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*Submission by Council of The Bar of Ireland to  
The Law Reform Commission  
on*

*The Issues Paper on Contempt of Court and Other  
Offences and Torts involving the Administration  
of Justice*

26th October 2016



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OF IRELAND

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26<sup>th</sup> October 2016

**Re: Issues Paper on Contempt of Court and Other Offences and Torts involving the Administration of Justice**

To whom it may concern,

I refer to the Law Reform Commission's issues paper on contempt of court and other offences and torts involving the administration of justice. Please find enclosed a copy of the submission of the Council of The Bar of Ireland.

Yours sincerely,

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Ciara Murphy  
DIRECTOR

INDEPENDENCE  
EXPERTISE  
INTEGRITY

# SUBMISSION OF THE COUNCIL OF THE BAR OF IRELAND ON THE LAW REFORM COMMISSION'S ISSUES PAPER ON CONTEMPT OF COURT AND OTHER OFFENCES AND TORTS INVOLVING THE ADMINISTRATION OF JUSTICE

## PRELIMINARY

1. Council of The Bar of Ireland welcomes the opportunity to make a submission on the Law Reform Commission's Issues Paper on *Contempt of Court and Other Offences and Torts Involving the Administration of Justice*. Council of The Bar of Ireland is of the view that legislation to address certain aspects of the law of contempt of court is long overdue. In this regard, the need for legislative intervention has been the subject of considerable judicial comment.<sup>1</sup> In particular there is a need for legislation to address certain recurring areas of uncertainty in the law of contempt of court. The rule of law requires that the law, in particular where it may result in the deprivation of liberty, should be transparent and accessible. In addition, certain aspects of the law of contempt involve balancing competing rights and interests and the calibration of such public policy considerations is appropriately a matter for the legislature.
2. Nonetheless any legislative measures dealing with contempt must be carefully drafted and considered in their proper context. This includes that the law of contempt of court is an important component in vindicating the authority of the Courts having been described as “the complement of the right of the court to protect its own dignity, independence and processes”<sup>2</sup>. The separation of powers under the Constitution and the constitutionally protected independence of the judiciary, means that any legislative measure must not unduly encroach on the judicial domain and the due administration of justice. Another important context is compliance by Ireland with the European Convention on Human Rights. In this regard the case law reveals that a number of provisions of the Convention may be engaged by the law of contempt which includes Article 6 (the right to a fair and public trial), Article 8 (privacy, in camera rule) and Article 10 (freedom of speech and information).

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<sup>1</sup> See *Kelly v O'Neill* [2000] 1 IR 354, Denham J at pg. 368: “In many other jurisdictions the law on contempt of court has been developed by legislation. There is benefit in the legislature addressing such matters of policy, so important in a democratic society. However, in Ireland this has not occurred. The law in the United Kingdom has been supplemented by legislation amending the common law”. *Director of Public Prosecutions v. Independent Newspapers* [2003] 2 IR 367, Kelly J. at pg. 379: “Despite the fact that the Law Reform Commission in its report on Contempt of Court published in 1994 (L.R.C. 47-1994) pointed out the many uncertainties in this area of the law and the need for clarification by legislation (a view which appears to have been endorsed by Keane J. in *Kelly v. O'Neill* [2000] 1 I.R. 354) no clarification by means of legislation has taken place”. In *Irish Bank Resolution Corp Ltd & Ors v Quinn & Ors* [2012] IESC 51, Hardiman J. stated; “It is twenty years now since the Law Reform Commission urged the need for statutory reform in this area and some thirty-one years since such reform took place by statute in the neighbouring jurisdiction. It is most unfortunate that no positive steps have been taken here with the result that this fraught matter has come on for resolution in an uncertain state of the law”.

<sup>2</sup> Per Finlay P in *The State (Commins) v. McRann* [1977] I.R. 78 at p. 89.

3. It is therefore against the backdrop of the above broad considerations that Council of The Bar of Ireland makes these submissions. The structure of this submission is to respond to each of main seven issues identified in the Issue Paper by reference to the specific questions in respect of each issue

## **ISSUE 1: OVERVIEW OF GENERAL QUESTIONS CONCERNING CRIMINAL CONTEMPT OF COURT**

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

4. Council of The Bar of Ireland is of the view that certain elements of the law on contempt of court should be placed on a statutory footing. A complete statutory code would have the advantages of increasing transparency and certainty. However, it may be neither necessary nor desirable that all elements of the law of contempt are enshrined in statute or that the law of contempt at common law should be abolished. Legislation should be clearly drafted to avoid any uncertainty as to what elements of the common law of contempt survive. Insofar as any legislation is not a comprehensive code, it would appear appropriate to insert a clear saving provision dealing with common law contempt such as similar to that under English Contempt of Court Act 1981.<sup>3</sup>
5. Council of The Bar of Ireland is of the view that the term “contempt of court” should be retained and does not require modification. While the term has been criticised as being archaic (such implying an affront to the dignity of the court<sup>4</sup>) and covering an overly broad range of conduct<sup>5</sup>, these matters are outweighed by advantages derived from the familiarity and long usage of the term. Underlying all species of contempt of

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<sup>3</sup> Section 6 of the Contempt of Court Act 1981 states that “Nothing in the foregoing provisions of this Act— (a) prejudices any defence available at common law to a charge of contempt of court under the strict liability rule; (b) implies that any publication is punishable as contempt of court under that rule which would not be so punishable apart from those provisions; (c) restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice”.

<sup>4</sup> See comments of Salmon LJ in *Morris v Crown Office* [1970] 2 QB 114 at 129 who describe term as “...unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth.” See also comments of Lord Cross of Chelsea in *Attorney General v Times Newspaper Ltd.* [1974] AC 273 at 322.

<sup>5</sup> See *Irish Bank Resolution Corp Ltd & Ors v Quinn & Ors* [2012] IESC 51, where Hardiman J observed “The Irish law of contempt of court is amorphous. It is extremely difficult for a lay person to understand, principally because the term “contempt of court” is used inexplicably, to mean several quite different things and it is not always clear which of them is intended. Even when the term is used by lawyers - and even judges - the distinctions are not always clear”.

court is that it involves the prejudice or abuse of the administration of justice<sup>6</sup>. It is also to be observed that other common law countries have continued to retain the term contempt of court and introducing new terminology may lead to uncertainty.

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

6. The question of *mens rea* in criminal contempt is one of the most uncertain and - inconsistent elements of the law on contempt and was accurately described by Lord Donaldson MR in *Attorney General v Newspaper Publishing Plc*<sup>7</sup> as a “something of a minefield”. No such uncertainty applies in respect of civil contempt, where it is generally accepted that a deliberate act constitutes civil contempt regardless of knowledge of breach of a court order or intention to interfere with the administration of justice<sup>8</sup>. However, in criminal contempt, there are widely diverging views and inconsistencies. It is not appropriate that a person may potentially be deprived of their liberty, in circumstances where *mens rea* of such crime is so unclear. Therefore in the interest of clarity and the rule of law, Council of The Bar of Ireland is of the view that this is an area which needs to be addressed in the legislation notwithstanding the undoubted difficulties in doing so.
7. As a preliminary step to considering *mens rea*, the legislation should seek to identify the different forms of criminal contempt; as different policy considerations may apply to different forms of criminal contempt. It further follows that the *mens rea* requirement may vary depending on the type of criminal contempt. The three broad categories of criminal contempt referred to in the Issue paper include;
  - contempt in the face of the court;
  - Scandalising the court and
  - *Sub judice* contempt

However, each of the above includes numerous sub-categories. That different approaches may be warranted even within each category is illustrated in the case of *sub judice* contempt. In *DPP v Independent Newspaper (Irl) Ltd.*<sup>9</sup> the Supreme Court referred to *sub judice* contempt as publishing material intended to interfere with the administration of justice or to create the perception of such interference. However, in the specific context of publication in breach of the *in camera* rule in *Health Service*

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<sup>6</sup> See Report of the Committee on Contempt of Court, Cmnd. 5794 (1974) para. 1; “The law relating to contempt of court has developed over the centuries as means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally,”

<sup>7</sup> *Attorney General v Newspaper Publishing Plc* [1988] Ch. 333 at 373H.

