THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 47-1994)

REPORT

ON

CONTEMPT OF COURT

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty six Reports containing proposals for the reform of the law. It has also published eleven Working Papers, eight Consultation Papers and Annual Reports. Details will be found on pp.77-81.

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NOTE

This Report was submitted on 15 September 1994 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination of and research in relation to Contempt of Court which was carried out by the Commission at the request of the former Attorney General, Mr John L. Murray S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments, the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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CHAPTER 1: INTRODUCTION

1.1 In January 1989 the then Attorney General pursuant to section 4(2)(c) of the Law Reform Commission Act, 1975, requested the Commission to undertake an examination of, and conduct research and formulate and submit to him proposals for reform of, the law of defamation and contempt of court. The Commission has already submitted Reports to the Attorney General on the two branches of the law of defamation, i.e. civil and criminal defamation. This Report contains our proposals on the second branch of the Attorney General's request, i.e. contempt of court.

1.2 In July 1991 we published a Consultation Paper which set out the existing law of contempt of court in detail and made tentative proposals for its reform. The publication of the Paper provoked much comment in the media and we received a number of submissions in relation to these proposals. A Seminar was held at the Commission's offices on 2nd November 1991 which was attended by judges, barristers, solicitors, academics and many representatives of the media and at which some of the more contentious areas dealt with in the Consultation Paper were discussed.

1.3 The Commission delayed publication of this Report pending the delivery and consideration of recent relevant judgments, e.g. in the various applications arising out of the proceedings of the Beef Tribunal.

1.4 We are grateful to those persons and bodies who assisted us in reaching our conclusions by furnishing submissions and participating in the Seminar. The Commission is, however, solely responsible for the contents of this Report.

CHAPTER 2: PRELIMINARY MATTERS

The Scope Of The Report

2.1 The administration of justice is assigned by the Constitution to the courts (Art. 34.1). Subject to the exceptions specifically permitted by Arts. 37.1 and 38.3 and 4 of the Constitution, justice is administered by judges who are independent in the exercise of their judicial functions (Arts. 34.1 and 35.2). In this Report we are concerned principally with the competence of the courts established in accordance with Art. 34 of the Constitution to ensure that court proceedings are conducted in such a way and under such conditions as not to imperil the due administration of justice. This is a competence which inheres in the courts by virtue of their judicial function, and the exercise of which has led to the development of a corpus of law known as contempt of court.

2.2 We should however mention that persons and bodies other than courts may exercise limited functions and powers of a judicial nature, in matters other than criminal matters. Specific provision is made in the Constitution for the exercise of such functions and powers (Art. 37.1), but there is considerable uncertainty as to which persons and bodies fall within this constitutionally-recognised category. Probable examples are the Censorship of Publications Board, the Employment Appeals Tribunal and social welfare appeals officers.[1]

2.3 We should also mention that persons and bodies other than courts may exercise quasi-judicial functions and powers; and that, in so far as their decisions affect the rights and liabilities of individuals, they are under a legal obligation to act judicially. No specific provision is made in the Constitution for the exercise of these functions and powers which are exercised in practice by a great number of persons and bodies and which are extremely diverse in nature. Some of these

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1 J. Casey queries whether the judicial power exercised by the Employment Appeals Tribunal is "limited" within the meaning of Art. 37.1: *Constitutional Law in Ireland* (2nd ed., 1992), p.215.

powers are essentially investigative, others disciplinary. Some are concerned with the awarding of compensation for injury, others with the allocation of State aid, and yet others with the licensing or regulation of private activities. The persons and bodies exercising these functions and powers derive their legal authority from a variety of sources. Some of them are private bodies whose powers are based on contract, others have been established by the executive within the administrative apparatus of the State, and others derive their powers from statute. The particular basis of the powers of such persons and bodies does not however afford a reliable guide as to the nature of their powers. Moreover, categorisation of these persons and bodies by function can be misleading since the same person or body may exercise a number of different functions and powers. Furthermore, the same person or body may exercise both quasi-judicial powers and limited functions and powers of a judicial nature within the meaning of Art. 37.1 of the Constitution.[2]

2.4 None of these persons and bodies, whether they exercise quasi-judicial functions and powers or limited functions and powers of a judicial nature, enjoy an inherent competence to police their own proceedings. Any competence they may possess in this regard derives from their particular legal basis and from the general law on trespass, powers of arrest, etc. As regards those persons and bodies which derive their powers from statute, it has been common for the relevant legislation to provide, by analogy with contempt of court, that interference with the proceedings of these persons and bodies or failure to comply with the lawful order of such person or body, shall be an offence.

2.5 It is beyond the scope of a report on contempt of court to study and assess the extent to which interference with the proceedings of all persons and bodies other than a judge or a court should be regulated by the civil or the criminal law. We will however give our views on the statutory penalisation, by explicit reference to contempt of court, of conduct which is obstructive of the proceedings of persons and bodies which exercise either quasi-judicial functions and powers or limited functions and powers of a judicial nature in other than criminal matters. We will also give our views on the extent to which the law should regulate interference with the proceedings of one particular type of investigative body. These are tribunals of inquiry, established in accordance with the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979. In so far as bodies which exercise quasi-judicial functions and powers lend themselves to any meaningful classification, tribunals of inquiry constitute a discrete category. They are unique among those bodies which derive their powers from statute in that they are treated generically by legislation whereas other bodies are addressed individually. Moreover, with the establishment in May 1991 of a tribunal to investigate allegations of illegal activities, fraud and malpractice in and in connection with the beef processing industry, public attention was drawn to the

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2 E.g. some of the powers conferred on the Minister for Local Government by the Local Government (Planning and Development) Act, 1963, were found by the High Court to constitute limited functions and powers of a judicial nature, while others were found to entail the taking of administrative decisions on matters of policy: *The Central Dublin Development Association and Others v. Attorney General* 109 I.L.T.R. 69.

operation of such tribunals; and the Tribunal of Inquiry into the Beef Processing Industry has been the object of much litigation as to the scope and nature of its powers. It is therefore timely that we should give our views on the desirability of the extension by analogy of the law on contempt of court to the proceedings of these tribunals.

The Nature And Scope Of Contempt Of Court

2.6 As the Consultation Paper demonstrated in detail, the present law of contempt of court is largely judge-made. It consists of decisions which give effect to a general principle that the courts have an inherent jurisdiction not dependent on any statute to ensure that the administration of justice is not obstructed and that court orders are obeyed.

2.7 This law draws a distinction between criminal contempt and civil contempt. Criminal contempt comprises contempt in the face of the court (*in facie curiae*), scandalising the court, breaches of the *sub judice* rule and other interferences with the administration of justice, such as threatening a witness. Civil contempt consists of defiance of a court order, whether by positive conduct or by the neglect or refusal to obey an injunction or other order of the court.

The Approach Of The Commission

2.8 The essential questions to be considered are whether it is (a) possible and (b) necessary to replace the existing common law structure of contempt of court with a new statutory scheme which would abolish the present concepts of criminal and civil contempt and replace them with a number of specific statutory offences. There may well be aspects of the law of contempt which could be reformed or clarified so as to render the law more "acceptable" in modern circumstances, but if the power to attach a person for contempt is an inherent power of the courts can one remove, curtail or vary that power or should one enact parallel legislation?

2.9 In considering these questions, we have constantly borne in mind what appear to us to be the paramount constitutional considerations which arise. First, there are the requirements as to the administration of justice which, under the Constitution, is entrusted to judges who are independent in the discharge of their functions.[3] There is secondly the requirement that justice be administered in public save in those special and exceptional cases permitted by law.[4] There is thirdly the constitutional acknowledgment of the right of freedom of expression and of communication of information.[5] In addition, we have borne in mind the requirements of Article 10 of the European Convention on Human Rights and the relevant judgments of the Commission and Court of Human Rights on that Article with particular reference to the requirement that restrictions placed on

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3 Arts. 34 and 35.2.
4 Art. 34.
5 Art. 40.6.1°i.

freedom of expression, which are designed to ensure the due administration of justice, shall be accessible, reasonably precise and necessary.

2.10 Public attention has naturally concentrated on those aspects of the subject where the law is seen as in potential conflict with freedom of expression, particularly the law relating to the *sub judice* rule, scandalising the court and the disclosure by journalists of their sources. Our inquiry and our proposals for reform have, however, extended to all aspects of the subject.

2.11 We first consider in this Report important questions of jurisdiction, including the respective roles of judge and jury in dealing with contempt. Secondly, we consider the various types of criminal contempt under the headings of contempt in the face of the court, scandalising, the *sub judice* rule and other acts which interfere with the course of justice. Thirdly, we consider the law relating to civil contempt. Finally, we consider the extension by analogy of the law on contempt of court to the proceedings of persons and bodies other than courts, in particular to the proceedings of tribunals of inquiry.

CHAPTER 3: JURISDICTION

The Inherent Jurisdiction Of The Courts

3.1 The courts have historically claimed an inherent competence to ensure that there is no undue interference with the judicial process and that court orders are obeyed. The resultant body of law, contempt of court, is therefore in origin a creation of the common law.

3.2 The Constitution has clearly had an impact on the law of contempt. Most importantly, the competence of the courts in this area must now be exercised with due regard to the constitutionally-protected fundamental rights of the individual, rights such as those relating to freedom of expression, personal liberty and fair procedures. In addition, there is reason to believe that the Constitution may have had a more extensive and more profound impact on the legal basis of contempt of court. While there is case law to the effect that the common law jurisdiction of the courts in this area has descended intact to the Irish courts under both the Constitution of the Irish Free State and the 1937 Constitution,[1] there is also some case law which suggests that the jurisdiction of the courts with respect to contempt now has a constitutional basis, deriving from the constitutionally-mandated role of the courts in relation to the administration of justice.[2] The extent to which the common law basis of the courts' jurisdiction in this area has been modified or replaced by the Constitution awaits some further judicial development and elucidation. However, on the basis of rulings which have already been clearly and unanimously made by the Supreme Court, over many years, the role of the legislature in reform of the law of contempt of

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1 See, e.g., *A.G. v. O'Kelly* [1928] I.R. 308 at 318 (per Sullivan P.) and 331 (per Hanna J.); *In re Earle* [1938] I.R. 485 at 493-4 (per Fitzgibbon J.); *A.G. v. Connolly* [1947] I.R. 213 at 219.

2 See, e.g., *A.G. v. O'Kelly* [1928] I.R 308 at 331 (per Hanna J.); *A.G. v. O'Ryan and Boyd* [1948] I.R. 70 at 86 (per Gavan Duffy J.); *A.G. v. Connolly* [1947] I.R. 213 at 223; *In re Haughey* [1971] I.R. 217 at 253; *State (Commins) v. Ryan* [1977] I.R. 78 at 88; *State (D.P.P.) v. Walsh and Conneely* [1981] I.R. 412 at 426 (per O'Higgins C.J.) and 440 (per Henchy J.).

court is restricted. Provided other constitutional requirements are met, there would appear to be no bar to legislative regulation of interference with the administration of justice where the legislation does not seek to limit or to replace the jurisdiction of the courts with respect to contempt of court.[3] However, we must state at the outset that the members of the Commission will divide between those who rule out any intereference with the inherent powers of the courts to attach summarily for contempt and those who wish to clarify and delimit such powers in legislation or remove them, as being unnecessary. The Commission will be unanimous when recommending clarification or alteration of the law relating to the common law misdemeanour of contempt, for public prosecution purposes.

The Circuit Court And District Court

3.3 We drew attention in the Consultation Paper to some degree of uncertainty that exists as to the jurisdiction of these courts in relation to criminal contempt. Both undoubtedly enjoyed a jurisdiction in regard to *in facie* contempt: beyond that, the position was less clear, and it was particularly uncertain whether the District Court's jurisdiction extended to such matters as the *sub judice* rule. While it was true that the High Court could exercise jurisdiction over contempts of inferior courts and it was also possible for the Director of Public Prosecutions to prosecute contempts of these types by means of indictment, we considered it wrong in principle that the Circuit Court and District Court should continue to be without a full contempt jurisdiction solely because of historical reasons which are no longer applicable, such as the fact that the personnel of some of those courts in former times had no legal qualifications.

We tentatively concluded that the Circuit Court and District Court should enjoy the same jurisdiction in relation to contempt as is presently enjoyed by the High Court. Clearly, any person charged with contempt of those courts should enjoy the same right, if any, to trial by jury as a person charged with contempt of the superior courts. *We confirm our provisional recommendation in this area* and consider in a later section of this chapter the question as to the circumstances in which such a right to trial by jury will be enjoyed.

3.4 As regards civil contempt, we were also of the view that the District Court and Circuit Court should in general have the same powers as the High Court. We were, however, somewhat concerned with the sanction of fines in those courts. As we have already mentioned, we favour a system under which the superior courts would have power to punish contempt of court by the imposition of a fine including, where appropriate, an accruing fine. In order to be fully effective the fine might in some cases have to be large, yet it might be thought that the District Court and Circuit Court should not have an unlimited jurisdiction in this respect.

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3 See, e.g., s.4 of the Offences against the State (Amendment) Act, 1972, and s.6 of the Family Law (Protection of Spouses and Children) Act, 1981.

3.5 Having considered the manner in which this problem has been dealt with in corresponding English legislation, we concluded that it would be desirable to introduce some limits to the fines which the District Court and Circuit Court may impose for civil contempt. We tentatively recommended that the District Court should have power to order a person in contempt to pay a sum not exceeding £200 for every day during which he or she is in default or a single fine of up to £5,000. The maximum amount a person ordered to pay a *per diem* sum should have to pay should also be £5,000. As regards the Circuit Court, we tentatively recommended that the appropriate maxima be £600 and £15,000.

While we said that views on these proposals would be particularly welcome, they did not provoke any widespread response. However, such reaction as there was favoured giving the courts increased powers to deal with civil contempt by means of fines. *We accordingly confirm our provisional recommendations.*

Appeals

3.6 As regards appeals from convictions for criminal contempt, we provisionally recommended that the machinery be the same as applies to all other indictable and summary offences. As regards appeals in cases of civil contempt, we provisionally recommended that these should be treated in the same way as appeals in other civil matters. *We confirm our provisional recommendations in this area.*

The Offence Of Contempt At Common Law

3.7 Contempt of court is a common law misdemeanour which can be prosecuted summarily or on indictment, by jury, at the election of the D.P.P. like any other such misdemeanour. The factor which distinguishes contempt from other offences is the power inherent in the courts to deal with any contempt offence, minor or non-minor, summarily, by way of attachment. The modern history of this power is examined in detail in Chapter 8 of the Consultation Paper.

3.8 Where the court itself declines to exercise its power of attachment, the field is left to the D.P.P. to prosecute or not as he or she sees fit. Indeed, as we noted in the Consultation Paper,[4] the High Court in *In Re McArthur*,[5] a case of prejudicial contempt, declined to attach and decided that it was "undesirable" for the accused himself to move for attachment while the D.P.P. was considering the matter.

3.9 While it is open to the legislature to modernise the *common law offence* of contempt, it cannot, in the view of a majority of the Commission, interfere with the court's inherent power of attachment, by legislation.

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4 At pp.188-9.
5 [1983] I.L.R.M. 355 (Costello J.).

The Respective Roles Of Judge And Jury

3.10 We discussed in detail in the Consultation Paper the problems that arise in this area having regard to the relevant provisions of the Constitution, as judicially interpreted, and we return to those questions more than once in the course of this Report.

3.11 The Commission provisionally concluded that the objections voiced by both O'Higgins C.J. and Henchy J., in *State (D.P.P.) v Walsh*,[6] to the assignment of the question as to whether contempt has been committed to a jury, were well founded. While we accepted that perverse acquittals in the mainstream of the criminal law are the price one pays for the existence of the jury system, it was quite another matter to extend that system to the area of contempt of court so as to enable juries to record perverse and unreviewable verdicts of condemnation on judicial decisions arrived at by judges appointed under the Constitution. Despite the strong objections voiced to that view, we have not been persuaded that we were wrong. In any event, whatever view may be taken of the desirability of changes in this area, the fact remains that the existing view of a majority of the Supreme Court, admittedly *obiter*, is that, while disputed issues of fact must be resolved by a jury, the question as to whether the proved facts amount to contempt must, under the Constitution, be decided by a judge. If the view of the minority of the Court is to be preferred, even the assignment of such disputed issues to a jury, save on a discretionary basis, is unconstitutional. On any view, accordingly a proposal which ended the summary jurisdiction of the superior courts in this area would run the risk of being found unconstitutional. We also remain of the view that the present law is not giving rise to any significant difficulties in practice.

3.12 *We accordingly confirm our tentative conclusion that, since the law is not giving rise to any urgent practical difficulties in this area, it should be left to the Supreme Court in an appropriate case to clarify the problems left unsolved by The State (D.P.P.) v Walsh.*

3.13 We also discussed in the Consultation Paper a separate question, i.e. whether legislation providing for jury trials in cases of alleged *civil contempt* would be constitutionally permissible. While the existing decisions had left that question unresolved (although they did establish that trial by jury was not *required* in such cases), we expressed the view that the tenor of the relevant decisions was such as to indicate that legislation removing the jurisdiction from the judges and placing it in the hands of juries would be constitutionally suspect. We accordingly provisionally recommended that there should be no change in this area also. *We confirm that recommendation.*

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6 [1981] I.R. 412.

