LMM(80)18

CONTEMPT OF COURT

Memorandum by the Commonwealth Secretariat

Introduction

The law and practice relating to contempt of court has been under scrutiny recently in a number of Commonwealth jurisdictions, and the purpose of this paper is to review some proposals for change and recent legislation in an area of the law which is essential to the fair and impartial administration of justice.

2. In most Commonwealth jurisdictions there are two sources of this law, statutory and case law. Statutes often contain specific provisions regarding various forms of contempt (disobeying a court order, obstructing justice, and misconduct in court, are examples) and often the court's powers, derived from the common law, are expressly retained, or accepted as being within the inherent jurisdiction of the court.

3. In a number of jurisdictions which have had to face industrial relations problems in recent years, the use of the court's powers to punish for contempt have, in several instances, been the subject of acrimonious and protracted debate.

4. Difficulties have often arisen over the resolution of such problems as the proper starting point for strict liability for publications relating to criminal and civil cases; what defences should be available against provisions importing strict liability; the extent of liability for prejudice deliberately caused; disclosing the identity of witnesses after an order suppressing their names; and, more recently, revealing the secrets of the jury room.

5. As regards contempt in the face of the court, although there is unanimity of approach in virtually all the superior courts of the Commonwealth (that the power to commit summarily for contempt should only be used in exceptional cases, and as a last resort where it is clearly proved that the act complained of interferes, or tends to interfere with the proper administration of justice) a power which allows the court to frame the offence, initiate and conduct the prosecution, and then to fix the penalty (often without limit and, sometimes, with no right of appeal) is seen by some members of the public as anachronistic and an affront to the rules of natural justice.

6. It will be recognised, of course, that the very diversity of the generally accepted forms of contempt makes it extremely difficult to formulate general solutions, and recent Commonwealth developments in this area show a meticulous consideration of every facet of the problems that arise.

Phillimore and subsequent developments in the UK

7. Since so many jurisdictions derive their law of contempt from inherited British law and practice, a major event in the Commonwealth was the publication, in 1974, of the Report of the Phillimore Committee [Cmnd. 5794]. The Committee recommended that legislation should be enacted to clarify the law of contempt and a summary of the Committee's conclusions and recommendations is set out in Appendix A.

8. In March 1978, the previous British administration issued a Green Paper [Cmnd. 7145] inviting public comment on the law of contempt of court. The Paper recognised that the Phillimore Report was a most valuable review of a difficult and sensitive area of the law, but suggested that there was room for legitimate argument about some of its most important recommendations. The central proposals concerning liability for contempt by publication raised issues about the proper balance between freedom of the press and the right of an individual to a fair trial, and upon such fundamental issues, it was suggested, conclusions could not be reached without informed parliamentary and public discussion.

9. The Green Paper raised four main questions for discussion. The first concerned the stage in legal proceedings at which the media should become strictly liable for contempt, or in other words should be under a duty not to publish anything which might seriously prejudice the proceedings, whether or not it is intended to do so. It was explained that under the present law, strict liability arose when proceedings were imminent (save in criminal cases in Scotland, where it arose as soon as a crime was known to have been committed—although this rule was currently under review). The Phillimore Report had recommended that in criminal cases strict liability should not begin until the accused is formally charged. The Green Paper recognised the advantages of such a rule but suggested that it could go too far in allowing prejudicial publication before a formal charge was made, thus endangering the fair trial of an accused person. As a result prosecutions might have to be dropped or convictions reversed on appeal, so that if the accused were innocent, he would have been denied the opportunity fully to clear his name; if guilty, he would have gone unpunished, to the possible danger of the public.

10. In civil cases, the Report had recommended that strict liability should not begin until the case is set down for trial. While the Green Paper did not challenge this recommendation, it pointed out that there were many forms of civil proceedings which had no setting-down stage or any real equivalent. It was suggested, if complex and elaborate rules were to be avoided, that the starting point for strict liability in such cases would have to be the date when the proceedings were formally commenced.