<sup>8</sup> See Arllige, Eady & Smyth on Contempt, 4<sup>th</sup> ed. At 12-83.

<sup>9</sup> [2006] 1 IR 366

*Executive v LN*,<sup>10</sup> Birmingham J held that there was no requirement at common law to show *mens rea* to amount to contempt of court. Council of The Bar of Ireland therefore believes that a nuanced approach to different types of criminal contempt is warranted. This need not necessarily lead to over-complication. The second cited category of contempt of scandalising the court involves doing or publishing intended to lower the authority of the Court. This could potentially be subsumed with the third category of *sub judice* contempt for purposes of describing *mens rea* and any defences under the broad term of “publication contempt”. Publication is an element of both the criminal contempt of scandalising the court and *sub judice* contempt and publication might be defined in any legislation.

8. Publication contempt could be further broken down to further sub-categories which encompass what amounts to contempt of court of scandalising the court and the various types of *sub judice* contempt. It is noted that the English Act introduced a strict liability rule in respect of certain forms of publication contempt, although it only applies where certain strict conditions are met<sup>11</sup> and the common law rules of contempt continue to apply to publications not falling within the statute. It is also worth noting that the English Act of 1981 was introduced as a result of judgment of the European Court of Human Rights in the *Sunday Times v United Kingdom*<sup>12</sup> with the Act being described as seeking to “effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech.”<sup>13</sup> The introduction of such Act has not assisted with clarity of common law publication contempt as the English Courts have continue to grapple with *mens rea* resulting in a wide divergence of view<sup>14</sup>. Council of The Bar of Ireland believes that lessons can be learned from the experience in England and that legislation which seeks to comprehensively address *mens rea* in criminal contempt is justified.
9. Council of The Bar of Ireland believes that in dealing with publication contempt, the appropriate balance between the various interests is by prescribing that an offence occurs where there is intention to publish the material, which is the standard applicable in Australia and New Zealand. There should be no requirement to

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<sup>10</sup> [2013] 4 IR 49

<sup>11</sup> Section 2 states: “(1)The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, programme included in a cable programme service] or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2)The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. (3)The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication. (4)Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section”.

<sup>12</sup> [1979 -80] 2 EHRR 245

<sup>13</sup> Per Lloyd LJ in *Attorney General v Newspaper Publishing Plc* [1988] Ch. 333 at 382D-F.

<sup>14</sup> In relation publication contempt see *Attorney General v Times Newspapers Ltd.* [1992] 1 AC 191 at pg. 217-218; *Attorney General v Newspaper Publishing plc.* [1988] Ch. 333 and [1990] TLR 158; *Attorney General v Hislop* [1991] 1 QB 514; *Attorney General v Sport Newspaper Ltd.* [1991] 1 WLR 1194; *Coe v Central TV plc* [1994] EMLR 422. See generally Arllige, Eady & Smyth on Contempt, 4<sup>th</sup> ed. at 5-120 et al.

demonstrate knowledge of the proceedings or indeed intent to prejudice the administration of justice. While this liability may be described as strict, Council of The Bar of Ireland is of the view that this is justified in the interest of ensuring the effectiveness of the administration of justice. However, proof of knowledge of breach of an order or intent to subvert the administration of justice or lack of any such knowledge or intent, would be a matter to be weighed in considering the appropriate sanction to be imposed. This form of strict liability would be similar to that which applies to civil contempt where an intention to do the act which constitutes contempt, is sufficient. However, due regard should also be had to compliance with the European Convention on Human Rights and so the harshness of any such standard may be tempered by making available certain specific defences such as that of “reasonable necessity” which would expressly include the public interest in publication and/or a defence of innocent publication. However, in dealing with specific instances of publication contempt such as relating to wards of court or breach of the in camera, such defences may not be made available or may be more restricted.

10. As regards other forms of criminal contempt such as contempt in the face of the court, again in the interest of certainty it may be necessary to identify the different forms of offences which may arise. In this regard there is some merit in the recommendation of the Law Reform Commission of Western Australia for creating a number of different specific statutory offences<sup>15</sup>. However, there is major uncertainty as regards the applicable *mens rea* for common law offence of contempt in the face of the court. The Law Reform Commission in its 1991 Report recommended that intention or recklessness should be required for prosecution for contempt in the face of the court. Council of The Bar of Ireland would consider such a *mens rea* requirement as reasonable<sup>16</sup> but would respectfully disagree with the Law Reform Commission’s suggestion that including *mens rea* in the statutory definition of the offence would unnecessarily complicate the offence. Such complexities are increased and not reduced by failing to set out with clarity the *mens rea* involved as an ingredient of the offence. The fact that any formulation of *mens rea* requirement is difficult or controversial, is not a reason why the legislature should avoid seeking to bring seeking to bring greater certainty to the matter.

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

11. Council of The Bar of Ireland is not of the view that the fault should comprise “intentionally, knowingly or recklessly”. As noted Council of The Bar of Ireland is of

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<sup>15</sup> Law Reform Commission of Western Australia, Report on Review of the Law of Contempt (No. 93 2003) at 61.

<sup>16</sup> As an alternative, it is noted that section 12 of the English Contempt of Court Act 1981 applies a standard of “wilfully”, in the context of an offence that a person “wilfully” insults the justice or justices or “wilfully” interrupts the proceedings of the court or otherwise misbehaves in court.

the view that it is not appropriate to have a single uniform *mens rea* for all types of criminal contempt – different interests and policies apply to different forms of criminal contempt. It would not therefore favour the above fault requirement in all circumstances. More generally, a further difficulty with the formulation of “intentionally, knowingly or recklessly”, is that it does not identify the precise subject matter of the same. Does it, for example, refer to “intentionally, knowingly or recklessly” carrying out the act alleged to constitute contempt or having an intention, knowledge or being reckless as whether an act has the consequent of prejudicing the administration of justice? Furthermore, “intentionally” could refer to the act itself or the consequences for the administration of justice, while “knowingly” could refer to knowledge that the matter breaches a court order or knowledge that the act would prejudice the administration of justice. There is also an overlap between the three fault standards, which may render the others redundant. The fault element of “intentionally, knowingly or recklessly” would not therefore appear to be entirely coherent without further elaboration. Council of The Bar of Ireland is therefore of the view that any *mens rea* must be understood in its full context of the description of offence and not in isolation.

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

12. As noted Council of The Bar of Ireland submits that a form of strict liability should apply in respect of publication contempt but it is not recommended that any criminal offence of contempt should involve absolute liability as this would lack the proportionality and flexibility which may be required to deal with the justice of any particular circumstance.

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

13. Council of The Bar of Ireland is of the view that there should be a statutory maximum penalty but not at such level as would unduly restrict the Courts’ discretion. In considering whether there should be maximum penalty prescribed by statute for contempt, due cognizance must be taken of the constitutional status of the independence of the judiciary<sup>17</sup> and the role of contempt of court in vindicating the authority of the Court.<sup>18</sup> However, this must be balanced against principles of proportionality and the rule of law which include the importance of transparency and predictability of a legal system<sup>19</sup>. The Supreme Court has emphasised that the penalty for criminal contempt should be a fixed penalty<sup>20</sup>

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<sup>17</sup> Article 35.2 of the Constitution. See also *Murphy v. British Broadcasting Corporation* [2005] 3 IR 336

<sup>18</sup> Contempt of court was been described as “essential adjunct of the rule of law” by Lord Morris in *Attorney General v Times Newspapers Ltd.* [1974] A.C. 273 at 302.

