] This is required because, although the conditional fee agreement will set out that either no fee, or a reduced fee, will be payable by the client in the event that the case is lost, the client will remain liable for the opposing party's costs. ATE insurance allows the client to cover the other party's costs in this situation.

6.4 Third Party Funding of Litigation

6.31 Third party funding of litigation is permissible in Ireland in circumstances where the funder has a legitimate interest in the proceedings. For example, in *Thema International Fund plc v HSBC Institutional Trust Services (Irl) Ltd*,[46] the High Court (Clarke J) held that a third party funder had sufficient connection to the plaintiff to take the funding outside of the scope of maintenance or champerty.

6.32 Litigation funding by a professional third party funder is not allowed in Ireland. In *Thema*, the High Court held that such funding is not permitted because maintenance and champerty remain part of the law.[47] Similarly, in *Persona Digital Telephony Ltd v Minister for Public Enterprise*,[48] the High Court held that professional third party funding of litigation is prohibited and is against public policy under the law of champerty. That case was the first to come before the courts in Ireland directly concerning the acceptability of professional third party litigation funding.

Case Study 10: *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187

In this case, the High Court (Donnelly J) noted that the laws of maintenance and champerty have been upheld by the courts on a number of occasions and have a "practical vibrancy" in this State. The Court also noted that the Oireachtas had retained three Acts concerning maintenance and champerty in Schedule 1 of the *Statute Law Revision Act 2007*. Although the retention of these Acts was "not determinative" of the issues, it was significant because it confirmed that the laws of maintenance and champerty continue to apply. The Court also found that it is well established in the case law that third party funding of litigation is prohibited in Ireland. This position could only be amended by an appellate court or by the Oireachtas. The High Court also considered arguments made by the plaintiff as to the constitutional right of access to the courts and accepted that the plaintiff would be unable to proceed with the litigation without the third party funding. The Court noted, however, that it had not been asked to examine the constitutionality of the offences and torts of maintenance and champerty and that no declaration of unconstitutionality had been sought.

[45] Civil Justice Council, *Improved Access to Justice –Funding Options & Proportionate Costs. The Future Funding of Litigation - Alternative Funding Structures. APENDIXES* (June, 2007).
[46] [2011] IEHC 357, [2011] 3 IR 654.
[47] *Ibid* at paragraphs 19-20.
[48] [2016] IEHC 187.

6.33 In light of the importance of providing access to justice, it is certainly arguable that legislation should be introduced to allow for third party funding of litigation by a person or body who does not have a legitimate interest in the proceedings. In the context of ATE insurance, the insurer does not have an independent interest in the litigation, but such insurance is nonetheless allowed and does not amount to maintenance or champerty. Arguably, the same considerations should apply in respect of third party funding of litigation by professional funders.

6.34 In England and Wales, third party funding of litigation is permitted by section 58B of the *Courts and Legal Services Act 1990*, as inserted by section 28 of the *Access to Justice Act 1999*. This type of funding is governed by a non-statutory *Code of Conduct for Litigation Funders* which was first published in November 2011[49] and revised in 2014.[50] This Code sets out standards of practice and behaviour to be observed by litigation funders who are members of the Association of Litigation Funders of England and Wales. There is no statutory regulation of third party funding and so this remains a system of self-regulation.[51] The *Jackson Report* concluded that statutory regulation of third party funding was not required but it acknowledged that if the use of this funding expands in the future, there may be a need for full statutory regulation.[52] In England and Wales, a particular concern in connection with third party funding is that funders sometimes influence, or attempt to influence, the direction of proceedings, for example through the selection of experts, or by trying to influence settlement discussions.[53]

6.35 Third party funding is also permitted in Australia and it has been recognised that such funding facilitates access to justice. In *Campbells Cash and Carry Ltd v Fostif Pty*,[54] the High Court of Australia held that a third party funding agreement did not constitute an abuse of process and was not contrary to public policy. That decision clarified a number of issues concerning third party funding of litigation in Australia such as "its legitimacy, the level of control exercised by third party funders, and what constitutes a legitimate representative opt-in action."[55]

[49] See: The Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (November 2011) < https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Code+of+Conduct+for+Litigation+Funders+(November+2011).pdf>

[50] The Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (January 2014) < http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf>

[51] Mulheron, "England's unique approach to the self regulation of third party funding: a critical analysis of recent developments" (2014) 73 *Cambridge Law Journal* 570.

[52] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (January 2010), Ch. 11, at 121, paragraph 2.12.

[53] Reyes, "Roundtable: Civil Litigation: Civil Unrest" (2016) 14 *Law Society Gazette* 11.

[54] [2006] HCA41.

[55] Civic Justice Council, *Improved Access to Justice –Funding Options & Proportionate Costs. The Future Funding of Litigation - Alternative Funding Structures* (June, 2007) at 59.

6.36 The Law Reform Commission of Hong Kong published a consultation paper in 2015 proposing that third party funding for arbitration should be permitted and should not be regarded as champerty or maintenance.[56]

[56] The Law Reform Commission of Hong Kong, Third Party Funding for Arbitration Sub-Committee, *Consultation Paper. Third Party Funding for Arbitration* (October 2015).

QUESTION 6

6(a) Should the crimes and torts of maintenance and champerty be retained or abolished: (a) as crimes; (b) as torts?

6(b) If the answer to 6(a) is that they should be abolished, should evidence that an agreement is champertous render it void?

