CHANCERY BAR

LAW COMMISSION CONSULTATION PAPER NO. 209: CONTEMPT OF COURT

RESPONSE OF THE CHANCERY BAR ASSOCIATION

1.1 The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

1.2 Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

1.3 Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

1.4 This response is the official response of the Association to the Law Commission's Consultation Paper No. 209 on the Law of Contempt of Court. It has been written by Timothy Fancourt QC, Mark West and Amy Berry. We also acknowledge the assistance of Alison McKenna, Principal Judge of the First–tier Tribunal (Charity) and Deputy Judge of the Upper Tribunal.

1.5 In view of the nature of the work undertaken by the members of the Association, this response does not purport to deal with the whole of the paper, but will concentrate on those areas which are of relevance to members of the Association and in particular those matters which are relevant to those Chancery barristers who sit as criminal recorders.

CHAPTER 4: JUROR CONTEMPT

Do consultees consider that a specific offence of intentionally seeking information related to the case that the juror is trying should be introduced?

The arguments against this, as set out in the paper, seem more compelling. It is hard to see that being told that seeking information is a criminal offence will have a greater impact on a jury than being told by the Judge that they must not seek information and that to do so is a contempt of court and is punishable by imprisonment. The responsibility for jury conduct should lie with the Judge and the weapons at the Judge's disposal are adequate. Educating the judiciary about the nature and extent of the warnings to be given may be as important as educating jurors.

There does, however, appear to be a need to clarify the procedural route by which such contempt is dealt with by the Court, where the Judge does not consider it appropriate to deal with the disobedience to his order summarily. The contempt is not a contempt in the face of the court but is, on the face of it, disobedience to a court order. (If not an order, then on what basis is a juror not entitled to seek information elsewhere?) That means that the procedure provided for the hearing of an application in the Divisional Court in CPR Part 81 does not on the face of it apply (presumably on the assumption that the Court itself will deal with disobedience to its orders), though the Divisional Court in *A-G v Dallas* assumed that the Divisional Court did have jurisdiction under RSC Order 52, which is in substantially similar terms to Part 81. See, for a discussion, the paper annexed, written by Amy Berry, junior counsel involved in the *Dallas* case. The Association does not necessarily agree with

or adopt all the views expressed in this paper but considers it to be a valuable discussion of the procedural difficulties.

Do consultees consider that it is necessary to amend section 8 to provide for a specific defence where a juror discloses deliberations to a court official, the police or the Criminal Cases Review Commission in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice?

No. There is no offence in reporting such matters to the Court itself in such circumstances and therefore no need for a specific defence. Moreover, jurors are encouraged (and are directed by the Judge) to report all such matters to the Court immediately, without delay, so that any impropriety can be put right, where possible, and the trial continue. Sending a message that it is appropriate to disclose such matters at a later date to the police or the CCRC runs contrary to this principle. The CCRC and Police already have appropriate powers to investigate to the extent necessary to investigate the commission of substantive criminal offences and miscarriages of justice.

Do consultees consider that section 8 unnecessarily inhibits research? If so, should section 8 be amended to allow for such research? If so, what measures do consultees consider should be put in place to regulate such research?

Some measure of research into the behaviour of juries is clearly appropriate, though it should be carefully controlled so as to avoid conflict with the important principle that jury deliberations are confidential. The research carried out to date by Professor Thomas has been of value and presumably was able to be authorised without problem under the existing law. The possibility of journalists being able to investigate what happened in jury rooms in particular trials is anathema to the way that jury trials are conducted in this country, and if there is to be any wider qualification to section 8 it should be limited to academic research by bona fide academics in academic posts (not self-employed soi disant

academics) and the project and its extent and limitations should be required to have the approval of the Lord Chief Justice in advance.

Do consultees consider that breach of section 8 should be triable only on indictment, with a jury? Do consultees consider that, if adopted, a statutory offence of intentionally seeking information related to the case that the juror is trying should be triable only on indictment, with a jury?