<sup>19</sup> In the *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245, European Court of Human Rights stated: “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 ... 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



14. As matters stand, there is a limitation on the sanction which can be imposed by the Superior Courts for criminal contempt which could therefore potentially include life imprisonment and an unlimited fine. Council of The Bar of Ireland would therefore be of the view that some maximum penalty should be prescribed by legislation but this should be set at such a level to ensure that the Courts retain considerable discretion as to the appropriate sanction. Council of The Bar of Ireland would consider as too low the maximum penalty of 24 months which is the level prescribed in the United Kingdom under the Contempt of Court Act<sup>21</sup>
15. Insofar as statutory jurisdiction for criminal contempt is conferred on the District and Circuit Courts for criminal contempt, it is appropriate that as courts of local and limited jurisdiction that a maximum term of imprisonment and fine<sup>22</sup> should be prescribed. In the case of the District Court, the jurisdiction will be subject to the general limitation of a maximum one year sentence<sup>23</sup> and so maximum sentence may also be required to be prescribed for the Circuit Court.

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

16. Council of The Bar of Ireland is of the view that that the District Court and Circuit Court should have the same jurisdiction in contempt as the High Court. It appears that the District Court and Circuit Court already have power to deal summarily with criminal contempt in the face of the court<sup>24</sup> but there is some doubt concerning its jurisdiction to deal with the *sub judice* rule or publication contempt and also indeed civil contempt. Any such doubts should be addressed by legislation expressly conferring such jurisdiction.

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with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.

<sup>20</sup> *Laois County Council v Hanrahan* [2014] 3 IR 143

<sup>21</sup> See section 12

<sup>22</sup> It is noted in this regard that the Law Reform Commission paper 1994 stated at pg. 415: “We tentatively recommend 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 once-off 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 recommend that the appropriate maxima be £600 and £15,000”.

<sup>23</sup> Section 11 of the Criminal Justice Act 1984 states that the maximum term of imprisonment that can be imposed by the District Court in respect of any number of offences for which sentence is passed at the same time cannot exceed 2 years. Also the District Court cannot exceed a maximum sentence of 1 year in respect of one offence.

<sup>24</sup> Section 16(1) of the Petty Sessions (Ireland) Act 1851 which provides that: “if any person shall wilfully insult any Justice or Justices so sitting in any such Court or place, or shall commit any other contempt of any such Court, it shall be lawful for such Justice or Justices by any verbal order either to direct such person to be removed from such court or place, or to be taken into custody, and at any time before the rising of such Court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding two pounds.

## ISSUE 2: DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

### *2(a) Should the distinction between criminal and civil contempt be retained?*

17. The distinction between criminal and civil contempt should be retained. There are compelling reasons for so doing. First, while the existence of a punitive sanction (as confirmed in *Laois County Council v. Hanrahan*<sup>25</sup>) changes somewhat the character of civil contempt and presents issues in relation to the procedure to be adopted when seeking to bring a motion for attachment and committal, civil contempt remains in practice mainly an issue between private parties. It is only in some circumstances that a Court will have to consider the wider public law issues of respect for the administration of justice which may give rise to the imposition of a punitive sanction. Moreover, the power of unlimited coercive detention remains appropriate in cases of civil contempt but is not appropriate (being preventative detention) in criminal cases. Finally, imprisonment for civil contempt does not amount to a criminal conviction. The abolition of the distinction between the forms of contempt would mean that civil contemnors, notwithstanding having never committed an offence, could be termed criminals.

### *2(b) What remedies should the law provide for civil contempt?*

18. Currently, the law appears to provide the broadest possible range of sanctions for civil contempt. These stretch from punitive sanctions imposed on the basis of the public interest (as set out in *Laois County Council v. Hanrahan*<sup>26</sup>) to unlimited powers of coercive imprisonment. There does not appear to be an overwhelming reason to modify these powers. While the UK has introduced a two year maximum sentence for contempt, given the origin of the contempt jurisdiction is not found in legislation promulgated by the Oireachtas, any suggestion that the sanctions which can be imposed by the Superior Courts could be limited by act of the Oireachtas would need to be carefully considered. As already stated, it is the view of Council of The Bar of Ireland that courts of limited and local jurisdiction should have maximum penalties which can be imposed. While the prospect of an unlimited coercive sanction does appear to be sweeping, the power to imprison on a coercive basis is rarely deployed. Council of The Bar of Ireland submits that judicial discretion is capable of dealing with persistent contemnors in respect of whom a lengthy period of coercive detention might amount to a disproportionate deprivation of liberty.

### *2(c) – should civil contempt attract a punitive element?*

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<sup>25</sup> [2014] 3 I.R. 143

<sup>26</sup> [2014] 3 I.R. 143

19. Council of The Bar of Ireland submits that the existence of a punitive element in civil contempt is warranted for the reasons provided by Fennelly J. in *IBRC v Quinn*<sup>27</sup> and *Laois County Council v. Hanrahan*<sup>28</sup>.

**2(d) – Should the procedural rights for civil contempt mirror those of the criminal law?**

20. Council of The Bar of Ireland submits that the protections guaranteed by Article 6(3) of the ECHR are appropriate and indeed required, for civil contempt. It would appear to follow from the UK Court of Appeal judgments in *Hammerton v. Hammerton*<sup>29</sup> (as endorsed by the ECtHR in *Hammerton v. UK*<sup>30</sup>) that civil contempt does amount to a criminal offence within the meaning of Article 6 of the ECHR. It must also be noted that this issue was considered, albeit *obiter*, in *McCann v. District Judge of Monaghan*<sup>31</sup> which concerned the failing associated with the imprisonment of an impecunious debtor under the Enforcement of Court Orders Act 1940.
21. A number of procedural rights have already been recognised by the Courts. For example the burden of proving contempt is on the moving party and the standard of proof has been held to be the criminal standard (*Elliot v. BATU*<sup>32</sup>). However, other matters are less clear. It is worth at this point setting out that Article 6(3) of the ECHR guarantees certain minimum protections for those “charged with a criminal offence”. These include prompt notification of the nature of the alleged offence, legal aid if impecunious, the right to cross examine and the presumption of innocence. The right to silence has also been found to exist in Articles 6(1) and 6(2).<sup>33</sup> Two of these require particular attention. The first is the right to legal aid, the second is the right to cross examine.

**Legal aid**

22. In *Eccles v. GMC/Sierra*<sup>34</sup>, the applicant was a respondent to a notice of motion seeking his committal for breaches of an injunction relating to the installation of water meters. Judicial review proceedings were commenced seeking, *inter alia*, a declaration that an impecunious person accused of contempt was entitled to legal aid at the expense of the State given that liberty was at stake. Legal aid had been sought from the Attorney General, the Department of Justice and the Civil Legal Aid Board

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<sup>27</sup> *IBRC v. Quinn* [2012] IESC 51

<sup>28</sup> [2014] 3 I.R. 143

<sup>29</sup> [2007] EWCA Civ 248 [2007] 3 FCR 107

<sup>30</sup> Application no. 6287/10, judgment of First Section, 17<sup>th</sup> March 2016

<sup>31</sup> [2009] 4 I.R. 200

<sup>32</sup> [2006] IEHC 340 (unreported, High Court, Clarke J., 20<sup>th</sup> October 2006) at para. 3.1

<sup>33</sup> *Heaney v. Ireland* (2001) 33 E.H.R.R. 12.