CHAPTER 4: CONTEMPT IN THE FACE OF THE COURT

General

4.1 Our provisional recommendation was for no change relating to contempt in the face of the court. While this part of the Consultation Paper provoked little reaction, there was some support for the view that the law was unsatisfactory. This dissatisfaction was based on two principal arguments:

(1) that the offence is vague and ill-defined; and

(2) that it requires the judge to act, not merely as a judge, but also as a witness and prosecutor, in contravention of normal legal principles.

It was also suggested that although from the very nature of the offence it was quite probable that some persons committing it might be, to some extent, mentally disturbed, the judge in committing an offender to prison would have no real opportunity of determining his or her mental condition.

4.2 The Commissioners are divided between those who are satisfied that the courts have an inherent jurisdiction to attach for contempt which cannot be altered by legislation and those who believe that legislation is both appropriate and necessary to clarify the court's power in this area. The majority would acknowledge that the common law of contempt can be altered or codified by statute but that such legislation could not have or purport to have any effect on the court's inherent jurisdiction in the area. There are branches of the law of contempt where new legislation would be helpful, others where it would achieve little.

4.3 Contempt is an offence *sui generis*, within the inherent jurisdiction of the court as has been laid down consistently in decisions of the present and the former Supreme Court and High Court. The courts have the function of

ensuring that the administration of justice in the courts is adequately and appropriately protected. This function can be exercised effectively only if the courts retain their full powers to respond to and punish contempt in the face of the court.

4.4 All of the decisions on the subject have made it plain that courts have a summary power to deal with contempt in the face of the court where this is necessary, as a matter or urgency, to preserve the integrity of proceedings in progress. No decision of which the Commissioners are aware, suggests that the legislature would have any power to restrict or harness this inherent power.

4.5 Whereas the principles of natural justice require that no one should act as judge in his own cause, the cause in question in the context of contempt *in facie* is the proper administration of justice, a cause in which every citizen has an equal interest. The cause is not the judge's personal, exclusive, cause. If it is so considered, from any point of view, contempt *in facie*, an offence *sui generis*, must constitute an exception to the relevant principles of natural justice. In the *State (D.P.P.) v Walsh*[1] Henchy J. speaking for the majority of the Supreme Court stressed that when the Court was dealing summarily with contempt:

> "In both the factual and legal aspects of the hearing of the charge the elementary requirements of justice in the circumstances would have to be observed."

4.6 When the Commission recommends the creation of a new offence, this is usually in substitution for an existing offence, common law or statute, or the offence to be created is an entirely new one. The majority have no objection in principle to legislating in respect of prosecutions by the D.P.P. for contempt *in facie*, as provisionally recommended in the Consultation Paper. But in this instance, because of the nature of the particular mischief, it is hard, if not impossible, to envisage a situation where the D.P.P. would wish to take the initiative, the court having declined to exercise its power of attachment. Legislation could be academic as it could not affect the court's inherent powers which would, inevitably, be exercised in these cases, if any step were to be taken to deal with the conduct.

4.7 The practical considerations which point strongly to the court's taking the initiative in these matters were admirably put by the Law Reform Commission of Canada in a passage which we cited in our Consultation Paper, but which bears repeating:

> "First, the judge must remain in full control of the hearing. If it is interrupted by misbehaviour in the court-room, he must take steps to restore order as quickly and effectively as possible. The time factor is crucial: dragging out the contempt proceedings would mean a lengthy

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1 [1981] I.R. 412.

interruption to the main proceedings, thereby paralysing the court for a time, and indirectly impeding the speed and efficiency with which justice is administered.

Secondly, the judge's power to control the court proceedings would be weakened if contempt proceedings were heard by another court. The second court would have to hear evidence about the act, with a judge before whom the disruption had taken place as principal witness. And should the accused again misbehave in court, the contempt case itself would have to be referred to still another court, and so on. The administration of justice could be brought to a complete standstill.

Accordingly, to ensure the effective administration of justice, the presiding judge must remain in control of the proceedings. He must therefore be able to use the classical summary procedure for cases of misbehaving in court."[2]

4.8 *Accordingly, by a majority, the Commission does not recommend any new legislation in respect of contempt in the face of the court.*

4.9 The minority are not happy with the lack of clarity in the existing law, and are of the view that a court's power to deal summarily with *in facie* contempt should be limited to measures necessary to maintain the orderly, efficient and dignified conduct of court proceedings. The minority are in complete agreement with the reasons given by the Law Reform Commission of Canada (quoted above, para. 4.7) for maintaining the summary procedure to enable a presiding judge to remain in control of proceedings. However, the present law relating to *in facie* contempt is defective in that it goes beyond what is necessary to achieve this objective. It incorporates no principle of proportionality in respect of measures taken, and its scope is imprecise. The minority agree that there is no evidence that the judges have abused their powers in this area. It appears that judges do not in fact do more by way of summary procedure than is absolutely necessary to maintain order. In the opinion of the minority, it is appropriate that new legislation should reflect this healthy state of affairs and that further legitimacy should be given to the judicial powers to deal effectively with *in facie* contempt by a more precise formulation of what those powers are.

4.10 Accordingly the minority would recommend that the offence of contempt in the face of the court be retained, but that the common law offence should be replaced by a statutory offence with the following elements:

(a) it should embrace any disruptive or other conduct which threatens the orderly, efficient and dignified conduct of the court's proceedings,

(b) the procedure should be summary,

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2 Law Reform Commission of Canada, Working Paper No. 20, *Contempt of Court*, pp.23-24.

(c) the court should have power to order the removal and/or detention in custody for a period of not more than one month of the offender, subject to the general principle that any sanction imposed should be no more than is necessary to enable the court to continue proceedings in an orderly manner.

Contempt In The Form Of Non-Attendance At Court

4.11 The boundary line of the inherent jurisdiction of the courts to deal with contempt summarily is not as clearly drawn as it might be. As we suggested in the Consultation Paper[3], the summary procedure would not afford the best way of dealing with most, if not all, conduct classified in the paper as "other acts interfering with the administration of justice." It is easier to discern the necessity for an interventionist role for the judge where the alleged contempt constitutes contempt *in facie* or scandalising the court itself rather than where it consists of, for example, interfering with or bribing a witnesses or failure to attend court. We hope the line will be more clearly drawn by the Supreme Court in future cases.

4.12 We discussed the question in the Consultation Paper of whether the non-attendance at court by a witness or one of the parties or their legal representatives should constitute contempt in the face of the court. While we were satisfied that where the intention of the person concerned was to interfere with the administration of justice, such non-attendance should constitute an offence, it was not appropriate to treat it as a form of contempt in the face of the court. There was no dissent from this provisional conclusion.

We accordingly recommend that where a party or witness or a legal representative of one of the parties fails to attend court without reasonable excuse and with the intention of interfering with the administration of justice or recklessly indifferent as to whether it is interfered with or not, that person should be guilty of an offence, which should be punishable by the maximum available summary punishment.

Privilege In Respect Of Confidential Communications

(a) Types of privilege

4.13 Sometimes a witness or a party to proceedings may claim that they are entitled to refuse to answer a question as to the source of information given to them in confidence on the ground that such communications are privileged. Leaving aside State privilege, it would seem that there are nowadays three main types of privilege, one which is constitutionally based, the other two - private privilege and public policy privilege[4] - deriving from the common law. We

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3 At pp.353-4.

4 We use the phrase "public policy privilege" rather than the simpler "public privilege" in order to distinguish this from State privilege, which is also sometimes called public privilege.

consider constitutional privilege below.[5] Private privilege applies to fixed categories of relationships and has an absolute effect where it operates. Public policy privilege requires a case-specific determination by the courts, balancing the public interest in the confidentiality of the relationship with the public interest in the availability of maximum evidence.

4.14 That there are two types of common law privilege was recently confirmed by the High Court in *Goodman v The Honourable Mr. Justice Hamilton and Others*.[6] The Court held that the Chairman of the Beef Tribunal had a discretion at common law not to order disclosure of confidential sources grounding the statements of Dáil deputies. Although, on appeal, the Supreme Court ruled that, in any event, Dáil deputies enjoyed a privilege under the Constitution to refuse to reveal such sources of information,[7] the High Court decision is important for the light it sheds on the concept of privilege generally.[8]

The Court first discussed private privilege,[9] and endorsed the four conditions for the establishment of such privilege set out in Wigmore's Treatise on the Anglo-American System of Evidence. These conditions are:

> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."[10]

The Court took the view that the "Wigmore rules" are appropriate, *prima facie*, being rules where the privilege is sought in respect of a private relationship analogous to that of lawyer and client, but that they are not appropriate where a direct public interest is a major factor in favour of upholding the privilege claimed.[11] It was furthermore of the view that "any unnecessary extension of privilege by reference to fixed categories of relationships would seem ... to offend

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5 See para. 4.40, below.

6 Unreported, 27th May 1993.

7 *Attorney General v The Hon. Mr. Justice Hamilton*, unreported, 28th July 1993 (discussed in paragraph 9.9, below).

8 In one respect, the point of the High court decision is not moot; if, in fact, common law privilege applies to this situation, it is the privilege of the informant. See ruling of the Tribunal of Inquiry into the Beef Processing Industry, 5th March 1993. Hence the issue would arise where, for example, a T.D. has waived his or her constitutional privilege but the informant claims there is still a common law privilege which the informant, has not waived.

9 Referring to the cases *Cook v Carroll* [1945] I.R. 515 and *E.R. v J.R.* [1981] I.L.R.M. 125.

10 See *Goodman v The Hon. Mr. Justice Hamilton and Others*, unreported, 27th May 1993, at p.5.

11 *Id*, p.6.

the jurisprudence of the Irish Courts".[12]

The issue before the Court concerned the refusal by a number of T.D.s to disclose to the Tribunal of Inquiry into the Beef Processing Industry the sources of allegations they had made. The Court therefore regarded the Wigmore rules as an inappropriate test to apply to the privilege claimed and employed instead a notion of public policy privilege, whereby the public interest in the administration of justice could be overridden by a conflicting public interest in non-disclosure in a particular case. The Court found the English House of Lords decision, *D. v N.S.P.C.C.*[13] most useful in this regard. It identified as a clear principle emerging from the speeches in the House of Lords in this case that confidentiality alone is never a ground for non-disclosure but may be a relevant factor in determining whether or not there is a public interest in non-disclosure. It adopted the summary by Lord Edmund-Davies of the relevant legal rules which, in essence, provide as follows: where disclosure in connection with a confidential relationship would breach some ethical or social value involving the public interest, a court may exercise its discretion against disclosure if it decides that this would better serve the public interest, notwithstanding the usual public interest in the disclosure of relevant evidence. Finally, the Court stated, there is no absolute rule and privileges often give way where, for example, the information is relevant to the question of guilt or innocence in a criminal trial.

(b) Private privilege

4.15 While lawyer/client privilege is the most familiar example it has been suggested that there are other categories of private privilege, most particularly, between spouses and between priest and parishioner. The latter category could easily be extended to include any individual and his or her spiritual adviser.

(i) Spousal privilege

4.16 There would seem to be no good policy reasons for recognising spousal privilege today, and the constitutional considerations identified in the judgment of the Court of Criminal Appeal in *The People (D.P.P.) v J.T.*[14] (dealing with the competence of spouses to give evidence against each other) would appear to reinforce this view. Moreover problems do not appear to have arisen in practice in this area, and it has not been suggested to us that the law is in need of any clarification.

We do not therefore, recommend legislation in this area in this Report, although we would not rule out legislating in the future, if the necessity for legislative intervention were to arise.

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12 *Id.*
13 [1977] 1 All E.R. 589.
14 C.C.A., 27th July 1988.

4.17 While section 3 of the *Criminal Evidence Act, 1992* repealed s.1(d) of the *Criminal Justice (Evidence) Act, 1924*, which preserved the old privilege for marital communications, section 26 of the 1992 Act provides,

> "Nothing in this Part [i.e. Part of the Act relating to competence and compellability of spouses] shall affect any right of a spouse or former spouse in respect of marital privacy."

4.18 It is unclear to what extent, if at all, this section reincarnates spousal privilege. Perhaps, as has been suggested by one commentator,[15] it envisages the absorption of such privilege into the general field of public policy privilege.

4.19 Section 7(7) of the *Judicial Separation and Family Law Reform Act, 1989* provides that where proceedings for judicial separation have been adjourned for certain purposes (attempts at reconciliation or agreement), any communication between either spouse and any third party assisting the spouses in such purposes is inadmissible as evidence in any court.

(ii) Sacerdotal privilege

4.20 As we pointed out in the Consultation Paper, Gavan Duffy J. held in *Cook v Carroll*[16] that a Roman Catholic priest was not obliged to answer questions as to the nature of communications made in confidence to him in a private consultation with a parishioner. Although the decision in *Cook v Carroll* was based in part on the provisions of Article 44 of the Constitution extending recognition to the special position of the Roman Catholic Church, it retains its status as a binding precedent.[17] It was followed by Carroll J. in *E.R. v J.R.*,[18] holding that where a priest or other minister of religion was serving as marriage counsellor, the spouses have the privilege to require the counsellor not to disclose the contents of such counselling sessions. However, she also warned that the courts should be slow to admit new categories of private privilege. Both judgments were regarded as good law by the High Court in *Goodman v The Honourable Mr. Justice Hamilton and Others*.[19]

4.21 In the area of religious confidences, problems do not appear to have arisen in practice and it has not been suggested to us that the law is in need of any clarification. As with spousal privilege, *we do not recommend any legislation at the moment.*

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15 Caroline Fennell, *The Law of Evidence in Ireland* (Butterworths, 1992), at p.181.

16 [1945] I.R. 515.

17 A later Circuit Court decision, *Forristal v Forristal & O'Connor* (1966) 100 I.L.T.R. 102, although dealing with privilege in a defamation context, regarded *Cook v Carroll* as applicable only where the confider was an actual parishioner of the priest and where the particular communication was clearly of a confidential nature.

18 [1981] I.L.R.M. 125.

19 Unreported, 27th May 1993.

(c) **Journalistic privilege**

4.22 We provisionally recommended in the Consultation Paper that there should be no change in the existing law under which journalists are not entitled to refuse to answer questions as to the source of information given to them in confidence on the ground that such communications are privileged. We did not consider that there were any policy grounds for changing the law so as to confer such a privilege on journalists.

4.23 Our provisional findings on this question provoked strong criticism and dissent, particularly from the National Newspapers of Ireland, the Provincial Newspapers of Ireland and the National Union of Journalists. It was urged that the acceptance in law of such a privilege would constitute a recognition by the law of the importance of investigative journalism. If the law compelled journalists to disclose their sources, it was argued, such sources of information would probably dry up and serious abuses and scandals of which the public was entitled to be aware would never come to light. It was also suggested that the present law was unenforceable since, even if faced with the sanctions for contempt of court, journalists would continue to refuse to disclose confidential sources of information.

4.24 In the case of *In re O'Kelly*,[20] the Court of Criminal Appeal accepted that journalists normally considered themselves under an obligation not to disclose confidential sources of information, but said that it remained the courts' function to decide whether a witness should be required to answer a specific question. It could not allow this issue to be decided solely by reference to the code of ethics of a particular profession. The public interest in the administration of justice made it essential that the courts should be able to obtain what evidence was necessary for the purpose of doing justice between the parties and, under the Constitution, the courts alone could resolve the issue as to whether a witness should be required to answer a particular question.

4.25 It is clear from the *O'Kelly* case that journalists in Ireland enjoy no absolute protection against disclosure. In other words, they do not form a special category for the purposes of private privilege. Moreover, in view of the observations of the Court in this case, it is unlikely that an absolute privilege for journalists would be constitutionally valid.

4.26 We think it is worth recalling in this connection the classic statement of the law by Lord Denning MR in *Attorney General v Mullholland*. He stated:

> "Then it is said ... that, however relevant these questions were and however proper to be answered for the purpose of the inquiry, a journalist has a privilege by law entitling him to refuse to give his sources of information .... It seems to me that the journalists put the matter much too high. The only profession that I know which is given

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20 (1974) 108 I.L.T.R. 97.

> a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker, or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge respects the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only is it relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered ... if the judge determines that the journalist must answer, then no privilege will avail him to refuse."[21]

4.27 It should not be thought that this view of the law is peculiar to England or Ireland. In the Australian case of *McGuinness v Attorney General of Victoria*, Sir Owen Dixon said:

> "No one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well as of honour, those would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with a question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client ... an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box."[22]

4.28 We remain of the view that it would be unacceptable for a court to be deprived of evidence which might be necessary to do justice between the parties in a particular case. In such circumstances, the paramount interest of the public in the administration of justice must, in our opinion, take precedence over the public interest in freedom of information.