No. There are real and obvious problems in having alleged juror contempt tried by jurors. It should be dealt with by the trial judge where appropriate or by the Divisional Court, under the existing procedure (amended if necessary), in accordance with the Guidance now issued by the President of the QBD. Alternatively, a new statutory provision may allow the contempt to be dealt with by another Judge, sitting alone.

Do consultees consider that breaches of section 8 should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?

If section 8 offences are to be tried as if on indictment (we suggest not: see the answer to the previous question), they should be tried by a judge sitting alone. There is no reason why such cases should not be tried by Circuit Judges, though the presiding judge should have the discretion to allocate the case to a more senior judge where appropriate.

Do consultees consider that, if a statutory offence of intentionally seeking information while serving as a juror were adopted, it should be tried as if on indictment by a judge sitting alone? If consultees consider that it should be a judge sitting alone, should it be a specific level of judge in all cases or should the trial judge be allocated by the presiding judge on a case-by-case basis?

If such a statutory offence is created (we suggest not), cases should be tried by a judge sitting alone, on the same basis suggested in the answer to the previous question.

If consultees disagree with the proposal to introduce a juror research offence in statute, should the contempt jurisdiction used in *Dallas* be instead tried by judge alone? If so, how can it be defined with sufficient precision as a form of contempt and how can the procedure be amended to ensure that the alleged contemnor's rights are better protected?

Yes, if the question raised is whether or not the offence should be tried by judge alone or judge and jury. The offence is sufficiently defined as a contempt by virtue of the orders made by the Judge at the start of the trial not to conduct research and that disobedience to such a direction is a contempt of court. The Court hearing the contempt application has sufficient powers to enable disputed questions of fact to be investigated, by hearing oral evidence where necessary.

Do consultees consider that the current maximum sentence for a breach of section 8 is appropriate? If not, what should it be? Do consultees consider that community penalties should be available as a sanction for breach of section 8?

Yes. Community penalties should be available.

Do consultees consider that the current maximum sentence within section 14 of the 1981 Act (a fine or two years' imprisonment) would be appropriate for a new offence of intentionally seeking information related to the case that the juror is trying (if adopted)? If not, what should it be? Do consultees consider that community penalties should be available as a penalty for this new offence (if adopted)?

Yes. Community penalties should be available.

Do consultees consider that the Department for Education should look at ways to ensure greater teaching in schools about the role and importance of jury service?

Yes, for many reasons, but not specifically for the reason that it would tend to reduce the incidence of jury impropriety.

Do consultees agree with our proposals at paragraphs 4.79 to 4.82 for informing jurors, both before and during their service, about what they are and are not permitted to do?

Wholeheartedly.

Do consultees agree that the oath should be amended? Do consultees consider that it is necessary to go so far as reproducing the oath in a written declaration to be signed by jurors, in addition to being spoken out loud?

No and no. The terms of the oath are wholly appropriate. The idea of a written declaration is at best unnecessary and at worse likely to lead to problems. What will the court do if a juror declines to sign a declaration. Release him or her from serving on a jury? Punish him or her for contempt?

Do consultees agree that jurors should be given clearer instruction on how to ask questions during the proceedings and encouragement to do so?

Yes, though they should not be encouraged to ask questions about the course that the evidence is taking, only about impropriety that happens outside the courtroom. Unless this is made clear to jurors, experience shows that the course of the trial is repeatedly interrupted by notes written from the jury box asking why such and such evidence has not been called, or why a particular question has not been asked. What jurors need to understand better is that the evidence is what is put before them in court, and the ability to raise questions does not take the place of researching the case outside court. If a judge's

directions of law are not clear then naturally the jury should be encouraged to ask for further explanation.

Do consultees agree that internet-enabled devices should not automatically be removed from jurors throughout their time at court?

Agreed

Do consultees agree that judges should have the power to require jurors to surrender their internet-enabled devices?