<sup>34</sup> Record number 2014/661 JR

prior to the action being commenced but had not been granted. The case was heard before McDermott J. and judgment was reserved. Prior to judgment being delivered, the Civil Legal Aid Board notified Mr. Eccles that it would grant him legal aid. McDermott J. held that the case was now moot and declined to deliver judgment. Further contemnors in the same proceedings were given legal aid by the Civil Legal Aid Board. As such there is provision for the impecunious alleged contemnor to receive legal aid. However, the reality is that this legal assistance cannot be directed by the Court and is instead at the discretion of the Legal Aid Board. This arrangement was criticised by Laffoy J. in the High Court in *McCann v. District Judges of Monaghan*<sup>35</sup> where she reviewed the legal aid schemes in the state and commented that:

*[140] A defaulting debtor without means may qualify for civil legal aid under the Civil Legal Aid Act 1995 ("the Act of 1995"). However, there is no automatic right to a legal aid certificate under that Act. Further, it is the legal aid board, not the court, which grants a legal aid certificate and the grant of such a certificate is dependent on the applicant fulfilling the criteria set out in that Act. It may well be that a debtor without means facing an application for an order under s. 6 would be able to compel the legal aid board to grant him legal aid. The decision in *Stevenson v. Landy* (Unreported, High Court, Lardner J., 10th February, 1993). would certainly seem to support that proposition. In that case, Lardner J. quashed a refusal by the non-statutory legal aid board, which operated under a non-statutory scheme prior to the enactment of the Act of 1995, and remitted the matter to the legal aid board for re-consideration in judicial review proceedings, having outlined the applicant's position as follows at p. 12:-*

*"Here there are wardship proceedings brought by the Eastern Health Board against the natural mother in respect of a child and the court is asked to make orders in relation to the future custody, residence, maintenance and welfare of the child and it is accepted that the mother, wishing to be heard in the wardship proceedings and applying for legal aid, has not the means to be legally represented. The legal aid certifying committee and the appeals committee on appeal should consider applications for legal aid in the light of the views which I have expressed above. It is in my view necessary that this should be done in order that the constitutional requirement that the courts should administer justice with fairness be given efficacy."*

*[141] Lardner J. had quoted the passage from the judgment of O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 365, stating that, while the case before him was different in nature from a criminal prosecution, having regard*

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<sup>35</sup> [2009] 4 I.R. 200 at para. 140

*to the circumstances of the applicant and the circumstances in which the application for legal aid to be represented in the wardship proceedings was made, he considered that the dicta of O'Higgins C. J. were applicable, mutatis mutandis , to the wardship proceedings.*

*[142] Even if it is the case that an impecunious debtor does not come within the scope of either the criminal legal aid scheme or the civil legal aid scheme, the decision of Lardner J. in Kirwan v. Minister for Justice [1994] 2 I.R. 417 which was also referred to earlier, points to the fact that it is incumbent upon the executive under the Constitution to afford such legal aid as is necessary to enable the debtor to defend a creditor's application under s.6. An impecunious debtor who is facing the possibility of imprisonment at the suit of a creditor under a legislative scheme put in place by the Oireachtas as a matter of public policy to assist creditors, in my view, has as much entitlement to State funded legal aid as a poor person who is facing a criminal sanction. That conclusion meets the criteria outlined by Hardiman J. in J.F. v. Director of Public Prosecutions [2005] IESC 24, [2005] 2 I.R. 174, in which there are echoes of the judgment of the European Court of Human Rights in Benham v. United Kingdom (1996) 22 E.H.R.R. 293 in that:-*

*(i) what is at stake, the liberty of the debtor, is of the highest importance;*

*(ii) a law which stipulates an absence of wilful refusal or culpable negligence as a defence to an application for imprisonment involves legal concepts of considerable complexity; and*

*(iii) the likelihood of a debtor whom the creditor has made the subject of an instalment order in the District Court having the capacity to represent himself or herself or the means to acquire legal representation is extremely remote;*

23. The **McCann** case was ultimately decided on the basis that the Enforcement of Court Orders Act 1940 did not afford fair procedures and accordingly the Constitutional guarantees in Article 34 and 40.3 were not satisfied. As a consequence of this, the Oireachtas passed the Enforcement of Court Orders (Amendment) Act 2009 which provides a number of safeguards not present in the original act. Importantly, from the perspective of the legal aid, it inserts a new section 6A which provides, *inter alia*, that:

**6A. - Entitlement to legal aid.**

If it appears to a judge of the District Court in proceedings on a summons under section 6 that the means of a debtor are insufficient to enable him or her to obtain legal aid, the judge shall, on application being made by the debtor in that behalf, grant to the debtor—

a certificate for free legal aid (in this section referred to as a ‘ debtor’s legal aid certificate’ ),

...

The Criminal Justice (Legal Aid) Act 1962 and regulations made under section 10 of that Act shall, where appropriate and with such modifications as may be necessary, apply to a certificate granted under subsection (1) and to such legal aid.

24. The flaw that was identified by Laffoy J. in *McCann*, that the trial Judge was unable to direct the provision of legal assistance, has been remedied, for debtors, on a statutory basis. It is submitted that if the provisions of the Civil Legal Aid Act 1995 were sufficient to protect the applicant’s rights in *McCann*, there would be no need for this explicit provision of legal aid. It is instructive that in enforcement cases, legal aid is now granted solely on the basis of means rather than being subject to the criteria provided in s.28 of the Civil Legal Aid Act 1995, which importantly contains a specific test of whether the “applicant is reasonably likely to be successful in the proceedings”<sup>36</sup> .
25. It is submitted that where the urgency of contempt cases require very fast responses, that a scheme similar to that created by the new s.6A of the Enforcement of Court Orders Act 1940 provides the flexibility required to allow speedy conclusion of proceedings.

### **Right to cross examine**

26. An application for committal is grounded on an affidavit. Article 6(3) of the ECHR guarantees a right of cross examination. However, the Rules of the Superior Court and the existing case law require that where it is intended to cross examine the deponent of an affidavit that the leave of the court be sought<sup>37</sup> . Moreover, in deciding whether such cross examination should be permitted, the Courts have held that a material difference in accounts between the parties to the proceedings which can only be resolved by cross-examination be deposed to by the party seeking the right to cross examine. In *IBRC v Moran*<sup>38</sup>, Kelly J. (as he then was) in considering whether an application to cross examine a deponent should be granted, held that:

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<sup>36</sup> Civil Legal Aid Act 1995, s.28(2)(c)

<sup>37</sup> Order 40, Rule 1 Rules of the Superior Courts

<sup>38</sup> [2013] IEHC 295

*15. It is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.*

27. It is submitted that where the right to cross examine is guaranteed by the ECHR, that there should be no discretion to refuse cross examination in contempt proceedings. It is tentatively suggested that this outcome could be achieved by the insertion of a new rule in Order 40 to cover the situation in relation to notices and grounding affidavits seeking committal for contempt.