4.29 At the same time, however, we expressed the view in our Consultation Paper that the Constitution allows some leeway to the legislature to prescribe cases where a witness should not be obliged to disclose a source, namely, when non-disclosure serves a rational goal, can be justified or defended on the basis of factors to which the Constitution attaches importance, and does not infringe against the requirements of constitutional justice.[23] In this regard, we have examined, as a statutory model, s.10 of the English *Contempt of Court Act, 1981.*

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21 [1963] 1 All E.R. 767 at 771 (CA).
22 (1940) 63 Commonwealth L.R. 73 at 102-3.
23 At p.245.

Section 10 provides:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, 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."

4.30 The European Commission of Human Rights has considered this section in the recent case of *William Goodwin against the United Kingdom*.[24] In that case a journalist had received unsolicited information that a company had financial problems. This information was contained in an article about to be published. The High Court eventually ordered the journalist to disclose his source's identity pursuant to the provisions of s.10 of the *Contempt of Court Act, 1981*, "in the interests of justice". He refused and, having lost appeals to the Court of Appeal and the House of Lords, brought an application to the European Commission of Human Rights.

4.31 Article 10 of the European Convention on Human Rights provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ....
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

4.32 The European Commission found that:

> "... (T)he disclosure order had a potential chilling effect on the readiness of people to give information to journalists such as the applicant. It also considered that the order in itself which exerted coercion on the applicant to reveal information which he received on a non-attributable basis constituted a restriction on his right to freedom of expression. There are circumstances in which a "negative right" is to be implied in

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24 Application No. 17488/91, Report adopted 1st March 1994.

Article 10 not to be compelled to give information or to state an opinion (see eg. No. 9228/80, Dec. 16.12.82, D.R. 30 p. 132 and No. 12090/86, Dec. 4.7.89, unpublished). Compulsion to provide information as to a journalist's sources must in particular constitute a restriction in the capacity of a journalist freely to receive and impart information without interference by a public authority."[25]

4.33 The European Commission had to determine whether the restriction on freedom of expression was justified under Article 10 para. 2, in particular, whether it was prescribed by law, pursued one or more of the aims enumerated and was necessary in a democratic society for that or those aims. The applicant submitted that the law permitting such orders was not formulated with sufficient precision to enable the individual to foresee with reasonable certainty when it would be applied. In particular, he argued that the criterion of the "interests of justice" in section 10 of the 1981 Act was insufficiently certain and rendered impossible the task of a journalist in assessing whether or not he could give a source an undertaking not to reveal his identity.

4.34 The European Commission quoted the following passage from the judgment of the European Court in the *Sunday Times* case:

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law', unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."[26]

4.35 The Commission found for the applicant on the basis that the particular restriction could not reasonably be considered necessary in a democratic society, and found it unnecessary to make a finding on section 10. However, the Commission made the following observations having noted that there exists a significant body of English case-law concerning the circumstances in which disclosure orders may be made.

> "The particular privilege afforded to journalists by section 10 of the

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25 Report p.8, para. 48.
26 [1979] 2 E.H.R.R. 245, para. 49.

Contempt of Court Act 1981 is subject to four exceptions which are set out in concise terms without definition. The Commission notes the view of the House of Lords that in each case to which section 10 applies the judge has to engage in a balancing exercise and that it would be foolish to attempt to give a comprehensive definition as to how the balancing exercise should be carried out.

The Commission recalls however that the proceedings brought against the applicant involved one of the first cases which considered the scope of the immunity against disclosure given to journalists under section 10 of the 1981 Act in the context of the exception in "the interests of justice". Consequently, there may be some doubt as to whether at the time this area of the law had been developed with sufficient precision as to render it reasonably accessible and foreseeable."[27]

4.36 This indicates that a law can gain precision in the judgments of the courts and that legislation is not the sole means, in the opinion of the European Commission, in which precision can be achieved.

4.37 The case is presently before the European Court of Human Rights.

4.38 The minority, Professor Duncan and Ms. Gaffney, would favour legislation similar to the English section 10, but with a stricter test of 'necessity'. They would recommend that the court should not be permitted to order disclosure 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. The reason for supporting this approach is that it gives appropriate, though admittedly not absolute, recognition to the public interest in the protection of journalistic sources. They would draw attention, in particular, to the following passage from the Report of the European Court of Human Rights in the *Goodwin* case:

> "The Commission considers that protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of "public watchdog" in a democratic society. If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest. The right to freedom of expression, ..., therefore requires that any such compulsion must be limited to exceptional circumstances where vital public or individual interests are at stake."[28]

4.39 A majority, the President, Mr. Buckley and Mr. O'Leary, is satisfied that the broad powers available to the court under the Constitution, as decided in

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27 Report p.10, paras. 56 & 57.
28 *Id.* para. 64.

O'Kelly,[29] should not and cannot be limited or restricted in any way. The majority is content to be bound by the *O'Kelly* decision and would not consider a non-specific, s.10 type approach to be any advance by way of clarification or otherwise on the present law. *By a majority, the Commission does not recommend legislation and would let the law develop in the courts.*

(d) Constitutional privilege

4.40 In recent decisions the Supreme Court has articulated areas of privilege which are based on the Constitution. The privileged communications are discussions at meetings of the Government[30] and communications between T.D.s and their constituents. These decisions were made in the context of refusals to answer questions before a tribunal of inquiry, but there is no reason to believe that these privileges would not apply equally to court proceedings.

The precise nature and scope of these privileges are matters of constitutional interpretation, to be decided by the courts as they arise.

We discuss these Supreme Court decisions below, in Chapter 9, when dealing with contempt in relation to tribunals.[31]

The Recording And Broadcasting Of Court Proceedings

(a) Tape recorders

4.41 The Commission has no objection in principle to the recording or broadcasting of the proceedings of the courts. The Commission's concern is about the possible disruption of courts' proceedings by the use of any recording or broadcasting equipment. We pointed out in the Consultation Paper that no statute regulates in express terms the use of tape recorders (or other sound recorders) in court and that the matter appeared to fall within the inherent jurisdiction of the court to regulate its own procedure. We provisionally suggested that legislation should prescribe that the judge should determine the matter in the exercise of his or her discretion or the light of the circumstances of the case. This would mean that the judge would be entitled to give or refuse leave to use the recorder in court on such conditions as he or she considered proper.

4.42 While little debate was provoked by our provisional recommendation, we are not satisfied on re-consideration that it was soundly based. The Constitution requires that justice be administered in public and it is regarded as a natural consequence of this that media reporters, and any other persons who may wish to do so, may take notes of the proceedings and do not require permission from the judge or any one else so to do. Their use would, of course, be undesirable

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29 *Supra.*

30 *Attorney General v Sole Member of the Tribunal of Inquiry into the Beef Processing Industry* [1993] I.L.R.M. 81.

31 Para. 9.9.

if they disrupted the court proceedings to any significant extent, but there is nothing to indicate that this is the case. It is true that recorders may be replayed to coach a person who is yet to give evidence. It is also the case that some witnesses might feel intimidated by the knowledge that their evidence is being recorded. These seem, however, to be weak arguments for requiring the use of sound recorders to be regulated by the court.

(b) Photographs, television and video recordings

4.43 We pointed out in the Consultation Paper that, as in the case of sound recordings, there are no statutory provisions dealing with the taking of photographs, television or video recordings. Again, the matter appears to be one governed by the inherent jurisdiction of the court on the same general principles as those relating to sound recordings. We said, however, that it was generally accepted that photographs may not be taken in court nor may the proceedings be televised or video recorded without permission. We should have added that in England there has been an absolute prohibition on photography in court since the enactment of section 41 of the Criminal Justice Act 1925. That Act makes it an offence to take or attempt to take *in court* any photograph, or with a view to publication make or attempt to make in court any portrait or sketch, of any person, being a judge of the court or a juror or witness or a party to any proceedings before the court, whether civil or criminal. It is also an offence to publish any photograph, portrait or sketch taken or made in contravention of these provisions.

4.44 The taking of photographs in court may be disruptive to a much greater extent than the use of sound recorders. The same could hardly be said of making portraits or sketches. We think there is something to be said for a statutory provision similar to that in the English 1925 Act, but omitting the prohibition on the making of portraits or sketches.

4.45 Whether proceedings should in any circumstances be televised or video recorded is, of course, a far more complex question. It was not dealt with in the Consultation Paper because we considered at that stage that it raised complex and distinctive issues which were not of pressing urgency. It was, however, the subject of some discussion at the Seminar and most of those who spoke appeared to be in favour of allowing the televising of court proceedings. Since then the whole topic has been intensively debated on both sides of the Atlantic following the televising of much publicised cases in the United States in the last few years, most recently, the O.J. Simpson case.

4.46 Although the issue is certainly one which has considerable implications for the administration of justice in general and not simply for the law of contempt, we are satisfied on re-consideration that we should at least address the question of whether it would be desirable in principle that court proceedings should be televised. We have borne in mind in this context the experience that may have been gained by the televising of proceedings of the Oireachtas. We have also given careful consideration to the constitutional requirement that justice

be administered in public. Justice is already administered in public and it cannot be said with any certainty that the Constitution *requires the maximum* degree of exposure or coverage of court proceedings. It is surely sufficient to ensure that justice is not administered behind closed doors. However, we recognise that there may be a significant public benefit to be gained from exposing the detailed workings of the administration of justice in the courts to everyone within reach of a television set, thereby lessening, as one would hope, the remoteness of court proceedings from the general public and the sense of alienation which many feel from that process.

4.47 We also appreciate the dangers which could result from the televising of court proceedings. Of these, perhaps the most important is the possible detriment to the interests of justice arising from the impact of televising the proceedings on the parties and witnesses. Some might be deterred from attending court because of fear or anxiety as to televising of the proceedings. Witnesses might feel severely inhibited in the actual giving of evidence by the presence of the cameras. Reaction to recent cases in the United States suggests that, unless the televising of some cases is either prohibited or curtailed, there could be serious prejudice to pending trials, significant invasions of privacy and the televising at inappropriate times of material which many would find offensive. There is also the danger that the television cameras would prove intrusive and disruptive of the proceedings.

4.48 Having considered these arguments carefully, we are, nevertheless, in favour in principle of the televising of court proceedings and, in particular, would suggest that at the least consideration should be given to a pilot scheme in the first instance. We have, in this context, had the advantage since the publication of the Consultation Paper of reading the Report of a working party of the Public Affairs Committee of the General Council of the Bar of England and Wales on *Televising the Courts*, published in May 1989. That Report, which was based on a considerable degree of research, was emphatically in favour in principle of the courts in that jurisdiction being televised. Their conclusions were based in part on the experience of members of the working party of seeing the way the system operated in other countries, particularly, of course, the United States and interviews with those concerned. The Report also addressed in some detail the technical problems and concluded that there were no insurmountable difficulties. They were, however, of the view that an advisory committee should be established to advise the Government generally in relation to the matter. We have no doubt that it would be desirable to adopt a similar approach in Ireland.[32]

4.49 *The Commission considers that the arguments in favour are sufficiently strong to sustain a recommendation that an advisory committee be established to review the arrangements for, and legal provisions relating to, the recording and broadcasting of court proceedings by the media. Part of the responsibilities of the Committee should be to devise and monitor pilot projects involving research and the*

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32 We understand that an experiment in televising courts in Scotland is already under way.

actual broadcasting of civil and criminal trials and of appellate proceedings. The Committee should also consider the desirability of permitting the broadcasting of proceedings of tribunals of inquiry.

CHAPTER 5: SCANDALISING THE COURT

5.1 We provisionally recommended in the Consultation Paper that the offence normally described in archaic language as "scandalising the court" should not be completely abolished, but that significant alterations, substantive and procedural, should be made to the present law. In particular, we recommended that imputing corrupt conduct to a judge or court should fall within the scope of scandalising and so also should publishing to the public a false or misleading account of legal proceedings. Abuse of the judiciary, even if scurrilous, however, should not constitute the offence. We also recommended that in such prosecutions, the test should be that of a risk, other than a remote one, that the administration of justice, the judiciary or any particular judge or judges would be brought into serious disrepute. We also recommended that the truth of a communication should render it lawful, but that the onus of proving the truth of the imputation of corrupt judicial conduct should rest on the defence. However, the onus of proving the falsity of an account of legal proceedings should rest on the prosecution.

5.2 Our tentative recommendations in this area were severely criticised by the media. It was argued that the offence was anachronistic, as its very name implied, that it constituted a wholly unwarranted interference with freedom of expression in contemporary society and that the judiciary should be in no different position from other public officials: the remedy of defamation, it was said, was available to them as much as to other public servants. The Boyle/McGonagle submission on behalf of the National Newspapers of Ireland urged that the present law should be replaced by a general offence confined to and directed at penalising untruthful allegations of corruption or corrupt motives in the performance of public duties by any person exercising public responsibilities.

Irish Constitutional Law

5.3 We examined the modern Irish decisions relating to scandalising and the implications of the European Convention on Human Rights in this area in great detail in Chapters 8 and 11 of the Consultation Paper. It is unnecessary to repeat that analysis. It discloses that the Supreme Court has very clearly laid down that the existence of a summary jurisdiction in the courts in contempt by scandalising, as in other instances of contempt, is of fundamental importance in maintaining public confidence in the fairness and impartiality of the judicial system.

5.4 In Chapter 8, we quoted the following extracts from the judgments in *the State (D.P.P.) v Walsh*,[1] first of Henchy J.:

> "The ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges. They cannot abdicate that responsibility, which is what they would be doing if they allowed juries of laymen to say whether the conduct proved or admitted amounted to criminal contempt. It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters, judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards ..."[2]

and secondly of O'Higgins C.J.:

> "Implicit in the guarantee ... of independence to judges in the discharge of their judicial functions is a recognition that such judges must be free and independent to act summarily, if necessary, to protect their judicial proceedings against criminal acts which are designed to interfere with the course of justice."[3]

In fact the Supreme Court in *Walsh* only divided on the question as to whether questions of *fact* in non minor cases of contempt should be tried by a jury. Questions of fact are rarely, if ever, in dispute in these cases. Controversy centres on whether the matter published amounts to scandalising, a question of law which would always be determined by the court alone.

This is exactly the same question, in different terms, which would fall to be decided by a *jury* were judges to be confined to taking an action in defamation as the only available remedy for scandalising.

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1 [1981] I.R. 412.
2 *Id.* at 440.
3 *Id.* at 427.

The European Convention On Human Rights

5.6 The interaction of the Convention and the Irish Constitution was also examined in Chapter 11 of the Consultation Paper with particular reference to freedom of expression and the need for specificity in legislation.

In the previous chapter of this Report, we quoted Article 10 of the Convention[4] and a passage from the judgment of the European Court of Human Rights in the *Sunday Times* case.[5]

5.7 While Article 10 of the Convention makes no express provision that legislation restricting freedom of expression should be precise, the requirements considered to be inherent in the Article have been developed in cases such as the *Sunday Times* case.

5.8 The majority would point to the acknowledgement in that judgment

(a) that experience shows that absolute certainty in foreseeing consequences is unattainable and

(b) that whilst certainty is highly desirable it may bring in its train excessive rigidity. The law must be able to keep pace with changing circumstances.

(c) that many laws are inevitably couched in terms which to a greater or lesser extent are vague and whose interpretation and appreciation are questions of practice.

(d) that appropriate advice may be needed to foresee the legal consequences of actions.

5.9 The minority would point to that part of the judgment which says that the restricting law should be precise and accessible, rendering it possible for a citizen to foresee the consequences of his or her actions, if necessary with appropriate advice, to a reasonable extent.

5.10 Critics of the majority position may have overlooked the fact that the abolition of a distinctive offence of imputing corrupt conduct to the judiciary would almost certainly be invalid having regard to the provisions of the Constitution. It follows, in the opinion of the majority, that the law cannot and should not interfere with the power of the courts to attach summarily for contempt by scandalising.

5.11 The minority see no pressing need for a summary procedure in this context for reasons which are expressed in para. 5.14 below. The interpretation of the Constitution is, however, the exclusive function of the superior courts and,

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4 *Supra*, para. 4.31.

5 *Supra*, para. 4.34.

even apart from the policy considerations to which we have referred, it would, in the view of the majority be a pointless exercise for the Commission to recommend a change in the law which, at the least, would run a serious risk of being found unconstitutional.

5.12 The history of attachment for contempt by scandalising in the Irish courts does not suggest to the majority that there is a real danger of the court's infringing the constitutional or human rights of Irish citizens in maintaining their authority and independence. Indeed, Article 10 of the European Convention makes express provision for the restriction of freedom of expression in order to maintain the authority and impartiality of the judiciary.

5.13 However, as we have pointed out above,[6] this does not mean that the common law offence of contempt cannot be clarified to the greatest extent possible by statute for the purposes of prosecution in the usual way by the D.P.P.

5.14 In the case of contempt *in facie*, the majority while having no objection in principle to legislating for ordinary prosecution purposes, declined to recommend that course, as being academic. However, proceedings for contempt by scandalising, while usually commenced by attachment, would more readily lend themselves to prosecution in the usual way for the common law misdemeanour, and the majority are happy to recommend the creation of a new offence or scheme of offences to replace the common law regime *for prosecution purposes*; such legislation to have no affect on the courts' summary powers. The minority support the creation of a new offence or scheme of offences to replace the common law regime not only for prosecution purposes but also because of the greater clarity and specificity that this would bring to the law. However, they are of the opinion that the need for an exceptional summary procedure, which is justified for contempt in the face of the court, has not been made out in this context, bearing in mind that a judge may always warn an offending party of the risk of prosecution.