Agreed, though only for particularly good cause. The judge's directions about use of internet should be given explicitly and should be obeyed. Jurors are perfectly entitled to make use of internet otherwise for personal needs.

Do consultees agree that internet-enabled devices should always be removed from jurors whilst they are in the deliberating room?

This is not a straightforward question. In principle, jurors when they retire should be concentrating on reaching a verdict and nothing else, but e-mail communication is such an accepted way of living in the modern world that we suspect that jurors could have real difficulties (e.g. in communicating with children at school, elderly persons in their care) without access to such devices. The jury chairman or foreman could perfectly properly adjourn deliberations for 15 minutes for jurors to make calls, send e-mails, etc. It also gives rise to problems with custody of such devices. We do not consider that such devices should routinely be removed.

Do consultees agree that whether jurors should surrender their internet-enabled devices for the duration of their time at court should be left to the discretion of the judge?

Yes.

Do consultees agree that systems should be put in place to make it easier for jurors to report their concerns?

Yes, if this is feasible.

Do consultees consider that other preventative measures should be put in place to assist jurors? If so, what should they be?

Yes; we are persuaded by the idea of an out-of-court-hours helpline, and there should be a designated person (jury manager?) present and identified as such in the court building for any juror with problems about a trial to be able to approach.

CHAPTER 5: CONTEMPT IN THE FACE OF THE COURT

Do consultees agree that proceedings for contempt in the face of the court are criminal proceedings to which the strict rules of evidence apply?

Yes.

Should there be specific guidance to courts on when an enquiry into an alleged contempt in the face of the court should be passed to another court, and if so, what factors would consultees identify as making that step desirable? Such factors might be:
(1) when the alleged contempt is directed at the judge or magistrate personally; and/or
(2) when there are issues of fact to be resolved.

We consider that there is probably currently sufficient guidance to judges on dealing with contempt in the face of the court. The ability to deal with contempt summarily, where appropriate, is an important aspect of maintaining the authority of the court, and judges

should have discretion to proceed in this way. No reasonable judge would so proceed if it was apparent that there was a dispute of fact, or a very serious contempt, and in such a case it is clearly appropriate for the matter to be heard by another judge, possibly in another court. If it is considered that more explicit guidance is needed, this can be provided by a practice direction issued under the CPR.

We provisionally propose a statutory power to deal with intentional threats or insults to people in the court or its immediate precincts and misconduct in the court or its immediate precincts committed with the intention that proceedings will or might be disrupted

We consider that either the common law should be left to work out the answers to any problems that arise (apart from amending the statutory provision that already applies in the Magistrates' Court to include "threats"), or that there should be a new, all-encompassing statutory provision, applying in the Crown Court and in the Magistrates' Court. The proposal to provide a new statutory provision to cater exclusively for certain contempts committed in the face of the court but not others seems to us to risk causing more confusion than may currently exist. Accordingly we are strongly opposed to the provisional proposal, as summarised here.

We provisionally propose that where the Crown Court or the magistrates' court order C's immediate temporary detention, C shall be entitled, if he or she so requests, to have one friend or relative or other person told, as soon as is practicable, that he or she is being detained, and, if he or she so requests, to consult a legal representative in private at any time.

We agree.

We provisionally propose that the Crown Court should have the following specific statutory powers:

(1) to require an officer of the court or a constable to take C into custody for the purposes of immediate temporary detention;
(2) following a finding of contempt, to impose a fine and/or a term of imprisonment;
(3) to suspend an order of committal; and
(4) to revoke an order of committal and to order the discharge of C.

These powers are all unnecessary as the equivalent powers already exist at common law, though if a statutory offence is to be created we agree that these powers should be included in the statutory provisions.

We provisionally propose that if the Crown Court orders C's immediate temporary detention then C should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out

We agree, subject to the extension of the Bail Act exceptions as proposed in para. 5.93 of the Paper

Are there other powers which consultees think courts need or duties the court should have in relation to sentencing for contempt in the face of the court?

No.