### **ISSUE 3: CONTEMPT IN THE FACE OF THE COURT**

#### ***3(a) Does the summary mode of trial for contempt remain appropriate?***

28. Council of The Bar of Ireland is of the view that the summary mode of trial for contempt remains appropriate. The criticisms associated with the summary mode of trial for criminal contempt such as *nemo iudex in causa sua* and the lack of time to prepare a defence are valid. Detailed arguments on the problems associated with summary hearings are set out by the ECtHR in *Kyprianou v. Cyprus*<sup>39</sup>. However, the requirement for speedy resolution of the issues which arise in this context is sufficient to outweigh the criticisms of a judge deciding on a case where they are a witness. However, it does not seem appropriate that a weighty punishment could be imposed where a judge has resolved to deal with a contemnor by means of a summary hearing. Accordingly, there is merit to the suggestion that any such penalty be limited to a short period to reinforce the immediate nature of the hearing and the sanction. More serious breaches, where lengthy penalties may be appropriate, are deserving of a more formal hearing, be that summary or on indictment. The law in relation to summary trials for contempt was recently reviewed in *Walsh v. The Minister for Justice*, a case in which the release of a contemnor following an Article 40 inquiry was ordered by Humphreys J. In that case, the brother of a defendant to civil proceedings attempt to speak on the defendant's behalf and was not permitted to by the trial judge as he had no right of audience. He persisted in attempting to address the court and was found to be in contempt and imprisoned for two weeks. In the Article 40 proceedings, Humphreys J. accepted that there is a power to summarily hear and determine contempt cases. Nevertheless he ordered the release of the applicant as the trial judge did not explain why a simple order of exclusion would not have been sufficient to deal with the matter in a proportionate fashion:

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<sup>39</sup> Application 73797/01

*It seems to me preferable and more proportionate that common or garden disruption of this type should be dealt with by exclusion from court, rather than by arrest and detention. For such an arrest to survive scrutiny on an Article 40 inquiry, the court whose order is under review must at a minimum find or state that exclusion would be insufficient to deal with the affront to justice; or alternately such a conclusion must be obvious from the circumstances, as would be the case where offensive, insulting or outrageous language, allegations or utterances were deployed, threatening words or gestures or any form physical aggression was offered by the contemnor, or where the disruption was in the nature of a planned protest rather than spontaneous obstinacy. In a case where the circumstances of the disruption were more serious than the norm, such as an abuse of the forum of the court contemptuously to offer gratuitous and outrageous allegations, no reasons need be articulated because the circumstances would speak for themselves and simple exclusion would properly be inherently considered inadequate in such a case. There is a significant difference between a person who commits contempt in the face of the court by making wild allegations against the court itself, for example, and a person who commits contempt merely by speaking out of turn, but the content of whose utterances is itself not inherently scandalous. Both are contemnors, but the latter can proportionately be dealt with simply by exclusion. Exclusion would be inadequate to deal with the former.<sup>40</sup>*

29. This judgment is the subject matter of an appeal which is yet to be heard but recognises the importance of judicial reluctance to impose severe sanctions in cases of summary contempt dealt with immediately. Council of The Bar of Ireland recommends that consideration be given to expressing a limit to the punishment which can be imposed in cases of summary contempt dealt with immediately where a custodial sanction is appropriate.

### ***3(b) Should there be a right to a jury trial?***

30. The question of the right of an alleged contemnor to a jury trial is fraught with difficulty. The constitutional guarantee of jury trials for all non minor offences would seem to indicate that the right to a jury trial is constitutional in nature. This indeed was the view of the majority of the Supreme Court in *State (DPP) v Walsh and Conneely*<sup>41</sup> where Henchy J., for the majority, concluded that there was a right to a jury trial albeit one where a special verdict would be returned by the jury and the trial judge would determine whether these facts amounted to contempt. The dissent by O'Higgins C.J. held that the requirement of the independence of the judiciary could not mean that the courts must await a decision of the Director of Public Prosecutions

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<sup>40</sup> Walsh v. Minister for Justice & Others [2016] IEHC 323 at para. 27

<sup>41</sup> [1981] I.R. 412



to commence a trial as to whether contempt of court had been committed and accordingly there was no right to a jury trial.

31. The majority view was subjected to criticism by Donal O'Donnell SC (as he then was) in his 2002 paper *Some Reflections on the Law of Contempt*<sup>42</sup>. The judgment of Henchy J. was declared *obiter*<sup>43</sup> by McKechnie J. in the High Court in *Murphy v. BBC*<sup>44</sup>, a case in which McKechnie J. comprehensively reviewed the law in relation to the right to a jury trial for non minor contempt following an application by the alleged contemnor for trial by jury. He ultimately held that there was no right to a jury trial and that the position prior to the foundation of the State where there was an undoubted right of Courts to conduct summary trials for contempt was preserved by the transitional provisions of the Constitution and that the *sui generis* nature of contempt took it outside the guarantees of Article 38.5. He held that:

*It is, in my view, of the first importance that a court of and by itself can vindicate its own authority and that the competence to so do is inherent from its very creation and from the purpose of its existence. It would be seriously impotent if it was otherwise. It is of crucial significance that its integrity be maintained and that its dignity, from both a principled and operational point of view, is not undermined by groundless words, actions or deeds. Under the separation of powers within our Constitution, courts are not only entrusted but are mandated to deliver justice and for that purpose judges have a constitutional safeguard of independence. Their capacity to achieve this would be seriously inhibited if they could not master their own destiny. Moreover since judges have the responsibility of setting not simply minimum, but due and proper standards for the effective administration of justice (see p. 440 of *The State (D.P.P.) v. Walsh [1981] I.R. 412*), it appears to me that as a necessary corollary they must likewise have the power to impose those standards against all. Public respect and public confidence demand and would not accept anything less.*<sup>45</sup>

32. As such there still exists a degree of confusion as to the right to a jury trial for contempt. Where this question is the subject of Supreme Court authority then the reality is that any confusion will have to be resolved by the Supreme Court. It must be noted that this question was considered by the Supreme Court in *DPP v. Independent*

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<sup>42</sup> Vol. 2 No. 2 (2002) 2 J.S.I.J. 88.

<sup>43</sup> at para. 72 (echoing the view of the Law Reform Commissioners in their 1994 Report on Contempt at para. 3.11)

<sup>44</sup> [2005] 3 I.R. 336

<sup>45</sup> *ibid.* at para. 75

*News (Ireland) Limited*<sup>46</sup> where the Supreme Court approved *State (DPP) v. Walsh and Conneely*. However, that judgment, in which Geoghegan J. approves Henchy J.'s determination that jury trials are available, subject to limitations, for non-minor contempt, is *per incuriam* *Murphy v. BBC*. Moreover, where a jury trial was never sought by the alleged contemnor, the judgment is *obiter* on that issue.

33. It is worthy of comment that should a new statutory offence of contempt be created and the common law offences abolished, the *ratio* of *Murphy v. BBC* may cease to have effect and there will be a strong argument that Article 38.5 would apply to the new statutory offences and accordingly, all non minor contempt offences would have to be tried by jury. This, of course, assumes that abolishing the common law offences would not represent an impermissible interference with the powers of the judiciary by the Oireachtas.

**3(c) Can/should the courts power to try summarily be altered by legislation?**

34. Council of The Bar of Ireland submits that the power to try summarily and immediately for contempt should not be removed by legislation. However, there is a case for considering whether a limit should be set to the punishments which can be imposed in respect of disorderly conduct which calls for an immediate custodial sanction.

**3(d) Should there be a statutory definition of contempt in the face of the court?**

35. The submission of Council of The Bar of Ireland is that there is no requirement for a statutory definition of the offence of contempt in the face of the court. It is sufficiently described in multiple authorities and the myriad behaviours which could amount to such contempt would challenge legislative description.

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

36. As contempt in the face of the court is a criminal offence, there is a strong presumption that there must also be a *mens rea* element to the offence. It is the submission of Council of The Bar of Ireland that the *mens rea* should be that of intentionally or recklessly. A further question arises in the context of setting a *mens rea* and that is the question of whether *mens rea* should be judged on an objective or subjective standard. The general trend in Irish legislation is to allow for a subjective

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<sup>46</sup> [2009] 3 I.R. 598

standard<sup>47</sup> when assessing *mens rea* however in the case of contempt in the face of the court there is an argument that an objective standard can be used in assessing whether there is contempt and a subjective standard should be used in assessing sanction.