5.15 Any new offence should obviously encompass the imputation of corrupt conduct to a judge or court. We are also satisfied that criticism which falls short of such an imputation, even if it is couched in scurrilous language, should not constitute the offence.

5.16 More difficulty arises in relation to the proposal that the publication of false or misleading accounts of legal proceedings should be capable of constituting the offence. Despite the criticisms that were advanced of this suggestion, we remain convinced that where false accounts endanger the administration of justice, they should be punishable as contempt of court. We would accept, however, that the inclusion of the adjective 'misleading' would impose too severe a liability.

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6 Para. 3.7 *et seq.*

5.17 That brings us to the question as to the degree of risk to the administration of justice which should be required before a conviction can be recorded and the requisite *mens rea*. On further consideration, we think that the wording we provisionally recommended - a risk other than a remote one - is not altogether satisfactory. We prefer the phrase "a substantial risk". As regards *mens rea,* while we had proposed that the test here should be negligence, we again have come to the conclusion that we should modify our provisional recommendation. We accept that, the offence should be carefully delimited so as to ensure that it infringes freedom of reporting and comment to the minimum extent compatible with the administration of justice. This would suggest to us that the offence, whether it takes the form of imputing corrupt conduct or falsely reporting court proceedings, should be committed only where the person communicating the imputation or account knew that it would create a substantial risk that the administration of justice would be brought into serious disrepute or was recklessly indifferent as to whether it would or not.

5.18 We considered substituting the description "contempt by scandalising" with another description on the ground that "scandalising" was an archaic and inappropriate description of this type of contempt. However, it did not take us long to abandon this quest. However dated the expression "scandalising" may be, it has become at this stage a familiar and well entrenched mode of describing and distinguishing a particular form of contempt of court. No other expression we considered was satisfactory for one reason or another and *we would not recommend a change of description.*

5.19 Before leaving the topic of "scandalising", we should refer again to the decision of Carroll J. in *Weeland v Radio Telefís Éireann.*[7] It will be recalled that, in that case, the plaintiff, who had been the successful defendant in a Circuit Court action which was the subject matter of a television programme produced by the defendants, sought an interlocutory injunction against its further broadcasting pending the determination of the High Court appeal. Carroll J. declined to grant the injunction, because she did not consider that certain deficiencies in its account of the Circuit Court proceedings amounted to contempt of court. We commented in the Consultation Paper that it seemed not to be a case involving legitimate criticism at all, but rather one of misrepresentation, through omission and selective quotation, of the judgment of the Circuit judge. We observed in that context that it was not clear why such misrepresentation did not amount to contempt of court.

The executive producer of the programme concerned took issue with this comment and said that it unfairly misrepresented the judgment of Carroll J. However, in the course of her decision the learned judge said:

> "The programme failed to advert at all to the reasons given by Judge Gleeson for the view he took of the evidence and would not appear to

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7 [1987] I.R. 662.

be unbiased in that respect. But to allege that a High Court judge would be influenced by a T.V. programme which was transmitted months before, rather than by the evidence given in court, I find to be unbelievable."[8]

In the light of that finding by Carroll J., we do not think it could be said that our comment was inappropriate. It is, however, clear that the case was decided on the basis that any such selective and unbalanced reporting of the Circuit Court proceedings would have had no effect on the subsequent determination by the High Court judge. In arriving at that conclusion, Carroll J. was adopting the same approach as that of the Supreme Court in *Cullen v Toibin and Magill Publications (Holdings) Limited,*[9] and, at a later stage in this Report, we accept that this limitation of the *sub judice* rule should be retained. We would also accept that, if the criterion which we propose in relation to false accounts of legal proceedings were applicable in that case, i.e. that there was a substantial risk that the administration of justice would be brought into serious disrepute, it is most unlikely that the result would have been any different.

5.20 The recent case of *McCann v RTE*[10] concerned an attempt to prevent the Taoiseach making a broadcast before the Maastricht referendum. In a separate hearing, independent of those proceedings, RTE acknowledged carelessly reporting the proceedings and imputing remarks to Mr. Justice Carney which he had not made. Although the judge found that RTE was in "serious" contempt, he decided that no further action was required because the contempt was not intended or malicious and was immediately and fully repaired.

5.21 *We recommend that:*

(1) the common law offence of contempt by "scandalising the court" should consist in:

(i) imputing corrupt conduct to a judge or court; or
(ii) publishing to the public a false account of legal proceedings;

(2) a person should only be found guilty of the offence where there is a substantial risk that the administration of justice, the judiciary or any particular judge or judges will be brought into serious disrepute;

(3) a person should be guilty of the offence only where he or she knew that there was a substantial risk that the publication would bring the administration of justice, the judiciary or any particular judge or judges into serious disrepute or was recklessly indifferent as to whether it would or not and, in the case of a publication of a false account, only where he or she intended to publish a false account or was recklessly indifferent as to

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8 *Id.* at 666.
9 [1984] I.L.R.M. 577.
10 Unreported. Our comments are based on a report in *The Irish Times* of 23rd June 1992.

whether it was false;

(4) *the truth of a communication should render it lawful. The onus of proof of the truth of an imputation of corrupt judicial conduct should rest on the defence; the onus of proving the falsity of an account of legal proceedings published (or provided for publication) to the public or a section of the public should rest on the prosecution;*

(5) *as regards the liability of editors, media proprietors and others for scandalous publications, the same principles should apply as apply in respect of sub judice contempt;*

(6) *abuse of the judiciary, even if scurrilous, should not constitute an offence.*

(7) *there should be no legislative interference with the court's power to attach summarily for contempt by scandalising.*

5.22 *A court should be empowered to order the publication of an apology and/or a correction, in cases of scandalising, similar to the orders recommended in our Report on Defamation.*[11]

11 LRC 38 [1991].

CHAPTER 6: THE SUB JUDICE RULE

General

6.1 Our provisional recommendations as to the *sub judice* principle in both criminal and civil proceedings broadly envisaged the retention of the present framework of the law subject to some clarification. However, we also recommended a number of substantive changes, some of which provoked rigorous criticism, particularly from the media.

6.2 We provisionally recommended that:

(1) There should be a new statutory definition of "publication" which should include any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public or to a judge or juror who is involved in the legal proceedings to which the publication relates;

(2) The *sub judice* rule should apply (with regard to proceedings which are "active") to any publication which creates a risk, other than a remote one, that the course of justice in the proceedings in question would be seriously impeded or prejudiced.

Under the present law, it would appear that, where liability does arise, it is strict. Under our proposals, the publisher would only be liable where he or she was negligent in relation to the publication.

We further proposed that, where the proceedings were not "active", liability should still arise with regard to publications where the publisher is actually aware of facts which, to his or her knowledge, render the publication certain, or virtually certain, to cause serious prejudice to a person whose imminent

involvement in criminal or civil proceedings is certain or virtually certain.

We also suggested a definition of "active" proceedings which, in the case of both criminal and civil proceedings, would mean that publications would continue to be affected until such time as any appeal was disposed of.

We also proposed that liability for contempt should arise in the case of publications which are likely to cause serious injury to the administration of justice in general as distinct from specific proceedings.

As to possible defences, we recommended that there should be a defence of reasonable necessity to publish (so that, for example, a warning to the public that a multiple killer was at loose would not render the publisher liable for an offence). We proposed however that it should not be a defence to *sub judice* contempt that the offending material was published incidentally to a discussion of public affairs.

6.3 Our proposals were criticised as being unduly restrictive of media freedom to comment on matters of public interest and as having a dangerous tendency to curtail knowledge by the people of wrongdoing in many areas, including spheres where the public interest is directly involved.

6.4 The Commission has given great weight to these factors, and, indeed, did so in preparing their provisional proposals. However, while it would be a manifestly unfair and distorted view of the submissions from the media to say that they overlook, still less disregard, the vital public interest in the proper and fair administration of justice, we remain convinced that it is not given sufficient weight (and perhaps understandably so) in the submissions advanced by them or on their behalf. In particular, we remain sceptical of the suggestion that the unquestionably greater freedom of comment enjoyed by the media in the United States, particularly in the period approaching a criminal trial (as is evidenced by the publicity being given to the O.J. Simpson case at the moment), is a desirable model to be followed in this jurisdiction. We think it cannot be emphasised too strongly that, particularly in the case of criminal proceedings, the powerful effect of coverage by the press, radio and television may, if not subjected to reasonable safeguards, have potentially serious effects for the proper administration of justice and may result in the imprisonment for lengthy periods of innocent people. In contrast, the public interest in the free flow of information is by no means wholly interrupted by a careful observance of the *sub judice* rule, since, at worst, the inhibition on unrestricted comment and publication of allegedly relevant facts is of a temporary nature only.

6.5 We considered in some detail in the Consultation Paper the arguments that had been advanced against the retention of the *sub judice* rule in any form. These were, first, that the rule offends against the constitutional entitlement to freedom of expression; second, that, in cases of trial by jury, there is not sufficient empirical support for the assumption underlying the rule's rationale that juries would be so affected by a publication as to prejudice the fairness of their

adjudication; and, third, that an extension and improvement of alternative remedies would suffice to ensure justice to all parties. We tentatively concluded that the interests of justice require the retention of the rule in some form and that this was reinforced by the requirements of the Constitution. The right of freedom of expression, guaranteed by the Constitution and protected by the European Convention on Human Rights did not, in our view, override the protection which must be afforded to persons involved in civil and criminal proceedings.

6.6 There was little dissent from our view that the *sub judice* rule should be retained in some form, although it was suggested by some critics that we had laid too much emphasis on the administration of justice at the expense of the right of freedom of speech. The major debate provoked by the Consultation Paper in this area was as to how the rule should be formulated in modern conditions.

6.7 In a democracy, the media play an essential role in ensuring that the public are kept fully informed as to what happens in court proceedings and that the proceedings of the courts are subjected to open and reasoned analysis and discussion. The requirement of the Constitution that, save in exceptional and limited cases, justice must be administered in public is of paramount importance and could be subtly undermined by an unduly restrictive approach to the *sub judice* rule.

6.8 Having weighed these various factors with considerable care, we have come to the conclusion that our original proposals should be modified in certain respects.

Definition Of The Offence

6.9 We do not see any reason to depart from our provisional recommendation that there should be a statutory definition of what constitutes "publication" for the purposes of the *sub judice* rule and as to the terms in which it should be couched. On further consideration, however, we think that the definition we had proposed of the nature of the risk of prejudice which must be proved in order to ground a finding of contempt was open to criticism. We had suggested that it would be sufficient if the risk of prejudice to proceedings was "other than remote". We are satisfied that this is open to objection on two grounds, first, that it fixes the threshold for a finding of contempt at an unnecessarily low level and, second, that it does not provide sufficient guidance for those concerned with the reporting of court proceedings.

We are also of opinion that once publication has to be negligent, it is unnecessary to maintain the passage in brackets after "improper motive" at the end of the last example in the list of statements in the Consultation Paper.

We think that the best approach would be to prescribe that the sub judice rule applies to any publication which creates a substantial risk that the course of justice in the proceedings in question may be seriously impeded or prejudiced. Moreover

the legislation should include an illustrative list of statements which are capable of constituting such a "substantial risk" in the case of criminal proceedings, using as a model a list proposed by the Law Reform Commission of Australia: namely, statements to the effect, or from which it could reasonably be inferred, that:

> *the accused is innocent or is guilty of the offence, or that the jury should acquit or should convict;*
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> *the accused has one or more prior criminal convictions;*
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> *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;*
>
> *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.*[1]

Having given the matter careful consideration, we are satisfied that it would be too difficult to draw up a similar list for civil proceedings.

Mens Rea

6.10 The next question is as to the degree of *mens rea* required to ground the offence. After a lengthy appraisal of the issues involved, we had provisionally concluded that the present criterion of strict liability should be replaced with negligence. We were not in favour of confining the offence to cases where the contempt was published either intentionally or recklessly.

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1 The Law Reform Commission of Australia, *Report on Contempt of Court*, 1987, para. 299.

We have not been persuaded that our provisional preference for a test based on negligence was misconceived. It appears to us that this would ease the burden on the media in this area to a reasonable degree and that to take the further step of confining the offence to cases where there was a deliberate or reckless publication would tilt the balance unfairly against the interests of those concerned in civil or criminal litigation. *We also remain of the view that it is reasonable that the same test should apply to distributors.*

"Imminent Proceedings"

6.11 Our tentative proposal that the present law should be altered so as to extend liability to cases where proceedings are "imminent" as distinct from "active" met with much criticism. We have carefully considered these objections, which were largely related to the degree of uncertainty that it was said would result from such a change in the law and which, it was urged, would have an inhibiting effect upon the freedom of the press. *We remain satisfied that our recommendation should extend to imminent proceedings.*

6.12 We think it important to stress again the extremely confined nature of the offence which we had proposed. It would apply only 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. We remain of the view that the danger of serious prejudice which can result from wholly uninhibited comment by the media, e.g. prior to a charge being preferred, is a decisive factor in this area, and *we accordingly confirm our provisional recommendation and, again, would extend it to distributors.* A person who publishes such material in good faith and unaware of the imminence of proceedings will be fully protected. We see no plausible ground for extending protection to those who publish such material in the full knowledge that a charge is about to be preferred and that the material in question can only have a damaging effect on the impending trial.

6.13 *In civil cases*, in view of the delay endemic in the system, we are satisfied that *proceedings should only be regarded as imminent when a date for the hearing is fixed.*

Appellate Proceedings

6.14 Our provisional recommendations as to when proceedings are to be considered as "active" so as to attract the full rigour of the law of contempt were, on the whole, welcomed, but with one important qualification. Our provisional recommendations, if implemented, would, in effect, have reversed the decision of the Supreme Court in *Cullen v. Toibin and Another*[2] where the Court discharged an injunction granted by the High Court in respect of the publication

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2 [1984] I.L.R.M. 577.

of an article dealing with the subject matter of an appeal pending in the Court of Criminal Appeal. While some of us share the opinion of Barrington J., the judge of the High Court in *Cullen v Toibín*, that judges can be prejudiced, judges by their training and experience are more accustomed to having to take objective positions than a jury and a line has to be drawn somewhere. *The Commission, with the exception of the President, is satisfied that it would be unduly restrictive to extend the operation of the sub judice rule to appellate proceedings, which are invariably decided by non-jury courts.*

Judicial Review Proceedings

6.15 We should refer to a decision of the High Court in this area which was delivered in the interval between the publication of the Consultation Paper and the presentation of this Report. In *Desmond and Another v. Glackin and Others,*[3] an application was made for an order attaching the second named respondent, the Minister for Industry and Commerce, for contempt of court. The application was one of a number of court applications prompted by the exercise by the Minister of his powers under s.14 of the *Companies (Amendment) Act, 1990.* The Minister had appointed the first named respondent as an Inspector under the Act to determine the ownership of certain companies alleged to have been involved in the sale of a site in Ballsbridge to Telecom Éireann. The transactions in question had been the subject of much public controversy and the first named applicant was one of the persons required by the Inspector to answer a number of questions in relation to the transactions. He applied *ex parte* to the High Court for relief by way of judicial review, alleging that the appointment of the first named respondent was invalid and that, in any event, he was exceeding his statutory powers. The applicant was given such leave and was also granted an injunction restraining the Inspector from continuing his investigation pending the determination of the judicial review proceedings.

6.16 Extracts from the affidavit grounding the judicial review proceedings and statements made to the press on behalf of the applicants were given extensive publicity in the media. These included allegations that the first and second named respondents were acting unfairly to the applicant and that, in particular, the second named respondent had acted illegally in obtaining certain information from the Central Bank.

6.17 The first named respondent was reported in the press as having been critical of the manner in which the application had been made and of the comments subsequently made by the first named applicant. In particular, he took exception to the fact that the application had been made without notice to him and that, in his press comments, the first named applicant was treating the decision on the *ex parte* application as in some sense a resolution of the issues which were raised in the proceedings.

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3 [1992] 12 I.L.R.M. 490.

6.18 The second named respondent was interviewed on radio and commented at length on the conduct of the applicants in seeking the judicial review. He was also highly critical of the fact that the order had been made by the High Court without notice to him or the Inspector and described the judicial review proceedings and earlier proceedings initiated by the applicants as attempts to frustrate the Inspector in his enquiries. The Minister suggested that what had probably prompted the application for judicial review was that the Inspector was "getting hot". He also referred to the High Court order as "facilitating" the blocking of the inquiry.