Should the court be required to have regard to the likely penalty which would have followed a conviction?

No; in some cases it may be appropriate to do so, but not in all cases.

Do consultees consider that there is any need to reduce the maximum sentence? If so, what maximum sentence would consultees suggest is appropriate?

No, the maximum sentence should not be reduced. It is now generally accepted that sentences for ordinary cases should be significantly below the statutory maximum (see e.g. the recent Sentencing Council Guidelines on Assault and Drug Offences). The maximum is there to cater for truly egregious cases.

Do consultees think that it should be put on a statutory basis that enquiries into alleged contempts in the face of the court are criminal proceedings to which the strict rules of hearsay evidence apply?

No; this is sufficiently clear in any event.

Do consultees think that other aspects of the rules and procedures which apply to criminal proceedings ought to apply to an enquiry into a contempt in the face of the court, and if so, why?

No.

TRIBUNALS

In recent years, a number of areas of traditional Chancery practice have been transferred from the courts to tribunals. For example, some proceedings relating to charities have, for policy reasons, moved from the Chancery Division to the First-tier Tribunal (Charity) and/or the Upper Tribunal (Tax and Chancery Chamber). Other areas of practice, such as tax appeals, have long been dealt with by tribunals. The Upper Tribunal, as a superior court of record, has an inherent jurisdiction over contempts, but the position of the First-tier Tribunals in particular is not so clear. Following their significant reform by the Tribunals Courts and Enforcement Act 2007, it would be desirable for the uncertainty about the ability of such tribunals to make a motion for contempt to be clarified. Appendix E of the

consultation paper, for example, refers only to a "possible power" for the FTT (Tax) to take such action.

The TCEA reforms brought with them the confirmation of the independence of the Tribunals judiciary and a coherent statutory framework of tribunal powers and procedural rules, proposed by the independent statutory body, the Tribunals Procedure Committee, and made in the form of statutory instruments. Given those developments, it no longer seems appropriate for contempt proceedings relating to tribunals to depend upon an assessment of how "court-like" each tribunal jurisdiction is for the purposes of deciding whether the tribunal is a "court" within the meaning ascribed to that term by section 19 of the 1981 Act, and following the test in *AG v BBC [1981] AC 303*. We suggest that it is no longer appropriate for the this definition to develop on a case by case basis (*Peach Grey & Co v Sommers* [1995] ICR 549; *Ewing v Security Service* [2003] EWHC 2051 and *AG v Singer* [2012] EWHC 326 (Admin)) and that the 1981 Act could sensibly be amended to make the collective position of those tribunals within the TCEA framework clear.

In the charity jurisdiction in particular, active appeals have been the subject of press comment far beyond the specialist charity press. For example, in a recent appeal concerning charitable status, a group of 50 Members of Parliament wrote to The Times urging a particular outcome to the appeal and the letter was published. Whilst the judicial office holders in the Tribunal (both judges and lay members) are professionals and can be expected to focus on the evidence and exclude from their consideration any press comment, it is nevertheless important for the parties to have confidence that they will receive a fair hearing. We would suggest that this right extends to a right for the merits of their case for charitable status not to be publicly debated (especially by Members of Parliament) where this is a live issue for the Tribunal to determine. We understand that the House of Commons authorities advised in that case that the *sub judice* rule does not apply to tribunals on the basis of the House's 23rd July 1963 resolution (although the resolution does not in fact refer to tribunals). We note that when the House of Commons Procedure Committee considered the matter in the 2004-2005 session it was accepted at paragraph 31 that "remarks made in Parliament could prejudice cases before tribunals, and [we] would

expect Members to take care to avoid doing so", but it went on that "we agree with our predecessors in 1963 that extending the rule to tribunals would be too restrictive". We do not consider that the mere assertion, on the basis of a 1963 resolution, that the extension of the *sub judice* rule to tribunals would be too restrictive can stand serious scrutiny in the light of the development of the independence of tribunals enshrined in the TCEA.