37. If a decision is made not to have a fault element for contempt in the face of the court, Council of The Bar of Ireland would repeat its submissions advocating against absolute liability for contempt offences.

**3(f) – *Should legislation be introduced to allow journalists to refuse to disclose sources?***

38. Council of The Bar of Ireland recognises that this issue is classically a matter of policy rather than law. It involves careful consideration of the right to free expression in Article 40.6.1, the similar rights of free expression guaranteed by Article 10 of the ECHR, the recognised requirement for a free media as part of a democratic society and journalistic ethics on one hand weighed against the requirement that the Courts administer justice and recognition that this involves a fact finding function as was held by O’Donnell J. in *DPP v. JC*:

*A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts’ capacity to find out what occurred in fact, detracts from the truth finding function of the administration of the justice.*<sup>48</sup>

39. Where the Irish Courts have held that there is no absolute protection against disclosure of journalists’ sources, there is merit in suggesting that a non-exhaustive list of factors taking account of the competing interests in play be set out to assist judges in determining whether such protection should be afforded in a given case.

**ISSUE 4: SCANDALISING THE COURT**

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

40. It is submitted that the offence of scandalising the court ought to be retained, as it is required to protect and promote the administration of justice. Further, it is imperative

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<sup>47</sup> See, for example, s.18(5) of the Non Fatal Offences Against the Person Act 1997 which applies a subjective standard to the defence of use of reasonable force for self defence and the criticisms of an objective standard of *mens rea* set out in *R v. G* [2003] 1 WLR 1060

<sup>48</sup> *DPP v. JC* [2015] IESC 31, judgment of O’Donnell J., para. 97

to preserve public confidence in the legal system and the administration of justice. Whilst it has been noted that scandalous conduct could fall within the scope of other statutory offences i.e. s.6 of the Criminal Justice (Public Order) Act 1994, s.10 of the Non-Fatal Offences Against the Person Act 1997 and s.4 of the Offences Against the State (Amendment) Act 1972, *inter alia*; it is nevertheless submitted that there is a public interest in prosecuting particular behaviour that seeks to undermine the authority of the court. It is submitted that the offence of scandalising the court, although rarely prosecuted, is not redundant and ought not be abolished.

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

41. It is proffered that the offence should not be limited by statutory definition; rather, its interpretation should be garnered from common law. Although the term ‘scandalising’ has been criticised as being antiquated and unclear, it is submitted that the plethora of case law<sup>49</sup> and jurisprudence in the area provide clarity and comprehension.

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

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

42. Council of The Bar of Ireland submits that a form of strict liability with defined defences is appropriate for the offence of scandalising the court. However, should a fault based offence be preferred, Council of The Bar of Ireland submits that in the interests of clarity, consistency and the rule of law, that the *mens rea* of the offence ought to be addressed in the legislation notwithstanding the obvious difficulties in doing so. However, it is Council of The Bar of Ireland’s view that if a fault element ought to apply, it should not comprise of such a broad phrase as “intentionally, knowingly or recklessly”. This phrase is mired with difficulties. The phrase “intentionally, knowingly or recklessly” fails to identify the subject matter to which it refers i.e. does the *mens rea* refer to the conduct of the offending behaviour itself – or –the result that arises from the offensive behaviour, or both?

***ii. If a fault element should not apply, should contempt of court be a strict liability offence (subject to a defence of due diligence or reasonable precautions) or an***

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<sup>49</sup> *Attorney General v Connolly* [1947] IR 213, *The State (DPP) v Walsh* [1981] IR 412, *PSS v JAS and Independent Newspapers (Irl) Lrd.* (Unreported, High Court, 1995), *Kelly v O’Neill* [2001] 1 IR 354, *Murphy v British Broadcasting Corporation* [2005] 3 IR 336

***offence of absolute liability (without any defence of due diligence or reasonable precautions)?***

43. It is suggested that a form of strict liability (not absolute liability) ought to apply in respect of the offence of scandalising the court. In the United Kingdom, section 2 of the English Contempt of Court Act 1981 enounces that the strict liability rule applies to ‘publication contempt’ where strict conditions are met and the common law rules apply to publications not falling within the statutory provisions. It is submitted that adopting a similar approach would be of benefit in this jurisdiction.
44. It is submitted that the public interest is not engaged to such an extent that would permit the more stringent standard of ‘absolute liability’ to be applied. Having regard to all the elements of the offence of scandalising the court, the accused person ought not be deprived of adopting a defence to exculpate himself.

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

45. Council of The Bar of Ireland submits that the provision of a limited statutory defence ought to apply to the offence of scandalising the court. It is suggested that a defence of “reasonable and necessary publication on a matter of public interest” ought to be available to an accused person. The provision of this defence would expressly provide for fair and proportionate criticism of the courts, if conducted in good faith and for the public benefit. Scandalising the court is an aspect of contempt that involves balancing competing rights and interests and thus, it is submitted that the regulation of such public policy considerations is appropriately a matter for the legislature.

**ISSUE 5: SUB JUDICE CONTEMPT**

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

46. Council of The Bar of Ireland submits that a test of “real risk” rather than “substantial risk” is appropriate for *sub judice* contempt. Council of The Bar of Ireland recognises that historically, a significant rationale for the summary jurisdiction to try contempt is not to punish breaches but instead to deter them. For example, O’Higgins C.J. held in *State(DPP) v. Walsh* that

*“The primary purpose of such action is not to punish those whose criminal conduct has endangered the administration. It is to discourage and prevent a*

*repetition of or continuous conduct, which if became habitual, would be destructive of all justice”.*<sup>50</sup>

47. Accordingly, it is suggested by Council of The Bar of Ireland that setting a very high barrier, that of a “*substantial risk of prejudice*” might weaken the deterrent effect of the offence of *sub judice* contempt. In *DPP v. Independent Newspapers (Ireland) Ltd*, Geoghegan J. refers to a submission made by counsel for the respondent that the appropriate test was one of a “*real risk of interference with a criminal trial*”<sup>51</sup>. It is submitted that the test of a real risk rather than a substantial risk would have a greater deterrent effect. It is also recognised that this is a similar position to that which pertains in Scotland, Australia and New Zealand. It must be recognised that where the precise line is drawn is a matter in which policy rather than legal considerations will weigh heavily.

**5(b) - Should the offence extend to “imminent” proceedings?**

48. Council of The Bar of Ireland submits that there is a case for extending the offence to “imminent” proceedings. It is recognised that extending the boundaries of the *sub judice* rule to matters which are not the subject matter of actual proceedings introduces a vagueness into the law. While the Law Reform Commissioners were satisfied in 1994 to extend the rule to “imminent” proceedings, it must be recognised that the avenues available for widespread publication on social media have increased beyond recognition since 1994. The Law Reform Commissioners in their consultation paper of 1991 proposed extending the *sub judice* rule to imminent proceedings on a very limited basis. The nuanced approach was set out in the judgment of Kelly J. (as he then was) in *DPP v. Independent Newspapers*<sup>52</sup> where he quoted the 1991 report:

*“Our tentative preference is for a narrow rule which would impose liability for contempt with regard to publications before proceedings are active where the publisher 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 criminal or civil legal proceedings is certain or virtually certain. Under this test, only cases which cry out for a sanction will fall within the scope of liability. No publisher could morally justify a publication of this character”*<sup>53</sup>

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<sup>50</sup> [1981] IR 412 at p.428

<sup>51</sup> [2009] 3 IR 598 at para. 29

<sup>52</sup> [2003] 2 I.R. 367

<sup>53</sup> *ibid.* p.382

49. Where the extension of the *sub judice* rule to imminent proceedings has previously been recommended, it is the view of Council of The Bar of Ireland that a very strict test be applied. While Council of The Bar of Ireland recommends in respect of *sub judice* contempt that a standard of “real risk” should apply, this standard is too low for “imminent” proceedings. Accordingly, it is recommended that any such extension should reflect the heavily nuanced and more restricted recommendation of the Law Reform Commissioners in 1991.