6.19 The application for attachment was made on two grounds: first, that the Minister's words constituted the offence of "scandalising the court", and, secondly, that they breached the *sub judice* rule. In dealing with the second ground, O'Hanlon J. referred to the different views that had been expressed as to whether material which might be regarded as capable of influencing a jury should be regarded as permissible where the issue in question would not fall to be resolved by a jury. He concluded that, on any view, a judge would be perfectly capable of deciding the issues that would ultimately arise in the judicial review proceedings without being affected in any significant way by the Minister's remarks. *The Commission, with the exception of the President, does not favour extending the sub judice rule to proceedings for judicial review.*

Prejudice To The Administration Of Justice In General

6.20 It was also contended on behalf of the applicants in *Desmond and Another v. Glackin and Others*[4] that the remarks of the Minister constituted contempt because they sought to pre-judge the issue in the proceedings for judicial review. As we pointed out in the Consultation Paper, the House of Lords in *A.G. v. Times Newspapers Ltd.*[5] held that a publication in respect of particular proceedings was capable of constituting a contempt, not because of the risk of prejudice in those proceedings but on account of the risk to the administration of justice generally. It was particularly concerned with what Lord Cross described as "a gradual slide towards trial by newspaper or television".[6] We also pointed out that the application by the House of Lords of the rule in that case had been widely criticised and had been held by the European Court of Human Rights to be inconsistent with the relevant protection afforded by the European Convention on Human Rights to freedom of expression.[7] In *Desmond*, O'Hanlon J. referred to the House of Lords decision as "a persuasive authority of considerable importance".[8] But he also observed that,

> "As Ireland has ratified the [European] Convention and is party to it, and as the law of contempt of court is based (as was stated by Lord Reid) on public policy I think it is legitimate to assume that our public

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4 *Ibid.*
5 [1974] A.C. 273.
6 [1974] A.C. 273 at 323.
7 *Sunday Times v United Kingdom* [1979] 2 E.H.R.R. 245.
8 [1992] I.L.R.M. 490 at 512.

policy is in accord with the Convention or at least that the provisions of the Convention can be considered when determining issues of public policy".[9]

6.21 It is not, however, altogether clear from the judgment whether the learned judge considered that, for this reason, the "pre-judgment" test adopted by the House of Lords could not be applied in Irish law. He made no reference to the Constitutional dimension of the contempt jurisdiction in this context. In the event, he found that while the Minister had been "injudicious and indiscreet"[10] in the comments he made in the course of the interview, these comments had to be seen in the context of the serious allegations made on the applicants' behalf and given extensive publicity in the media and the enormous public interest provoked by the affair in general. He accordingly considered that it would be an unjustifiable interference with freedom of expression to attach the Minister for contempt in the circumstances of the case.

6.22 We provisionally recommended that liability should arise in the case of publications which are likely to cause serious injury to the administration of justice in general as distinct from specific proceedings. This recommendation provoked considerable dissent. We should emphasise that our tentative proposal was not intended to lead to the incorporation in Irish law of the "pre-judgment" test favoured by the House of Lords in *A.G. v. Times Newspapers Ltd.*[11] We thought, however, that there should be no exclusion *a priori* of contempt proceedings on account of the fact that a prejudicial publication risked injury to the administration of justice without reference to specific legal proceedings. We accordingly proposed that such publications should be liable to contempt proceedings, but that the threshold of liability should be significantly higher than that which we were recommending for criminal contempt generally.

6.23 Having considered the matter further, we are doubtful whether any such provision would be desirable or necessary. No matter how it was worded, it would seem capable of bringing within its ambit legitimate public discussion of issues of importance. We do not underestimate the difficulties posed for litigants and courts alike by uninhibited discussion in the media of the possible outcome of impending litigation. There may well be a danger that litigants may be deterred from proceeding with cases by such discussion and, while courts will doubtless do their best to remain uninfluenced by the advice freely offered as to how the cases should be decided, it cannot make their task any easier. But the definition of what is to constitute contempt in this context presents problems which, on further consideration, seem insuperable. However defined, it would seem to capture conduct which could not possibly be regarded as suitable for general sanctions, such as the discussion of a complex legal issue in a learned journal. Equally, any workable definition would probably not extend to a highly publicised comment by a person whose views would carry great weight with the

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9 At 513.
10 At 517.
11 [1974] A.C. 273.

public, provided he or she was careful to avoid giving a concluded opinion. As the Phillimore Committee pointed out, the test of "pre-judgment" seems to go too far in some respects but not far enough in others.[12] Given that conclusion, which we endorsed in the Consultation Paper, *we do not see that any useful purpose would be served by attempting to formulate a vaguely worded and uncertain extension of the law of contempt beyond cases which affect specific proceedings.* Moreover, although the decision of the High Court in *Desmond and Another v Glackin and Others*[13] does not definitely resolve the question as to whether the "pre-judgment" approach favoured by the House of Lords has found a secure anchorage in Irish law, it continues to be at least doubtful whether, in the light of the judgment of the European Court of Human Rights, the House of Lords decision can be regarded as a safe authority in this country. Publications likely to cause serious damage to the administration of justice can be dealt with as contempt by scandalising.

Defences

6.24 As to the possible defences, there was little criticism of our proposal that there should be a defence of reasonable necessity to publish. *We accordingly confirm this recommendation.* There was, however, considerable opposition to our proposal that it should not be a defence that the offending material was published incidentally to a discussion of public affairs.

6.25 We commented in the Consultation Paper that this latter issue was a most difficult one to resolve and we debated the arguments for and against such a defence at considerable length. *We are still of the view that the fact that a publication is on a matter of public interest cannot, on that account, justify the person who engages in that conduct in prejudicing legal proceedings.* We should emphasise that the fact that such proceedings are imminent does not mean that public discussion of issues of public interest relevant to the case is automatically stifled. It means no more than that the discussion must be conducted in a manner which does not offend the *sub judice* rule. Moreover, if other recommendations we have made are implemented, the position of the media will be eased significantly in that liability will attach only where the publisher ought reasonably to have appreciated that the publication created a substantial risk of causing serious prejudice to particular legal proceedings. On balance, we think that the inhibition that may result in the occasional discussion of public affairs is a relatively small price to pay for securing justice to those engaged in criminal and civil legal proceedings.

Immunity For Reporting Parliamentary Proceedings

6.26 In the Consultation Paper, we pointed out that the present law was uncertain and that, in contrast to defamation, it would appear that no privilege, absolute or qualified, attached to this type of publication. We recommended that

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12 *Report of the Committee on Contempt of Court*, Cmnd. 5794, 1974, para. 111.

13 [1992] I.L.R.M. 490.

the law should be clarified, along the lines suggested by the Law Reform Commission of Australia, by providing an express statutory defence for fair and accurate reports published contemporaneously with, or within a reasonable time after, the proceedings. However, we also referred to the dangers that could arise from the use or abuse of parliamentary privilege by inexperienced or irresponsible deputies or senators and suggested that the Ceann Comhairle of the Dáil or Cathaoirleach of the Seanad should be entitled to prohibit publication of any specific portion of the proceedings on the basis that it might offend against the *sub judice* rule.

6.27 Some commentators claimed that this latter proposal was in violation of the provision in Article 15.12 of the Constitution which provides that,

> "All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged".

It is unnecessary to deal with this objection at any great length, since in our recent Report on Civil Defamation we have analysed the Article in some detail. We see no reason to depart from the conclusion we expressed in that Report that the extension of privilege to "utterances made in either House wherever published" was intended to protect the persons who made the statements and not unofficial reports of such statements and that this was made clear by the opening words of the Article.[14]

6.28 The proposal also provoked much indignation on the part of the media. We were accused of attempting to roll back hard won press freedoms and of assigning to politicians the right to conceal wrongdoing which had been exposed on the floor of Parliament. So far as we are aware, no commentator in the media expressed any concern at the possibility that criminal trials might be put in jeopardy by the irresponsible use of parliamentary privilege, although a graphic illustration of its potential for mischief had been afforded in England in recent times in a case which was extensively reported in the same media.[15]

6.29 We remain unconvinced that our proposal would represent any serious intrusion into press freedom. However, we are satisfied, on further consideration, that it would present serious practical difficulties. Some of these were emphasised in a helpful comment we received from the Clerk of the Dáil. We acknowledge that its operation might be unsatisfactory in practice, since it

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14 Article 15.12 was analysed to a certain extent in the recent Supreme Court decision, *Attorney General v The Honourable Mr. Justice Hamilton*, unreported, 28th July 1993. The question of the precise meaning of the word "published" did not come up for decision; but Denham J., dissenting, said *obiter* that the word is confined in Article 15.12 to "formal means of making public utterances in the House". It should also be noted that, in *Attorney General v The Sole Member of the Tribunal of Inquiry into the Beef Processing Industry*, O'Flaherty J. adverted to the absolute immunity conferred on members of each House of the Oireachtas by Article 15.13 of the Constitution in respect of any utterance in either House, and stated that, by virtue of this immunity, no member could be attached for contempt of court in respect of something said in either House even if it constituted the grossest contempt of court: [1993] I.L.R.M. 81 at 125.

15 See the statement of the then Attorney General, Mr. John Murray, on his rejection of the British request to extradite the Rev. Patrick Ryan, reported in *The Irish Times*, 14th December 1988, p.10.

would not be possible to prevent the live transmission of offending material on radio or television. We were also satisfied on further consideration of the proposal that it is probably inappropriate to entrust powers of this nature to politicians who, however experienced they may be in questions of parliamentary procedure, are not necessarily equipped with legal training. *Accordingly, we will not proceed with the provisional recommendation that the Ceann Comhairle and Cathaoirleach have power to prohibit publication.*

6.30 The most serious possibilities of prejudice to judicial proceedings should be avoided by the *sub judice* convention as it operates within the Dáil. Indeed, for decades the Dáil has imposed on itself a far-reaching restraint in order to avoid, generally, any risk of such prejudice. Recently the Dáil passed a motion to relax the *sub judice* convention so as to achieve a better balance, given the inherent right and duty of the House to debate matters of public interest.[16] However, even the looser *sub judice* rule still counters the worst dangers. The motion as passed states:-

> "Subject always to the right of Dáil Éireann to legislate on any matter (and the guidelines drawn up by the Committee on Procedure and Privileges from time to time), and unless otherwise precluded under Standing Orders, a Member should not be prevented from raising in the House any matter of general public importance, even where court proceedings have been initiated:
>
> Provided that -
>
> (1) the matter raised must be clearly related to public policy;
> (2) a matter may not be raised where it relates to a case where notice has been served, that is to be heard before a jury or is then being heard before a jury;
> (3) a matter should not be raised in such an overt manner so that it appears to be an attempt by the Oireachtas to encroach on the functions of the Courts or a Judicial Tribunal;
> (4) Members may only raise matters in substantive manner (i.e. by way of a parliamentary question, debate on the adjournment, motion and so forth where due notice is required); and
> (5) when permission to raise a matter has been granted, there continues to be an onus on Members to avoid, if at all possible, comment which might in effect prejudice the outcome of the proceedings.[17]

Further, it was emphasised in the relevant Dáil Debates that there was now "an onus on Members to be responsible in their remarks and to avoid the temptation of reacting to the emotional clamour that often surrounds controversial cases

16 Motion of 8th April 1993.
17 Dáil Debates, 8th April 1993, col. 1035.

before the courts".[18]

6.31 *We therefore confirm our provisional recommendation that there should be an express statutory defence to contempt proceedings for fair and accurate reports of proceedings in the Oireachtas published contemporaneously with, or within a reasonable time after, the proceedings.*

6.32 We are confident that the Ceann Comhairle of the Dáil and Cathaoirleach of the Seanad will continue to exercise appropriate control over any portion of the proceedings of either House which might be in contempt of Court.

Persons Legally Responsible For Publication

6.33 We considered in detail in the Consultation Paper the question of the liability that should attach to the various categories of persons responsible for the publication of material which was in breach of the *sub judice* rule, i.e. proprietors, editors and reporters or authors.

6.34 In the case of reporters or authors, we concluded that the author should be held responsible where the piece appeared in the publication unamended. In exceptional cases, however, the author should be excused, as, for example, where he or she had no reason to expect that the material would be published without further communication between the publisher and himself or herself. In cases where the offending material was derived from information supplied by a person, whether a journalist or otherwise, we were tentatively of the view that such a person should be capable of being held responsible for *sub judice* contempt if he or she, in all the circumstances, ought reasonably to have anticipated the publication of the information without correction. We also considered that the same principle should apply even though what was published represented an amalgam of contemptuous material contributed by the author and another person if, in isolation, the contemptuous material for which he or she was responsible would constitute *sub judice* contempt.

6.35 We also recommended that those in control of newspapers and other media, such as editors, should be capable of being criminally responsible for *sub judice* contempt to the extent that, by the exercise of that control, they ought to have prevented the publication of the offending material. We also thought it right that the proprietors of newspapers should be liable for *sub judice* contempt published in their newspapers. In the latter case, however, the liability would be vicarious and only fines should be imposed on personal owners by way of punishment.

6.36 While some unease was expressed as to the imposition of vicarious liability in a criminal law context and as to the difficulties that might be posed for

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18 Dáil Debates, 4th May 1993, col. 355.

reporters, we are satisfied that our provisional proposals would not result in the imposition of criminal liability on any persons other than those who were actually responsible for the publication of the offending material or who, by reason of their overall control of the publication, should be required to accept responsibility. *We accordingly confirm our provisional recommendations in this area.*

Publicity Of Judicial Proceedings

6.37 We provisionally recommended that the restrictions imposed by the Criminal Procedure Act, 1967, in respect of preliminary proceedings for indictable offences should be retained. We said that there had been no serious criticism of the operation of these restrictions during the two decades in which they had been in force and that they had been thoughtfully drafted with proper regard for the need to do justice to the defendant. We also pointed to the serious difficulties that would arise if such restrictions were abolished or substantially modified. There was no suggestion in response to these observations that the operation of the 1967 Act had given rise to any appreciable difficulty. *We accordingly confirm our provisional recommendation.*

Suppression And Postponement Of Reporting

6.38 While we recognised in the Consultation Paper the concern that might be felt at any additional powers being conferred on courts to suppress the reporting of matters taking place in open court, we were also of the view that we could not overlook the serious dangers that might arise if the present law was left wholly unamended.

6.39 We were particularly concerned in this context with applications for bail. We pointed out that material seriously prejudicial to a defendant may, of necessity, be given on behalf of the State on the hearing of such applications. But we also commented that the problem was not confined to such applications: a witness giving evidence in a case may make remarks which are highly prejudicial to other proceedings still to be heard.

6.40 We accordingly recommended that there should be a provision along the lines of s.4(2) of the English 1981 Act, giving the court power to order the postponement of publication of any report of its proceedings, where it appeared to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent. We also proposed that a breach of the order should be a criminal offence with a maximum penalty of imprisonment for two years or a fine of £20,000 or both. Liability should depend on knowledge or recklessness as to the existence of the order.

6.41 The Boyle/McGonagle submission on behalf of the National Newspapers of Ireland, while accepting that such a power might be desirable, also suggested that it should be subject to certain safeguards. It pointed out that the power

should only be used in exceptional circumstances and with "particular clarity and certainty", particularly having regard to the provisions of the European Convention on Human Rights. It pointed out that it had been thought necessary in the United Kingdom for the Lord Chief Justice to issue a practice direction to ensure that the order was sparingly used and only in appropriate cases. It also suggested that the media should have an effective means of challenging such orders, especially in the light of the severe penalties proposed.

6.42 *We accept the validity of these observations and, while adhering to the substance of our original recommendation, would also propose that the legislation should incorporate a provision along the lines of the English practice direction. This would require that all orders made under the provision must be formulated in precise terms, committed to writing by the judge personally or by the registrar or clerk of the court under the judge's direction and a permanent record kept. The order should also state (a) its precise scope, (b) the time at which it is to cease to have effect, if appropriate, and (c) the specific purpose of making the order. The legislation should also provide that, where the order is made by an inferior court, it shall be expressly subject to immediate review by the High Court and, if made by the High Court, by the Supreme Court.*

6.43 *As with other sub-headings of contempt, all recommendations for legislation in this chapter relate to prosecution and not to attachment for contempt.*

CHAPTER 7: OTHER ACTS INTERFERING WITH THE ADMINISTRATION OF JUSTICE

Has Contempt Any Useful Role In This Area?

7.1 We pointed out in the Consultation Paper that, apart from the offences of *in facie* contempt and scandalising the court and offences against the *sub judice* rule, the law of criminal contempt also extends to a wide range of other acts which interfere with the administration of justice. However, we noted the fact that virtually all these offences are duplicated in the mainstream criminal law. Thus, apart from specific offences such as assault, perjury etc, there are other offences of a generic nature, notably that of perverting the course of justice. This naturally led us to consider whether there is any need for contempt proceedings in this area. The arguments for and against retaining a role for the law of contempt in this context, as set out in the Consultation Paper, lay particular stress on the fact that, under the law as traditionally understood, these offences, if treated as contempt of court, may be disposed of summarily by a judge sitting without a jury. We provisionally concluded that the arguments in favour of a summary procedure in such cases are not convincing and that, accordingly, the balance of the argument lay in favour of abolishing criminal contempt proceedings in relation to such matters which should, however, continue to be subject to prosecution to the extent that they are contrary to the criminal law.