6(c) Should damages-based/ contingency fee agreements be permitted?

6(d) Should there be express statutory provision for after-the-event (ATE) insurance?

6(e) Should third party funding of litigation be permitted? If so, in what circumstances?

6(f) If permitted, should third party funding be regulated by legislation or should it be subject to "self-regulation"?

Please type your comments (if any)

ISSUE 7
EMBRACERY

7.1 Overview

7.01 Embracery is an offence of corrupting or attempting to influence, other than through the evidence which is given in a courtroom, a member of the jury.[1] In *The People (DPP) v Walsh*,[2] the Court of Criminal Appeal noted that embracery has not arisen very often in practice but that it is still a serious offence which must be dealt with "very severely." The common law offence of embracery was abolished in England, Wales and Northern Ireland by section 17(1)(a) of the *Bribery Act 2010*. Prior to this, the English courts had tended to treat the offence of embracery as obsolete, preferring instead to rely on general offences relating to perverting or obstructing the course of justice or contempt of court.[3] In most Australian States, improper interference in the discharge of a juror's duty by threats or inducement is prohibited by statute.[4]

7.02 In *Walsh*, the appellant had been convicted of embracery but claimed that no such offence existed in Irish law. Although the Court of Criminal Appeal found it to be "somewhat surprising" that the offence is not defined in modern legislation, it held that embracery is an offence under Irish law.[5] The Court noted that in *In re MM and HM*,[6] the Supreme Court in 1933 had endorsed the definition of embracery set out by the English Court of Appeal in *R v Owen*[7] and had found that an interference or attempt to interfere with a jury was a very grave criminal offence.

7.03 In its 2013 *Report on Jury Service*, the Commission examined the offence of embracery in some detail. It noted that the offence was specifically referred to in section 49 of the *Juries (Ireland) Act 1871* but that it did not appear in either the *Juries Act 1927* or the *Juries Act 1976*. The Commission also noted that the two cases cited by the Court of Criminal Appeal in *Walsh* to support its conclusion that embracery remains an offence under Irish law could be cited in support of the opposite conclusion.[8] The Commission noted that in *In re MM and HM*, the Supreme Court had treated the conduct as contempt of court, rather than as embracery, suggesting that there was little support for the use of embracery even in 1933. The Commission also noted that in *R v Owen*, the second case cited in *Walsh*, the English

[1] *People (DPP) v Walsh* [2006] IECCA 40, [2009] 2 IR 1 at paragraph 1. Older authorities treat embracery as a type of maintenance. Law Commission for England and Wales, *Proposals for the Reform of the Law Relating to Maintenance and Champerty* (No 7 1966) at paragraph 6.
[2] [2006] IECCA 40, [2009] 2 IR 1 at paragraph 1.
[3] O'Malley, *The Criminal Process* (Round Hall 2009) at 837.
[4] *Halsbury's Laws of Australia*, at paragraph 140.
[5] [2006] IECCA 40, [2009] 2 IR 1 at paragraph 8.
[6] [1933] IR 299, at 323.
[7] [1976] 1 WLR 840.
[8] Law Reform Commission, *Report on Jury Service* (LRC 107-2013) at paragraph 7.07.

Court of Appeal had found that the offence of embracery was obsolete in England and Wales and that the conduct that it covered should instead be dealt with by way of a prosecution for contempt of court.[9]

7.04 The Commission observed that section 41 of the *Criminal Justice Act 1999* creates a statutory offence of intimidating certain persons connected with the administration of justice, including jurors and potential jurors. The Commission was satisfied that because the law in this area is a mixture of common law and statutory offences, it would be appropriate to introduce a single offence of interference, "applicable to conduct ranging from the persuasive to the menacing."[10] This single offence would include any elements of embracery that are not already included in the statutory intimidation offence created by section 41 of the *Criminal Justice Act 1999*. The proposed offence would also specifically state that it is to apply in connection with both civil and criminal proceedings. At present, section 41 of the 1999 Act would appear to apply in respect of criminal proceedings only. Section 38(1) of the draft *Juries Bill* in the 2013 Report incorporated this recommendation in the following terms:

> "Without prejudice to any provision made by any other enactment or rule of law, a person shall be guilty of an offence who (whether in or outside the State)—
>
> (a) with the intention of causing an investigation by the Garda Síochána of an offence or the course of justice to be obstructed, perverted or interfered with, harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, or a member of his or her family, or his or her civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, or
>
> (b) with the intention of causing the course of justice to be obstructed, perverted or interfered with, attempts to corrupt or influence or instruct a juror or potential juror (whether in connection with in a civil trial or a criminal trial) or attempts to incline the juror to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions."

7.05 The question arises, therefore as to whether the offence of embracery should be abolished and, if so, whether a single offence of interference with witnesses, jurors and other persons, along the lines of the Commission's recommendation in its 2013 Report, be introduced to replace the common law offence of embracery.

[9] Law Reform Commission, *Report on Jury Service* (LRC 107-2013) at paragraph 7.07.
[10] *Ibid* at paragraph 7.09.

QUESTION 7

7(a) Should the offence of embracery be abolished?

7(b) If so, should a single offence of interference with witnesses, jurors and other persons, along the lines of the Commission's recommendation in its 2013 *Report on Jury Service*, be introduced to replace the common law offence of embracery?

Please type your comments (if any)

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