**5(c) – *Should publication be regarded as a continuing act?***

50. Council of The Bar of Ireland does not believe that publication should be viewed as a continuing act. It would appear that placing an onus on a publisher to constantly subject their historic work output to analysis in order to ensure that it does not offend the *sub judice* rule would be too severe a burden. Accordingly, it is not the view of Council of The Bar of Ireland that publications which did not offend the *sub judice* rule at the time of publication should amount to unlawful conduct at some future date.

51. It is noted however that these publications, if accessed, do have the capacity to amount to prejudicial material which could affect the fairness of proceedings which are in being. In those circumstances, it is suggested that consideration be given to warnings, particularly to jurors, not to access information relating to the case or the parties thereto. It is noted that the ECtHR recently upheld a finding of contempt of court against a juror in which a sanction of imprisonment was imposed after the juror did access information relating to a defendant during the currency of a trial. In *Dallas v. UK*<sup>54</sup>, the Court held that the juror had sufficient warning that this behaviour amounted to an offence. She was found to have been given a verbal instruction by the court’s jury officer, there were notices stating that accessing information could amount to contempt of court in the jury room and the trial judge gave a specific warning not to access the internet prior to the opening of the case.

**5(d) – *To what extent should sub judice apply between conviction and sentence?***

52. Council of The Bar of Ireland recognises that the Courts have held that publication in this period can amount to a breach of the *sub judice* rule. However, once a jury has delivered a verdict, it must be recognised that the risk of prejudicial information infecting the mind of either an appellate court or a sentencing judge is far less. Accordingly, the margin of appreciation which is to be afforded to publishers during this time is significantly larger than that which applies prior to a finding of guilt. Accordingly, Council of The Bar of Ireland suggests that the law is not in need of

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<sup>54</sup> Application No. 38395/12, Final Judgment on the 6<sup>th</sup> June 2016

further modification as it currently protects a convicted person but to a lesser extent than that available to a person who benefits from the presumption of innocence. The test recommended in 5(a) above, that of a real risk, would of course have to be viewed in the context of a judge or appellate court rather than a jury.

***5(e) – What fault element should apply?***

53. Council of The Bar of Ireland recommends that strict liability should apply to *sub judice* contempt. However, Council of The Bar of Ireland also recognises a need for defences including due diligence and reasonable precaution. Moreover, being cognisant that the right of freedom of expression is both a constitutional and convention right, it is submitted that explicit recognition is given to a public interest defence. It is submitted that the onus of establishing any of these defences should rest on the publisher and that they should not be defences which are required to be negatived.

***5(f) – Should an online database be created setting out the cases subject to restrictions?***

54. Council of The Bar of Ireland submits that any such database does not need to be authorised or created by legislation. If such a database is brought into being a failure to check it in advance of publication which offends the *sub judice* rule would clearly impact on any due diligence/reasonable precaution defence which may be relied upon. However, if such a database is created, the inadvertent absence of a record of the reporting restrictions would allow a publisher to publish with immunity, having performed a check of the statutorily mandated database. It is further noted that in Scotland, the orders which are listed are postponement orders rather than a list of all reporting restrictions. Reporting restrictions are a regular and understood part of court procedure and currently work well in the absence of either formal postponement of reporting orders similar to s.4(2) of the UK act or a database of such orders.

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

55. Council of The Bar of Ireland recommends that a power should be given to order certain materials removed from a website. However, the use of any such power poses multiple problems. In the simplest scenario, there may be prejudicial material on a well known Irish website which is easily identified and accessed. In those circumstances, there is merit in the suggestion that some form of suppression order could be made. Courts regularly grant adjournments of trials in order to allow for a fade factor in respect of prejudicial publications and if the offending material could be suppressed, it would make sense to do so.



56. The complicating factors are where the information is stored external to the jurisdiction where an Irish Court simply could not make such an order. Similarly, could an Irish Court order a search engine such as Google to alter its algorithms in order not to return results which contain prejudicial information? In that case, the search engine is not hosting the prejudicial material, they are merely pointing to its existence.
57. Then, should it be possible to suppress information on an Irish website (for example [www.irishtimes.ie](http://www.irishtimes.ie)), would the inability to order a UK based website (e.g [www.telegraph.co.uk](http://www.telegraph.co.uk)) to remove a syndicated article with identical information create an unfairness which would warrant the prohibition of a trial?
58. Where the mischief which is to be avoided is the inappropriate accessing of this information, a simpler solution may be to focus on influencing juror behaviour by means of warnings and directions as outlined in 5(c) above.

## ISSUE 6: MAINTENANCE AND CHAMPERTY

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

59. Council of The Bar of Ireland is of the view that the crimes and torts of maintenance and champerty should be retained and not abolished, although a more compelling case can be made to abolish the crime on the basis of obsolescence. Recent cases<sup>55</sup> demonstrate as Hogan J said in *Greenclean Waste Management Ltd v Leahy t/a Maurice Leahy & Co Solicitors (No 2)*<sup>56</sup>, that maintenance and champerty still has “practical vibrancy”.<sup>57</sup> While the crime and tort were abolished in England in 1967<sup>58</sup>, the New Zealand Law Commission recommended in 2001 retaining the torts of maintenance and champerty in the context of its broad consideration of subsidising litigation<sup>59</sup>. The ongoing relevance of maintenance and champerty in Ireland means

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<sup>55</sup> See *GE Capital Woodchester Ltd v Staunton Fisher Ltd* [2016] IEHC 172; *SPV Osus Limited v. HSBC International Trust Services (Ireland) Limited* [2015] IEHC 602; *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187; *Greenclean Waste Management Ltd v Leahy t/a Maurice Leahy & Co Solicitors (No 2)* [2014] IEHC 314; *Thema International Fund PLC v HSBC Institutional Trust Services (Irl) Ltd* [2011] 3 IR 654

<sup>56</sup> [2014] IEHC 314

<sup>57</sup> *Ibid.* at para. 15.

<sup>58</sup> Under the Criminal Law Act 1967

<sup>59</sup> Law Commission, *Subsidising Litigation*, Report 72, May 2001

that it could not be as “useless lumber”<sup>60</sup>, which was the description given by the UK Law Reform Commission leading to its abolition in England in 1967. It also worth noting that section 14(2) of the English Criminal Law Act 1967 carefully preserved the rule that maintenance could render unenforceable a contract between maintainer and maintained.<sup>61</sup>

60. Maintenance and champerty has proven itself adaptable and capable of accommodating “modern ideas of propriety”<sup>62</sup> and is “...not frozen by reference to the social conditions and public policy considerations which pertained several hundred years ago”<sup>63</sup>. Although the policy basis for maintenance and champerty may have altered from its original conception it still reflects certain important policy considerations including preventing “trafficking in litigation”<sup>64</sup>, “improperly stirring up litigation”<sup>65</sup> and ensuring that the time and resources of the courts are not abused. The common law has proven capable of striking the appropriate balance with other competing interests such as right of access to the courts. Thus in *O’Keeffe v Scales*<sup>66</sup> the Supreme Court stated that the maintenance and champerty cannot be used to “deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims”<sup>67</sup>.