7.2 We have re-considered our position. The majority is satisfied that whether or not the arguments in favour of a summary procedure in this area are convincing, this summary jurisdiction derives from the courts' inherent powers under the Constitution and the majority is content to let the courts themselves set out the limits to their powers in an appropriate case or cases. The majority notes in particular the view of O'Higgins CJ in *Walsh*[1] that questions, such as

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1 [1981] I.R. 412 at 428.

whether a witness had been threatened or a juror bribed, should be decided by a judge alone and the decision of Costello J. in *In re Kelly and Deighan*[2] to treat inducing a witness not to attend court as contempt *in facie*.

7.3 Having said that, as with other areas of contempt, there is no constitutional restriction on reforming the mainstream law of contempt for prosecution purposes. While there is no point in creating new offences where the criminal law already deals adequately with interference with the administration of justice, falling under this general heading, there may still be scope for the creation of new contempt offences.

7.4 The Consultation Paper addressed the question as to what should be the potential scope and content of any new contempt offence in this area. The first question was as to what level of interference with the administration of justice should be required. We had recommended that the impugned conduct should create a risk, other than a remote one, of interference with the administration of justice. We think, however, that this proposal should be modified so as to accord with our earlier proposals in relation to the other forms of contempt and that, accordingly, *a prosecution should only lie where the impugned conduct creates a substantial risk of serious interference with the administration of justice.*

7.5 The second question that arose was whether the contempt jurisdiction should exclude cases of interference after the legal proceedings have terminated. We concluded that to exclude victimisation of jurors or witnesses at that point would be artificial and would not be fully consistent with the goal of protecting the administration of justice. *We think that this conclusion was soundly based and accordingly confirm our provisional recommendation.*

7.6 The third question was as to whether the contempt jurisdiction should exclude cases of interference before legal proceedings have begun. Again, we concluded that, if contempt proceedings are to have any role in relation to conduct of this nature, there can be no objection in principle to their applying to pre-litigation conduct. Obviously, its proximity or distance from forthcoming or apprehended litigation would be taken into account in determining the existence and extent of a threat of interference with the administration of justice; but in a case where such threat is established, there seemed to be no reason to exclude the application of the law of contempt by reason of this factor. *We are satisfied that this was correct and confirm our provisional recommendation.*

7.7 The fourth question was as to the requisite mental ingredient. Having examined the different possibilities that arose, we concluded that the *mens rea* in respect of such conduct should require proof of intention or recklessness. The intention or recklessness should relate both to the physical act in question (locking-up of a witness, for example) and the consequential risk of interference with the administration of justice. *We confirm our provisional recommendation*

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2 [1984] I.L.R.M. 424.

in this area.

Payments To Witnesses

7.8 We remarked in the Consultation Paper that, while payments by the media to witnesses had a clear potential for injustice, we were not aware of any problems having arisen in this country. However, we were concerned with the dangers that might arise, particularly in cases where payment was contingent on the outcome of the trial, which clearly could have a serious impact on the way in which the witness gave evidence.

7.9 We concluded that, while some payments to witnesses might be regarded as innocuous, the practice in general was sufficiently undesirable to require the creation of a new offence. This might have the salutary affect of discouraging such practices, while at the same time introducing needed clarification and specificity into the law. However, it would also be wrong for the law to prohibit all such payments irrespective of their trivial size or insignificant impact on the proceedings. We accordingly recommended that it should be an offence to make or offer payment to any person who is, or who is likely to be, a party, a witness or a juror in legal proceedings where, in the particular circumstances, the making or offer of such payment creates a substantial risk of injury to the administration of justice or to the constitutional or other rights of any person (as would be the case with any contingent offer of payment). We also tentatively proposed that the new offence should replace rather than act as an adjunct to the law of contempt on this matter. Making reasonable payments for expenses sustained by the witness or party in giving an interview or otherwise consulting with the media should not fall within the scope of the offence; but the fact that the payment is one which would be made to other persons for a similar contribution should not, of itself, afford a defence.

7.10 *We confirm our provisional recommendations on this matter*, which we are satisfied were soundly based and have not provoked any serious degree of dissent.

Reprisals Against A Party To Civil Proceedings

7.11 We also considered whether it should be unlawful to take or threaten reprisals against a party to civil proceedings to the same extent as we propose it should be unlawful to make or threaten reprisals to others involved in the legal process, such as witnesses, judges, jurors etc. Having weighed the arguments for and against an extension of the law in this area, we tentatively concluded that the case in favour of a change was convincing. We accordingly recommended that it should be an offence to take or threaten reprisals against a party, intending thereby to punish the latter, without reasonable excuse, for having instituted, defended or persisted in civil legal proceedings. We drew attention to the fact that such a change in the law could have wide-ranging implications in the context of industrial relations. Thus, our proposals might render criminal the bringing to bear of pressure by employees on employers to discontinue proceedings for

injunctions or damages arising out of disputes. However, we did not consider it appropriate in the restricted context of the subject under consideration, to offer any view as to whether, in such circumstances, the operation of the criminal law should be relaxed.

We are satisfied that our provisional recommendation was soundly based and we reaffirm it, while drawing the attention of interested parties again to the possible impact of the proposals in the field of industrial relations.

Monetary Compensation

7.12 Another question we addressed was whether conduct of the nature now under discussion, irrespective of whether it constitutes contempt or a separate offence, should entitle the victims to claim monetary compensation. We concluded that there should be such an entitlement, but invited views on two questions. The first was whether the entitlement should be premised on (a) the initiation of proceedings for contempt, or for a criminal offence, as the case may be; (b) a conviction in such proceedings; or (c) neither an initiation of, nor conviction in, such proceedings. The second was whether, in the event of either (a) or (b) applying in relation to the first question, the judge before whom the proceedings were heard should determine the question of damages.

7.13 Since we published our Consultation Paper, the Criminal Justice Act, 1993 became law. Section 6 of that Act provides for the payment of compensation by a person convicted of any offence in respect of any personal injury or loss resulting from that offence to any person who has suffered such injury or loss. Accordingly, the questions raised in the previous paragraph are answered by the terms of the new legislation and *we withdraw our provisional recommendation.*

Jury Secrecy

7.14 We also considered in the Consultation Paper whether it is desirable to seek to preserve secrecy for the deliberation process in which juries engage and, if so, whether that goal should be served by means of contempt proceedings. We pointed out that under the present law a juror may not give evidence in any proceedings - including an appeal from the jury's verdict - as to what took place in the jury room and why the jury came to its verdict and that only the most limited exceptions to this exclusionary rule are permitted.

7.15 Having considered the arguments for and against the desirability of ensuring that the secrecy of the jury's deliberations should be protected, we concluded that it is beyond argument that there could be no absolute rule of secrecy. We also accepted that there are good reasons for preserving a considerable range of secrecy. We tentatively identified three areas in which disclosure would seem reasonable. The first was where offences are committed in the jury-room, as for example, where a juror threatens or attempts to bribe another juror. The second was a disclosure in relation to a miscarriage of justice.

However, in this context, we said that it is not appropriate in a Consultation Paper on Contempt of Court to address the important question of the proper extent of the exclusionary rule already referred to: that was a matter to be dealt with in the context of reform of the law of criminal procedure. We did, however, suggest that the law of contempt should not penalise any disclosure relating to miscarriages of justice in the jury-room where that disclosure would not offend against the exclusionary rule. The third area was the carrying out of *bona fide* research into the manner in which juries arrive at their verdicts. We were satisfied that such research could be valuable, but we were equally clear that some controls are necessary. We tentatively recommended that the approval of the Chief Justice, the President of the High Court or the President of the Circuit Court should be a pre-condition of the carrying out of such research, subject to such conditions as might be specified. The intentional or reckless breach of any of these conditions by any person engaged in that research should constitute contempt of court. We did not consider that the principle of vicarious liability should apply.

We were also satisfied that, in view of the real danger to justice posed by a sanctionless rule in this area, the subject of jury secrecy was one that should be properly dealt with by the law of contempt.

7.16 As to the degree of secrecy that should be required, we recommended that it should be contempt of court intentionally or recklessly to disclose the voting score in the case of an acquittal after the judge has informed the jury of their right to come to a majority verdict, or to disclose any other information, again intentionally or recklessly, about what took place in the jury-room where this creates a risk of detriment to the liberty, reputation or physical or financial interests of a party to litigation.

7.17 We also considered the question as to whether the law of contempt should limit itself to cases of publication of jury secrets to the public or a section of the public and leave other more private disclosures alone. While we recognised that there are strong arguments against prohibiting such private disclosures, as, for example, in cases where spouses might tell each other what went on in the jury-room, we did not consider they were sufficiently strong to warrant limiting the operation of the law of contempt of court to cases which involve publication to the public or a section of the public.

7.18 Finally, we considered whether there should be any temporal limits on disclosure. Our tentative conclusion was that there should be no such temporal limits and that general principles of prosecutorial discretion should be capable of dealing sensibly with cases of disclosure long after the event.

7.19 There was little dissent from our provisional recommendations in this area and much support, in particular, for the view that disclosure is desirable in cases of suspected miscarriages of justice and for purposes of *bona fide* research. *We have no difficulty in confirming our provisional recommendations.*

CHAPTER 8: CIVIL CONTEMPT

8.1 Our provisional recommendations in the area of civil contempt provoked little discussion, probably because, in contrast to the law of criminal contempt, civil contempt has given rise to little difficulty in practice. It would, indeed, have enjoyed a doubtful priority as a subject of law reform, were it not for the fact that the reference by the Attorney General extended to contempt of court generally and not merely to the criminal variety. The only radical proposal made to us in this field - in the Boyle/McGonagle submission on behalf of the National Newspapers of Ireland - was that the present concepts of criminal and civil contempt should be abolished and replaced with a number of specific statutory offences. We have already expressed our view in Chapter 1 that we do not think that changes in the present law need go that far.

8.2 The first major question considered in the Consultation Paper was whether the present law, under which the principal sanction for breach of an order of the court is imprisonment, might be improved. Having examined in detail the question as to whether the rationale for the civil contempt procedure should properly be regarded as coercive or punitive, and having concluded that the arguments in favour of a punitive rationale had much force, we went on to consider whether imprisonment should be excluded totally as a sanction in civil contempt proceedings. We tentatively concluded that the case for its abolition as such a sanction had not been established. The question, however, as to whether imprisonment for civil contempt should continue to be open-ended, was somewhat more complex. Having examined the arguments for and against, we came to the tentative conclusion that the balance of the argument was against the introduction of a fixed term of imprisonment to deal with the coercive function of civil contempt. We were of the view that it would introduce an added potential for injustice for no substantial gain.

We also considered whether there was a case for resorting to fines as an

alternative or supplement to committal or sequestration. We provisionally concluded that fines had a role, both as punitive and coercive sanctions, and that the court should have power to order them either on an accruing basis or otherwise.

While we would emphasise that the object of the sanctions in relation to civil contempt is to secure compliance with the court's order, *we recommend that fines continue to have a role to play in cases of civil contempt.*

8.3 We pointed out that there was at present no clear rule as to the mental state necessary to render a person liable for civil contempt. Having considered the various options, we concluded that a person should be held responsible when the person (i) ought to have been aware that his or her conduct (or inaction) constituted (or, more broadly, risked constituting) a breach of a court order, or (ii) acted, or failed to act, with the intention of breaching the order. *We confirm this provisional recommendation.*

8.4 We next considered whether the legislation should include a specific defence of reasonable excuse. We accepted that, in practice, courts will listen to what defendants have to say in explanation of why they acted contrary to the terms of the order and, where there appears to have been a reasonable excuse, will be unlikely to punish the defendant. But we also took the view that it was contrary to basic notions of justice to hold a defendant in contempt who had a reasonable excuse for acting as he or she did. While there accordingly seemed good reason for affording a general defence of reasonable excuse, we were conscious of the fact that, in the context of custody and access to children, and, to a lesser extent, maintenance, the person accused of contempt might claim that he or she acted contrary to a court order because of a *bona fide* belief that the plaintiff spouse or parent had acted or was likely to act in a manner detrimental to the child's interests. We accordingly recommended that the legislation should provide a general defence of reasonable excuse without further specificity, save that it should also provide that the defence should not be available when the excuse relates to a matter on which the defendant could reasonably have invoked the authority of the court in such circumstances as would have been likely to make it unnecessary for him or her to be in breach of the order. *We confirm our provisional recommendation in this area.*

8.5 We next considered the question as to whether the present law, under which it is a matter for the parties as to whether they will continue to seek enforcement of an order which they have obtained by using the court's process, should be retained. We pointed out that it could be plausibly argued that the civil contempt machinery, while undoubtedly benefiting individual litigants, also serves another important goal, i.e. protecting the integrity of the judicial process. However, we tentatively concluded that there should be no change in the existing law. Apart from the principled objections, such as that the procedure is concerned primarily with the protection of private rights, we were also mindful of practical difficulties which could arise. Thus, a rule of law which insisted on a party's invocation of the contempt machinery to the bitter end would be likely

to damage on-going relationships in such contexts as family law and industrial relations. These reasons still appear persuasive to us and *we accordingly endorse our provisional conclusion that there should be no change in the law.*

Contempt In Relation To Family Litigation

8.6 The Consultation Paper discussed a number of difficulties which family law presented, in principle and in practice, in relation to contempt of court. The first of these was whether, given the special considerations which must apply to family litigation, contempt proceedings should have any role in this area. Having examined the arguments in detail on either side and in particular the helpful discussion by the Law Reform Commission of Australia in its Discussion Paper and Report on *Contempt and Family Law,* we tentatively concluded that the contempt jurisdiction should remain. The first reason we relied on was one of practical common sense: if court orders are not enforceable, they will tend not to be obeyed. The second point was one of principle: if there are to be no contempt proceedings because enforcing such orders are damaging to family life, then the logical consequence should be that no such orders should be made. As to this latter point, while we recognised that even so radical a proposal as withdrawing the law completely from this area had received some international support, we were satisfied that such a proposal was not acceptable. It would involve the withdrawal of social support, through the law, for justice in family life. This was not of course to say that the courts should not be sensitive to the wider ramifications of any orders they may make so far as the continuity and quality of family relationships are concerned.

We are satisfied that we were correct in arriving at this conclusion and confirm our provisional recommendation that the law of contempt should continue to operate in this area.

Enforcement Of Maintenance Obligations

8.7 We next considered the question of the propriety of imprisonment as a means of enforcing maintenance orders. Our discussion of the question emphasised that the law permitted the imprisonment of maintenance defaulters only where the default was *wilful.* The arguments against the present system were:

(a) that it was unduly costly to the State;

(b) that it was counter-productive, in depriving the family of financial support while the defaulter was in prison;

(c) that there were other more effective remedies, such as attachment of earnings;

(d) that it cast the net too widely and resulted in the imprisonment of debtors who could not properly be regarded as wilful defaulters;

(e) that the obligation to pay a maintenance debt creates psychological difficulties which are not present in the case of an ordinary civil debt; and

(f) that the possibility of imprisonment encourages defaulters to flee the jurisdiction rather than meet their obligations.

As against these, we identified a number of factors which justified the present system:

(1) the specially damaging effect of maintenance default on families, which distinguishes default in this area from ordinary commercial debts;

(2) the moral responsibility flowing from marriage and parenthood;

(3) the efficacy of imprisonment as a means of ensuring payment of maintenance;

(4) the interest of society in ensuring that those who have family commitments discharge them, thereby avoiding the burden falling on other members of the community.

So far as the third of these arguments was concerned, i.e. the efficacy of imprisonment, we drew attention to the helpful study by Peter Ward, The *Financial Consequences of Marital Breakdown*.[1] This demonstrated that, to an admittedly limited degree, the making of committal orders assisted in securing compliance with maintenance orders.

8.8 Having considered these arguments, we concluded that the sanction of imprisonment for wilful refusal or culpable neglect to obey a court order to support one's family should be retained. Sensitively and prudently applied, it was an appropriate response to such default. The view was expressed at the Seminar that attachment of earnings was a more desirable and less counter-productive means of ensuring that spouses in default meet their obligations.

We entirely agree with this view, but we anticipate that imprisonment may be a useful remedy of last resort in certain cases, for example, where a defaulting party of adequate means wilfully refuses to pay and will not divulge the whereabouts of their assets or the nature of their earnings from self-employment.

We are fully aware that the sanction of imprisonment will not solve the many problems relating to payment, collection and enforcement of maintenance. Consideration of these issues however lies well outside the scope of this Report. That said, *we are satisfied that our provisional recommendation that the sanction*

1 Combat Poverty Agency, Dublin, 1990.

of imprisonment should remain was soundly based.

"Trading-off" Rights Against Contempt

8.9 We also considered the question as to whether legislation should provide that a spouse in contempt of a court order should forfeit reciprocal entitlements. Thus, a mother with custody of children may frustrate her husband's right of access and it could be argued on his behalf that he should be relieved of the obligation to maintain her and the children for as long as she is in contempt. Conversely, it could be said that a husband who failed to maintain his family in breach of a court order, but wished to exercise his right of access, should be denied his right to take contempt proceedings for frustration of his right of access until he accepted his financial responsibilities.

8.10 We tentatively concluded that legislation should not include any "trade-off" principle. One of the factors which weighed most heavily with us in coming to this conclusion was that any such "trade-off" might damage the interests of innocent third parties, particularly, of course, children. We recognise, however, that a spouse's contemptuous defiance of a court order should continue to be a factor to be given such weight as the court considers appropriate in any subsequent proceedings brought by a spouse seeking to vary or discharge an order respecting that other spouse's obligations relating to the family. *We confirm our provisional recommendations in this regard.*

The Civil Law/Criminal Law Overlap

8.11 We pointed out in the Consultation Paper that problems could arise from the existence of parallel jurisdictions in this area. Thus, a spouse who contravenes a barring order or a protection order is guilty of an offence under the Family Law (Protection of Spouses and Children) Act, 1981. He or she is also, however,liable to be committed for contempt of court.

8.12 We were of the view that, where the contempt alleged against the person who has broken one of these statutory provisions is civil in nature, there should be no change in the current situation whereby dual liability arises. However, where the contempt alleged is criminal in nature, the possibility of double jeopardy arises. We accordingly recommended that the legislation should make it clear that in respect of offences of this type, no person who has been charged with the statutory offence should later be exposed to proceedings for criminal contempt. Moreover, where proceedings for criminal contempt have been brought with regard to conduct which constitutes a breach of the statutory provision, no prosecution for that offence should subsequently be permissible.

8.13 We are still of the view that, where there is overlapping civil liability in contempt and criminal liability under statute, there is no need for change. We have however revised our review on overlapping criminal liability. There are many examples in the criminal law of different offences covering the same set of facts and problems of double jeopardy rarely if ever occur. On reflection,

therefore, *we are satisfied that our provisional recommendation for a precautionary provision was unnecessary.*

CHAPTER 9: CONTEMPT IN RELATION TO TRIBUNALS

9.1 We set out in some detail in the Consultation Paper the law in relation to contempt as it affects tribunals. We were concerned in that Paper not simply with tribunals established under the Tribunals of Inquiry (Evidence) Acts of 1921 and 1979, but also with other bodies in the nature of tribunals established by various enactments. We limit ourselves here to some general comments on the statutory penalisation, by explicit analogy with contempt of court, of conduct which is obstructive of the proceedings of tribunals. We then specifically consider, by reference to the received categories of contempt of court, the desirability of penalising such conduct in relation to the proceedings of tribunals of inquiry.

Should "Deemed Contempt" Provisions Be Retained?

9.2 We pointed out that it had become popular for legislation in relation to tribunals to provide for an offence, sometimes in conjunction with specific offences, to do or omit to do anything "if such doing or omission would, if the tribunal had been the High Court, have been contempt of that court". We commented that while such a provision has the benefit, if not the virtue, of covering the widest range of conduct without having to make any attempt to define its actual content, it seemed to us to have fundamental weaknesses.

The first was that there was no basis in justice for criminalising conduct the characterisation of which as contempt, when occurring in respect of the High Court, is defensible only, or primarily, in the light of protecting the underlying function of the court in relation to the administration of justice. The second was that the generic criminalisation of conduct in relation to tribunals was surely unconstitutional in view of the arbitrary imposition of criminal responsibility which it necessarily involves. We provisionally concluded that such "deemed contempt" provisions in legislation dealing with tribunals should be abolished.

We confirm our provisional recommendation in that regard.

9.3 We also pointed out in the Consultation Paper that an even more unsatisfactory procedure had been adopted in the case of the Companies Act, 1990. The part of the Act dealing with inspectors appointed by the Minister for Industry and Commerce to investigate the affairs of a company included a provision empowering the inspector to certify a refusal to attend or answer questions to the High Court, which could then fine the offender as if he or she had been guilty of contempt of court. We expressed surprise at the revival of this procedure by the 1990 Act having regard to the finding of the Supreme Court in *In re Haughey*[1] that such a procedure was unconstitutional. Since the publication of the Consultation Paper, the Supreme Court has found in *Desmond and Another v. Glackin and Others (No. 2)*[2] that the section was indeed invalid to the extent that it purported to enable the court to punish an offender in like manner as if he had been guilty of contempt of court. While part of the section which provides another procedure for dealing with non co-operation with the inspector was found not to contain any constitutional flaw, the case clearly demonstrates that *this form of provision is even more unsatisfactory than the "deemed provisions" already considered and should not be resorted to in future.*

Tribunals Of Inquiry

(a) A scandalising parallel?

9.4 We provisionally concluded that scandalising a tribunal should not be treated as contempt (or its equivalent). We were influenced in this conclusion by four considerations which are particularly applicable to tribunals of inquiry:

(1) The essence of the offence of scandalising the court is interference with the administration of justice. Very many tribunals are concerned with investigations and recommendations rather than the administration of justice.[3]

(2) Tribunals often deal with matters of considerable public importance which necessarily require the fullest public discussion.

(3) Tribunals are frequently established in a political context and there should be free and frank public discussion as to the motives of the Government of the day in deciding to establish a tribunal and as to the choice of who is to compose the tribunal.

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1 [1971] I.R. 217.

2 Unreported, 30th July 1992.

3 That tribunals of inquiry perform an investigative, fact-finding function and do not exercise judicial functions and powers, even of a limited kind, was recently confirmed by the Supreme Court in *Goodman v. The Hon. Mr. Justice Hamilton and Others* [1992] 12 I.L.R.M. 162.

(4) Defamation affords an adequate and appropriate alternative remedy in the case of tribunals, unlike courts.

While we considered that not all these arguments could be accepted without qualification, on balance we were of the view that they were sufficiently weighty to support a provisional conclusion that scandalising tribunals should not constitute an offence. There was no dissent from that conclusion. *We now therefore confirm that scandalising a tribunal of inquiry should not constitute an offence.*

(b) An *in facie* contempt parallel?

9.5 We considered whether there should be a distinct offence of contempt in the face of a tribunal, equivalent to contempt *in facie curiae*. We were of the view that the principal justification for the retention in our law of the admittedly somewhat anomalous offence of *in facie* contempt - the paramount need of upholding the efficient and orderly dispensation of justice - does not apply in the case of tribunals of inquiry. It did not, of course, follow in any sense from that conclusion that such tribunals should have no power to regulate their proceedings. On the contrary, we considered that it was essential that their powers in that respect should be wide-ranging and fully effective. However, we considered that this necessary goal was capable of being achieved by a provision which would make it an offence to disrupt a tribunal in the holding of its proceedings. In making this recommendation, we envisaged disruption of a direct kind. Our proposal was not intended to capture actions such as publishing material which were equivalent to *sub judice* contempt of court.

9.6 We also voiced our concern as to paragraphs (d) to (e) of s.1(2) of the Tribunals of Inquiry (Evidence) Act, 1921, as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. These provide that if a person -

"(d) by act or omission, obstructs or hinders the tribunal in the performance of its functions, or

(e) fails, neglects or refuses to comply with the provisions of an order made by the tribunal,"

that person shall be guilty of an offence. We were of the view that these provisions did not clarify the *mens rea* requirements. If they were to be retained, it should be made clear that liability should accrue only when the act or omission was intentional or reckless. However, we considered that since these two provisions, especially paragraph (d), extend too widely and would be capable of rendering criminal conduct which should be permitted, the preferable course would be to repeal them and replace them with the disruption offence we had already proposed.

9.7 As an adjunct to the criminal sanction in this context, we tentatively recommended that members of tribunals should have specific statutory powers to expel persons who are engaging in disruptive conduct. This power should be

capable of being effected through the use of reasonable force.

We are satisfied that our recommendations in this area were soundly based and confirm them.

9.8 We should also mention paragraph (b) of s.1(2) of the *Tribunals of Inquiry (Evidence) Act, 1921*, as amended, which provides, *inter alia*, that it is an offence for a person being in attendance as a witness before a tribunal to refuse "to answer any question to which the tribunal may legally require an answer." At present journalists enjoy no privilege to refuse to answer questions as to the source of information given to them in confidence. We have already recommended, in dealing with contempt *in facie curiae*, that there should be a limited right to protect the confidentiality of sources of published information (para. 4.19); and we have therefore considered whether a similar right should be created in relation to the proceedings of tribunals of inquiry. While the considerations regarding the administration of justice which apply to contempt of court do not apply to the proceedings of tribunals of inquiry, the public interest in freedom of information must nonetheless be balanced against the public interest in the facilitation of the investigation of matters of great public importance. Tribunals of inquiry are rare; they may only be established pursuant to a resolution of both Houses of Parliament, and only for the purpose of inquiring into a definite matter of urgent public importance.[4] It is desirable that they have the power to require that all the information necessary for them to fulfil their functions be made available to them. On the other hand, it is also desirable that the value of investigative journalism in a democratic society be recognised. *We therefore recommend that legislation should provide that a person may only be required to disclose the source of information contained in a publication for which he or she is responsible if it is established to the satisfaction of the tribunal of inquiry that disclosure is absolutely necessary for the purpose of the inquiry or to protect the constitutional rights of any other person.*[5]

9.9 It should also be noted that the constitutional limits to the power of a tribunal of inquiry to require information have recently been clarified by the courts. On 21st August 1992, in *Attorney General v The Sole Member of the Tribunal of Inquiry into the Beef Processing Industry*,[6] the Supreme Court held that the Tribunal was not legally entitled to inquire into the content and details of discussions at meetings of the Government which benefitted, under the Constitution, from absolute confidentiality in all circumstances. Also, on 28th July 1993, the Supreme Court held, in *Attorney General v The Honourable Liam*

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4 Section 1(1) of the *Tribunals of Inquiry (Evidence) Act, 1921.*

5 Section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, empowers a tribunal, *inter alia*, to "make such orders as it considers necessary for the purposes of its functions". In *Kiberd and Another v. The Sole Member of the Tribunal of Inquiry into the Beef Processing Industry* [1992] 12 I.L.R.M. 574, the High Court, following earlier case law, held that for an order to come within the power given by the section not only must it be one which the tribunal considers necessary for the purposes of its functions, it must also fulfil three further conditions: (i) the opinion of the tribunal that the making of the order was necessary for the purposes of its functions must be one which is *bona fide* held; (ii) that opinion must be supported by the facts; and (iii) it must not be unreasonable. See further, below, note 8 on this case.

6 [1993] I.L.R.M. 81.

Hamilton,[7] that current and former members of the Dáil were entitled to refuse to reveal to the Tribunal of Inquiry into the Beef Processing Industry the sources of information on which they had based statements to the Tribunal, where those statements were simply repetitions of earlier statements made by them in the Dáil. By virtue of Articles 15.12 and 15.13 of the Constitution, utterances within either House of the Oireachtas are privileged and members of the Oireachtas are not amenable to any authority other than the House itself for the utterances. While this Parliamentary privilege does not extend to utterances made outside the confines of the House, the privilege could be invoked by the deputies in connection with their submissions to the Tribunal, not by way of extension, but by simple logical application of the privilege in order to give it real effect. To question them on those submissions would be in reality to question them on their utterances in the Dáil. Given the Tribunal's mandate to inquire, *inter alia*, into certain allegations made in the Dáil, it would be too simplistic to say that a mere dual speaking of words in this case, once inside and once outside the Oireachtas, meant loss of privilege.[8]

(c) A *sub judice* parallel?

9.10 We provisionally recommended in the Consultation Paper that there should be no *sub judice* rule in relation to tribunals. The first reason was that such tribunals were frequently composed of persons who should have no difficulty in excluding irrelevant matters from their minds. Clearly, this argument loses some force when it is remembered that members of tribunals are not necessarily judges or other persons with legal training. The second, and more substantial, argument was that a *sub judice* offence in relation to tribunals would be an unwarranted, and perhaps unconstitutional, interference with freedom of expression, especially on matters of public interest, which could not be justified by the special requirements of the administration of justice peculiar to court proceedings. We did, however, recommend that there should be a provision along the lines proposed by the English *Salmon Committee on the Law of Contempt as it Affects Tribunals of Inquiry* designed to discourage media interviews with potential witnesses before tribunals.

9.11 Our provisional recommendations in this area acquired some topical interest in view of the proceedings of the Tribunal appointed to enquire into the Beef Industry which commenced its hearings subsequent to the publication of our Consultation Paper. During the course of the hearings, the sole member of the Tribunal, Mr Justice Hamilton, President of the High Court, expressed concern

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7 Unreported.

8 The majority in this case also gave their opinion on two issues which had not been appealed. The first was the question of waiver of the privilege. In their view, the standard for waiver was exceptionally high, requiring a clear unequivocal indication to this effect. Mere participation by the deputies in, and willingness to cooperate with, the Tribunal did not constitute a voluntary, conscious waiver of the privilege on their part. The second issue concerned whether or not the privilege was absolute. In the view of the majority, the privilege is very far-reaching and may, in many instances, represent a major invasion of the individual's personal rights. The High Court had earlier said in its judgment in this case that the privilege "was intended by the Constitution to be absolute in the sense even that it cannot be sacrificed to protect other constitutional rights": unreported, 18th February 1993, at p.32 of the transcript.

at comments in the media which appeared to pre-judge the Tribunal's findings. However, no action was subsequently taken in respect of any of the publications in question.

9.12 Nonetheless, the general question of principle as to whether there should be a *sub judice* rule in relation to tribunals of inquiry is clearly among the matters which we have been requested to consider by the Attorney General. Having considered again the arguments for and against having such a rule, we are satisfied that our provisional view was correct. The proceedings of many of these bodies are of significant public interest, unlike private litigation between individual citizens or criminal proceedings involving one person and his or her victim. Indeed, in the case of tribunals established under the 1921 Act as amended by the 1979 Act, it is a necessary pre-condition to their establishment that the matters proposed to be assigned to them should be of public importance. Even more significantly, they are investigating bodies and do not administer justice so that the requirements of the administration of justice which, in our view, warrant the retention in our law of the *sub judice* rule are not relevant. *Given the constitutional requirements as to freedom of expression, reinforced by the requirements of the European Convention on Human Rights, we consider that the sub judice rule should have no place in relation to such tribunals.*

9.13 We are, however, satisfied that there should be a provision to ensure that witnesses are not discouraged from giving evidence before such bodies and that the evidence which they do give is not distorted by prior media coverage of the matters concerned. *We accordingly confirm our provisional recommendation that it should be an offence to publish, say or do anything in relation to evidence which is intended or obviously likely to alter, distort, destroy or withhold such evidence from a tribunal of inquiry.*[9]

(d) Other acts interfering with the administration or effectiveness of a tribunal of inquiry

9.14 We considered whether there should be any procedure for dealing with matters which interfere with the effective operation of tribunals of inquiry, equivalent to the procedures available in the case of the courts. We had in mind matters such as the intimidation of witnesses, members of tribunals or assessors, or victimising them for having given evidence, adjudicated or given advice, as the case may be. To some extent, the existing legislation already provides certain

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9 On 9th February 1992 two articles were published in *The Sunday Business Post* on matters which were to come before the Tribunal of Inquiry into the Beef Processing Industry. It appeared that the information in the articles had been based on or culled from books of statements served on a number of persons prior to the giving of the evidence in the Tribunal, and the Tribunal was concerned that it might not get the assistance of potential witnesses, interested parties and other persons if there was any fear on their part that material which they might submit in confidence to it would be disclosed in the public press before being publicly dealt with before the Tribunal. The Tribunal therefore ordered the editor of the newspaper and the journalist who wrote the articles to appear before the Tribunal, to produce thereat all documents, letters and memoranda in their possession and control which provided the basis for the contents of the articles, and to answer all questions to which the Tribunal might legally require an answer in connection with the source of such documents, letters and memoranda. The competence of the Tribunal to make this Order was upheld by the High Court in *Kiberd and Carey v. The Sole Member of the Tribunal of Inquiry into the Beef Processing Industry* [1992] 12 I.L.R.M. 574.

controls. However, we felt that a case had been established for providing more wide-ranging controls. We accordingly tentatively recommended that the following types of conduct should be an offence:

(1) improperly influencing or attempting to influence a tribunal in the determination of any issue which it may have to decide;

(2) bribing or attempting to bribe a person who is or may be a witness in proceedings before a tribunal;

(3) intimidating or attempting to intimidate such a witness with respect to such evidence;

(4) taking or attempting to take reprisals against a witness who has given evidence in such proceedings.

There should be similar offences in respect of members of the tribunal and other persons involved in the work of the tribunal.

We confirm our provisional recommendations in this regard.

CHAPTER 10: SUMMARY OF RECOMMENDATIONS

Jurisdiction

1. The District Court and Circuit Court should enjoy the same jurisdiction in relation to criminal contempt as is presently enjoyed by the High Court: para. 3.3.

2. The District Court and Circuit Court should have the same powers as the High Court in relation to civil contempt, except as regards the imposition of fines imposed in prosecutions which should be subject to the following *maxima*:

   (i) **District Court**

   A sum not exceeding £200 for every day during which he or she is in default, subject to an overall maximum of £5,000, or a single fine of £5,000.

   (ii) **Circuit Court**

   A sum not exceeding £600 for every day during which he or she is in default, subject to an overall maximum of £15,000, or a single fine of £15,000: para. 3.5.