61. Insofar as it appears that there has been no prosecutions for maintenance and champerty in the history of the State (or even the last century)<sup>68</sup> there is more of case for abolishing the crime (as opposed to tort), based on obsolescence. However, it is noted that the Statute Law Revision Act 2007 did not recommend its abolition.

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

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<sup>60</sup> Law Reform Commission Proposals for the Abolition of Maintenance and Champerty (1966) at pg. 7

<sup>61</sup> Section 14(2) states that “The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.”

<sup>62</sup> As stated by Cozens Hardy MR in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.*, [1908] 1 K.B. 1005 at 1012

<sup>63</sup> Per Hogan J in *Greenclean Waste Management Ltd v Leahy t/a Maurice Leahy & Co Solicitors (No 2)*, *ibid.* at para. 29.

<sup>64</sup> See *Fraser v Buckle* [1994] 1 IR 1

<sup>65</sup> Per Lord Denning M.R. in *In re Trepca Mines Ltd. (No. 2)* [1963] Ch. 199 at pp. 219-220

<sup>66</sup> [1998] 1 I.R. 290

<sup>67</sup> Per Lynch J at pg. 295.

<sup>68</sup> See the comments of Donnelly J in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187, where she stated at para. 27 “It should be observed that there has been no indication of any criminal prosecution occurring for maintenance or champerty in this jurisdiction since the foundation of the State, and indeed no reference to any such prosecution in the immediately preceding century. Virtually all of the modern authorities from other common law jurisdictions (save for an authority from Hong Kong; see, *Winnie Lo v. HKSAR* [2012] HKCFA 23 ) concern civil cases in which both tortious and criminal liability has been discussed”.

62. As noted above, Council of The Bar of Ireland is of the view that maintenance and champerty should not be abolished. It further follows that a champertous agreement should be void on grounds of public policy as continues to be the case in England, notwithstanding the formal abolition of the crime and torts.

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

63. Council of The Bar of Ireland is of the view that damages based/contingency fee agreements should not permitted except those which are already allowed under existing law. Damages based/contingency fee arrangements were prohibited for solicitors under section 68(2) of the Solicitors in all matters except to recover a debt or liquidated demand. While this provision is proposed to be repealed under the Legal Services Act 2015<sup>69</sup> (which has yet to commence), section 149(1)(a) of the 2015 Act (also not yet commenced), re-enacts the same prohibition which is to apply to all “legal practitioners”<sup>70</sup>. This is further reflected in the Code of Conduct for The Bar of Ireland which prohibits barristers from accepting instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded other than in relation to a matter seeking only to recover a debt or liquidated demand<sup>71</sup>. Damages based/contingency fee agreement raise significant ethical issues for legal practitioners involving real prospects conflict of interest by virtue of a having a personal financial interest in the outcome of proceedings. Since this matter has recently been considered by the legislature in the context of the Legal Services Act, Council of The Bar of Ireland can see no basis for reconsideration of such matters as part of the reform of the law relating to contempt of court. Council of The Bar of Ireland is therefore of the view that damages based/contingency fee agreement should continue to be prohibited except in case of recovery of a debt or liquidated demand.

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

64. Council of The Bar of Ireland is of the view that express statutory provision for after the event (ATE) should be made. The first and only time the Irish Courts has considered after the event (ATE) insurance was in the context of a security for costs application in *Greenclean Waste Management Ltd v Leahy t/a Maurice Leahy & Co*

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<sup>69</sup> Under section 2 and Schedule 5 of the 2015 Act.

<sup>70</sup> Section 2(1) of the 2015 states that “legal practitioner”, subject to subsection (2), means a person who is a practising solicitor or a practising barrister and a reference to a solicitor includes a reference to a firm of solicitors.

<sup>71</sup> See Paragraph 12.7 of the Code of Conduct for the Bar of Ireland Adopted by a General Meeting of the Bar of Ireland on 25th July 2016 which states: “Barristers may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded other than in relation to a matter seeking only to recover a debt or liquidated demand”.

*Solicitors (No 2)*<sup>72</sup> where Hogan J in the High Court declined to make an order for security for costs due to the existence of after the event insurance held by the plaintiff. While this was reversed on the facts by the Court of Appeal, this was based on the terms of insurance rather than any finding that ATE insurance is invalid or against public policy. ATE insurance is generally understood as involving insuring plaintiffs against the risk of having to pay a defendant's legal costs, and cover their own outlay, if they are unsuccessful in the proceedings. While ATE is commonplace in England, this is in the context of different legal regime where damage based agreements and contingency fees are permitted. ATE raises issues touching on important policy considerations such as access to the courts and third party funding. Statutory provision for the same would provide some welcome clarity on the validity of the existence of ATE insurance including whether ATE insurance may be validly entered into after the institution of legal proceedings (or only after the event but before the institutions of proceedings) and the permissible terms of ATE insurance.

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

65. Council of The Bar of Ireland does not consider that it is appropriate<sup>73</sup> to make a submission on this matter in the light of the fact that judgment of the High Court in *Persona Digital Telephony Ltd & anor -v- The Minister for Public Enterprise & ors* which held that third party funding of litigation is not permitted under the Irish common law, has been certified for appeal to the Supreme Court. In its written determination whereby a direct appeal to the Supreme Court was accepted, the Supreme Court in *Persona Digital Telephony Limited & anor -v- The Minister for Public Enterprise Ireland & ors*<sup>74</sup> stated that:

*“In light of constitutional principles of access to the courts, and thus access to justice, the Court considers that the applicants have raised issues which are of general public importance”*<sup>75</sup>.

The precise question which was certified for determination by the Supreme Court is:

*“Whether third party funding, provided during the course of proceedings (rather than at their outset) to support a plaintiff who is unable to progress a case of immense public importance, is unlawful by reason of the rules on maintenance and champerty.”*

66. Council of The Bar of Ireland is of the view that it is prudent to await the judgment in these proceedings which may also provide helpful guidance in the consideration of any legislation.

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<sup>72</sup> Ibid.

<sup>73</sup> [2016] IEHC 187

<sup>74</sup> [2016] IESCDET 106

<sup>75</sup> Ibid. at para. 46

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

67. It follows from the answer to the previous question that Council of The Bar of Ireland believes that it is appropriate to await the determination of the Supreme Court in the *Persona* litigation, prior to adopting a position on this issue.

## **ISSUE 7: EMBRACERY**

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

68. The common law offence of embracery involves attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats or persuasions. In *The People (Director of Public Prosecutions) v. Walsh*<sup>76</sup>, the Court of Criminal Appeal observed at pg. 4:

“...that while it is perhaps somewhat surprising that this offence has not received a statutory definition in more recent times that the common law offence nonetheless exists and is a certain offence in our legal system and that the submission that there is no such offence known to Irish law is unfounded”.

69. It is noted that there is some overlap between the offence of embracery and the offence of intimidating persons connected with the administration of justice, including jurors and potential jurors under section 41 of the Criminal Justice Act 1999. However, it also noted that the offence of embracery is broader than this statutory offence, insofar as it is not confined to intimidation but includes any attempt to influence a jury by means of promises, persuasion. Insofar as there already has been statutory intervention in this area, Council of The Bar of Ireland accepts the merit in the recommendation of the Commissions in its 2013 Report on Jury Service of creating a more comprehensive statutory offence of interference with witnesses, jurors and other persons. Council of The Bar of Ireland would therefore submit that the offence of embracery and the offence of intimidation under section 41 of the 1999 might therefore be abolished and replaced with a single offence.

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

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<sup>76</sup> [2009] 2 IR 1

70. It follows in answer to the previous question, that Council of The Bar of Ireland would submit that there should be a single offence of interference with witnesses, jurors and other persons, along the lines of the Commission's recommendation in its 2013 Report on Jury Service.