3. As regards appeals in cases of criminal contempt, the machinery should be the same as applies to all other indictable and summary offences: para. 3.6.

4. As regards appeals in cases of civil contempt, these should be treated in the same way as appeals in other civil matters: para. 3.6.

Mode Of Trial

5. The uncertainties in the law with respect to the mode of trial for criminal contempt resulting from the Supreme Court decision in *The State (D.P.P.) v. Walsh* [1981] I.R. 412 should be left to be resolved by a future decision of that Court: para. 3.12.

6. There should be no change in the summary mode of trial for civil contempt: para. 3.13.

Contempt In The Face Of The Court

7. The law in respect of contempt in the face of the court should be retained without amendment: para. 4.8.

8. Where a party or witness or a legal representative of one of the parties fails to attend court without reasonable excuse and with the intention of interfering with the administration of justice or recklessly indifferent as to whether it is interfered with or not, that person should be guilty of an offence, punishable summarily by the maximum summary penalties: para. 4.12.

9. The law relating to confidentiality of sources should remain unchanged: para. 4.39.

10. As regards inter-spousal and religious confidences, no changes in the law are recommended at this time: paras. 4.16. and 4.21.

11. An advisory committee should be established to review the arrangements for, and legal provisions relating to, the recording and broadcasting of court proceedings by the media. Part of the responsibilities of the Committee should be to devise and monitor pilot projects involving research and the actual broadcasting of civil and criminal trials and of appellate proceedings. The Committee should also consider the desirability of permitting the broadcasting of proceedings of tribunals of inquiry: para. 4.49.

Scandalising The Court

12. The common law offence of "scandalising the court" should be defined by statute for prosecution purposes and should consist in:

    (i) imputing corrupt conduct to a judge or court: para. 5.15; or

    (ii) publishing to the public a false account of legal proceedings: para. 5.16.

    The description of the offence need not be changed: para. 5.18.

13. A person should be guilty of the offence only where he or she knew that there was a substantial risk that the publication would bring the administration of justice, the judiciary or any particular judge or judges into serious disrepute or was recklessly indifferent as to whether it would or not and, in the case of a publication of a false account, only where he or she intended to publish a false account or was recklessly indifferent as to whether it was false: para. 5.17.

14. The truth of a communication should render it lawful. The onus of proof of the truth of an imputation of corrupt judicial conduct should rest on the defence. The onus of proof of the falsity of an account of legal proceedings published (or provided for publication) to the public or a section of the public should rest on the prosecution: para. 5.21.

15. As regards the liability of editors, media proprietors and others for scandalous publications, the same principles should apply as apply in respect of *sub judice* contempt: para 5.21.

16. There should be no legislative interference with the court's power to attach summarily for contempt by scandalising: para. 5.21.

17. Abuse of the judiciary, even if scurrilous, should not constitute an offence: para. 5.21.

18. A court should be able to order the publication of an apology or correction in cases of careless reporting: para. 5.22.

The Sub Judice Rule

19. Whereas the courts' summary powers of attachment should remain unchanged for both criminal and civil proceedings, there should be a new statutory definition, for prosecution purposes, of what constitutes "publication" for the purposes of prosecution for breach of the *sub judice* rule in proceedings which should include any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public or to a judge or juror who is involved in the legal proceedings to which the publication relates: paras. 6.2 and 6.9.

20. The statutory *sub judice* rule should apply to any publication which creates a substantial risk that the course of justice in proceedings would be seriously impeded or prejudiced. Legislation for criminal cases should include an illustrative list of statements which are capable of constituting such a "substantial risk" using as a model a list proposed by the Law Reform Commission of Australia: namely, statements to the effect, or from which it could reasonably be 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;

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.

The Commission encountered insurmountable difficulties in making a similar list for civil proceedings: para. 6.9.

21. Criminal proceedings should be considered active from the time an initial step has been taken until they are concluded. The initial steps of criminal proceedings would be: (a) arrest without warrant; (b) the issue of a warrant for arrest; (c) the issue of a summons to appear; (d) the service of an indictment or other document specifying the charge, and (e) oral charge. Criminal proceedings would be concluded by (a) acquittal or sentence; (b) any other verdict, finding, order or decision which puts an end to the proceedings; (c) a *nolle prosequi*; or (d) operation of law. Criminal proceedings should cease to be active if an order is made for the charge to lie on the file, but should become active again if leave is later given for the proceedings to continue. They should also cease to be active if the accused is found unfit to plead or is transferred to the Central Mental Hospital. Criminal proceedings against a person which became active on the issue of a warrant for his or her arrest should cease to be active a year after the date the warrant was issued, unless he or she has been arrested in that period; they

should become active again if he or she is subsequently arrested: para 6.13.

22. With respect to proceedings which are active, a publisher should only be liable where he or she was negligent in relation to the publication: para. 6.10.

23. The same test of liability should apply to a distributor as to a publisher with respect to proceedings which are active: para. 6.10.

24. Liability should be imposed in respect of publications *before* proceedings are active where the publisher or distributor is 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 proceedings is certain or virtually certain: para. 6.12.

25. Civil proceedings should only be regarded as imminent when a date for trial has been fixed: para. 6.13.

26. The *sub judice* rule should not apply to appellate proceedings: para. 6.14.

27. The *sub judice* rule should not apply to proceedings for judicial review: para. 6.14.

28. No liability, apart from liability for scandalising the court, should attach to publications, not referable to specific proceedings, which are likely to cause serious injury to the administration of justice in general: para. 6.23.

29. There should be a defence to *sub judice* contempt of reasonable necessity to publish: para. 6.34.

30. It should not be a defence to *sub judice* contempt that the offending material was published incidentally to a discussion of public affairs: para. 6.25.

31. There should be an express statutory defence to *sub judice* contempt for fair and accurate reports of proceedings in the Oireachtas published contemporaneously with, or within a reasonable time after, the proceedings. The Ceann Comhairle of the Dáil or Cathaoirleach of the Seanad should not have any power to prohibit publication of any portion of the proceedings on the basis that it may offend against the *sub judice* rule: paras. 6.26-6.32.

32. The author of material which offends against the *sub judice* rule should in general be liable where the material appears in the publication unamended. In exceptional cases, however, the author should be

excused, as, for example, where he or she had no reason to expect that the material would be published without further communication between the publisher and himself or herself: paras. 6.33-6.36.

33. In cases where the offending material was derived from information supplied by a person, whether a journalist or otherwise, such person should be capable of being held responsible for *sub judice* contempt if he or she, in all the circumstances, ought reasonably to have anticipated the publication of the information without correction: paras. 6.33-6.36.

34. A person may be found guilty of *sub judice* contempt even though what was published represents an amalgamation or cumulation of contemptuous material contributed by himself or herself and another person if, in isolation, the contemptuous material for which he or she is responsible would constitute *sub judice* contempt: paras. 6.33-6.36.

35. Those in control of newspapers and other media, such as editors, should be capable of being criminally responsible for *sub judice* contempt to the extent that, by the exercise of that control, they ought to have prevented the publication of the offending material: paras. 6.33-6.36.

36. The proprietors of newspapers should be vicariously liable for *sub judice* contempts published in their newspapers. Only fines should be imposed on proprietors by way of punishment: paras. 6.33-6.36.

37. The restriction imposed by the Criminal Justice Act, 1967, in respect of preliminary proceedings for indictable offences should be retained: para. 6.37.

38. It should be provided by statute that a court has power to order the postponement of publication of any report of its proceedings, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent. A breach of the order should be an offence with a maximum penalty of imprisonment for two years or a fine of £20,000 or both. Liability should depend on knowledge or recklessness as to the existence of the order. The statute should further provide that:

    (i) the order should be formulated in precise terms, be committed to writing by the judge personally or by the registrar or clerk of the court under the judge's direction, and a permanent record kept;

    (ii) the order should state (a) its precise scope, (b) the time at which it is to cease to have effect, if appropriate; and

(iii) where the order is made by an inferior court, it should be expressly subject to immediate review by the High Court and, if made by the High Court or a Special Criminal Court, by the Supreme Court: paras. 6.38-6.43.

Other Acts Interfering With The Administration Of Justice

39. The following rules should apply to any new offence of contempt

(i) a prosecution should only lie where the impugned conduct creates a substantial risk of serious interference with the administration of justice: para. 7.4;

(ii) contempt should include victimisation of jurors or witnesses after legal proceedings have terminated: para. 7.5;

(iii) contempt should extend to pre-litigation conduct: para. 7.6;

(iv) the *mens rea* test should require proof of intention or recklessness. The intention or recklessness should relate both to the physical act in question and the consequential risk of serious interference with the administration of justice: para. 7.7.

40. Legislation should provide that it is an offence to make or offer payment to any person who is, or who is likely to be, a party, a witness or a juror in legal proceedings where, in the particular circumstances, the making or offer of such payment creates a substantial risk of injury to the administration of justice or to the constitutional or other rights of any person. The new offence should replace rather than act as an adjunct to the law of contempt on this matter. Making reasonable payments for expenses sustained by the witness or party in giving an interview or otherwise consulting with the media should not fall within the scope of the offence; but the fact that the payment is one which would be made to other persons for a similar contribution should not, of itself, afford a defence: paras. 7.8-7.10.

41. There should be a new statutory offence of taking or threatening reprisals against a party, intending thereby to punish the latter, without reasonable excuse, for having instituted, defended or persisted in civil legal proceedings: para. 7.11.

42. No special provision for compensation for injury caused by a contempt offence is necessary since the passing of s.6 of the *Criminal Justice Act,*

1993: para. 7.13.

43. There should be no absolute rule of secrecy as to jury deliberations: paras. 7.14-7.19.

44. Contempt of court should remain the appropriate means of protecting jury secrecy: paras. 7.14-7.19.

45. Disclosure should be permissible so far as it relates to offences committed in the jury-room: paras. 7.14-7.19.

46. Disclosures relating to miscarriages of justice in the jury-room should be permissible to the extent that they do not offend against the exclusionary rule: paras. 7.14-7.19.

47. *Bona fide* research into the manner in which juries arrive at their verdicts should be permitted, subject to:

    (i) the prior approval of the Chief Justice, the President of the High Court or the President of the Circuit Court, as appropriate; and

    (ii) such conditions as may be specified by the Chief Justice, the President of the High Court or the President of the Circuit Court.

    The intentional or reckless breach of any condition by a person engaged in such research should constitute contempt of court. The principle of vicarious liability should not apply to such cases: paras. 7.14-7.19.

48. It should be contempt of court intentionally or recklessly to disclose the voting score in the case of an acquittal after the judge has informed the jury of their right to come to a majority verdict, or to disclose any other information, intentionally or recklessly, about what took place in the jury-room where this creates a risk of detriment to the liberty, reputation, or physical or financial interests of a party to litigation: paras. 7.14- 7.19.

49. Liability for contempt of court relating to jury secrecy should not be limited to cases which involve publication to the public or a section of the public: paras. 7.14-7.19.

50. There should be no temporal limits on the obligation not to make improper disclosures regarding the jury: paras. 7.14-7.19.

Civil Contempt

51. Imprisonment should be retained as a sanction in civil contempt: para.

8.2.

52. Imprisonment for civil contempt should continue to be open-ended: para. 8.2.

53. Fines should continue to have a role to play in cases of civil contempt: para. 8.2.

54. As to the mental state necessary to render a person liable for civil contempt, legislation should provide that a person may be held responsible when he or she (i) ought to have been aware that his or her conduct, or inaction, constituted, or risked constituting, a breach of a court order, or (ii) acted, or failed to act, with the intention of breaching the order: para. 8.3.

55. There should be a general statutory defence of reasonable excuse. This defence should not be available when the excuse relates to a matter on which the defendant could reasonably have invoked the authority of the court in such circumstances as would have been likely to make it unnecessary for him or her to be in breach of the order: para. 8.4.

56. There should be no change in the present law under which it is a matter for the parties as to whether they will continue to seek enforcement of a court order which they have obtained: para. 8.5.

57. Contempt proceedings should continue to apply to family litigation: para. 8.6.

58. The sanction of imprisonment should be retained for wilful refusal or culpable neglect to obey a court order to support one's family: para. 8.8.

59. One spouse's contemptuous defiance of a court order should not be capable of being "traded off" against the breach of another order by the other spouse. It should, however, continue to be a factor to be given such weight as the court considers appropriate in any subsequent proceedings brought by a spouse seeking to vary or discharge an order respecting that other spouse's obligations relating to the family: para. 8.10.

60. We are satisfied that our provisional recommendation of a specific provision protecting against double jeopardy in this area was unnecessary: paras. 8.11-8.13.

Contempt In Relation To Tribunals

61. "Deemed contempt" provisions in legislation dealing with tribunals should be abolished: para. 9.2.

62. Resort should not be had in future to certification procedures such as are provided by section 10(5) of the Companies Act, 1990: para. 9.3.

63. Scandalising a tribunal of inquiry should not constitute an offence: para. 9.4.

64. There should be no offence of contempt in the face of a tribunal of inquiry, akin to contempt *in facie curiae*: paras. 9.5 and 9.7.

65. It should be an offence to disrupt a tribunal of inquiry in the holding of its proceedings: paras. 9.6 and 9.7.

66. Paragraphs (d) and (e) of section 1(2) of the Tribunals of Inquiry (Evidence) Act 1921, as amended by the section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, should be repealed and replaced with the recommended offence of disruption of a tribunal in the holding of its proceedings: paras. 9.6 and 9.7.

67. If paragraphs (d) and (e) of section 1(2) of the Tribunals of Inquiry (Evidence) Act 1921, as amended, are to be retained, legislation should make it clear that liability will accrue only when the act or omission was intentional or reckless: paras. 9.6 and 9.7.

68. As an adjunct to the criminal sanction in this context, members of tribunals of inquiry should have specific statutory powers to expel persons who are engaging in disruptive conduct. This power should be capable of being effected through the use of reasonable force: para. 9.7.

69. Legislation should provide that a person may only be required to disclose the source of information contained in a publication for which he or she is responsible if it is established to the satisfaction of a tribunal of inquiry that disclosure is absolutely necessary for the purpose of the inquiry or to protect the constitutional rights of any other person: para. 9.8.

70. There should be no *sub judice* rule in relation to tribunals of inquiry: para. 9.12.

71. Legislation should provide that it is an offence to publish, say or do anything in relation to evidence which is intended or obviously likely to alter, distort, destroy or withhold such evidence from a tribunal of inquiry: para. 9.13.

72. Legislation should provide that the following types of conduct in relation to tribunals of inquiry constitute an offence:

    (i) improperly influencing or attempting to influence a

tribunal in the determination of any issue which it may have to decide;

(ii) bribing or attempting to bribe a person who is or may be a witness in proceedings before a tribunal;

(iii) intimidating or attempting to intimidate such a witness with respect to such evidence;

(iv) taking or attempting to take reprisals against a witness who has given evidence in such proceedings.

There should be similar offences in respect of members of the tribunal and other persons involved in the work of the tribunal: para. 9.14.

APPENDIX

LIST OF PARTICIPANTS AT THE SEMINAR HELD ON 2ND NOVEMBER 1991

Monica Barnes, T.D.
Vincent Browne, Sunday Tribune
Con Burke, R.T.E.
Ray Byrne, Irish Council for Civil Liberties
G. Colleran, Kerryman
Supt. Martin Crotty, Garda Siochana
Frank Cullen, National Newspapers of Ireland
B.G. Cunningham, President, P.N.A.I.
Judge Liam Devally, Judge of the Circuit Court
Martin Fitzpatrick, Sunday Independent
Michael Foley, National Union of Journalists
Douglas Gageby, National Newspapers of Ireland
Michael Keeley, Irish Independent
Mr. Justice Kevin Lynch, Judge of the High Court
Donal Murray, D.P.P.'s Office
Eugene Murphy, R.T.E.
Pat McCartan, T.D.
Mr. Justice Niall McCarthy, Judge of the Supreme Court
J. Paul McCutcheon, National Institute of Higher Education, Limerick
Marie McGonagle, U.C.G.
Gerald McLoughlin, R.T.E.
Dr. D. Nowlan, Irish Times
Mr. Justice Rory O'Hanlon, Judge of the High Court
Eoin O'Dell, Law School, T.C.D.
J. O'Hanlon, Anglo-Celt
Michael O'Kane, Evening Press
Michael O'Mahony, Solicitor
Andrew O'Rourke, Irish Times
Jack Phelan, Cork Examiner
Judge David Sheedy, Judge of the Circuit Court
Una Sheridan, Director, P.N.A.I.
Boyce Shubotham, Irish Press
Paddy Smith, National Union of Journalists
Judge Peter Smithwick, President of the District Court
Ciaran White, University of Ulster
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First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) **[out of print] [photocopy available]** [10p Net]

Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) [£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977) **[out of print] [photocopy available]** [£ 1.00 Net]

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First (Annual) Report (1977) (Prl. 6961) [40p Net]

Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978) [£ 1.00 Net]

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Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child (Feb 1979) [£ 1.50 Net]

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First Report on Family Law - Criminal Conversation, Enticement and Harbouring of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

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