11. The Phillimore Committee had also recommended that it should be a defence to strict liability

that a publication which created a risk of serious prejudice to legal proceedings was nevertheless justified because it was a fair and accurate report of legal proceedings in open court, or because it was part of a legitimate discussion of a matter of general public interest. In relation to reports of legal proceedings, the Paper drew attention to the fact that the Report had also proposed that the judge should be given power to prohibit, in the public interest, the publication of names or other matters arising at a trial. While acknowledging the arguments for a defence of general public discussion, the Paper suggested there was room for the view that (taken with the other changes proposed) such a defence could tilt the balance too far against accused persons and litigants.

12. The Paper considered the Report's recommendation that it should not be contempt of court to bring influence or pressure to bear on a party to legal proceedings unless it amounted to intimidation or unlawful threats to his person, property or reputation. It pointed out that this was one of the issues that arose in *Attorney-General* v. *Times Newspaper Ltd.* [1974] A.C. 273, a case which concerned the proposed publication by the *Sunday Times* of an article about the thalidomide litigation. The Paper put forward the view that the recommendation drew no distinction (as the House of Lords had sought to do) between press comment and criticism which is fair and temperate, and that which is unfair and intemperate. Instead it would allow both. [Of course the Green Paper appeared before the April 1979 decision of the European Court of Human Rights.]

13. The Queen's Speech after the present Government was formed stated that a Bill would be introduced to amend and clarify the law of contempt. There have been various press reports about the progress of the drafting of the Bill, and Sir Michael Havers made mention of it recently when addressing a Conference on the Law and the Press organised by the Law Society (of England and Wales) and the Guild of British Newspaper Editors. Sir Michael revealed that the Bill was not likely to be confined to the Phillimore recommendations, although it was expected to be broadly based upon them. If the Bill is published before Ministers meet in Barbados, Sir Michael will be in a position, if he so chooses, to discuss its main provisions.

14. During the course of this address, Sir Michael Havers mentioned the problem of the publicity of committal proceedings where more than one accused was before the court and all did not agree that reporting restrictions should be lifted. On this point, it is interesting to note that in a recent Report issued by the Statute Law Revision Committee of Victoria, one of the recommendations made was that in cases where there is more than one defendant in committal proceedings, an applicatoin to allow publicity should have the unanimous agreement of all the defendants.

15. Sir Michael also dealt with the "danger that too free publicity of what goes on in the jury room may bring the system into disrepute", and explained what those dangers were. He told his audience that he had sought to clarify whether such disclosures would be regarded as contempt of court, but that the result had been inconclusive. He was, of course, referring to *Attorney-General* v. *Statesman and Nation Publishing Co. Ltd.* [1980] 2 W.L.R. 246 where the Divisional Court held that in order to establish that publication after a trial of a juror's disclosure of jury room secrets was a contempt of court, it was necessary to show, in the light of the circumstances of the case, that such disclosure tended or would tend to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations. The Court's view was that in the instant case the sole ground on which the allegation of contempt was based was the publication of some of the secrets of the jury room in the Thorpe trial. Apart from that, there were no special circumstances which, it was suggested, called for condemnation. The evidence showed that for a number of years the publication of jury-room secrets had occurred on numerous occasions. To many of those disclosures no exception could be taken because, from a study of them, it would not be possible to identify the persons concerned in the trials. In those cases jury-room secrets were revealed in the main for the laudable purpose of informing would be jurors what to expect when summoned for jury service. Thus it was not possible to contend that every case of post-trial activity of the present kind must necessarily amount to a contempt.

16. Looking at the case as a whole, the court concluded that the article in the *New Statesman* did not justify the title of contempt of court. That did not mean that the court would not wish to see restriction on the publication of such an article, because it would; but the Court's duty was to say what the law was today, and to see whether, today, the activity in question was a contempt of court. The Court was unable to say that it was, and therefore refused the application.

New Zealand proposals

17. At the end of 1977, in New Zealand a Committee on Defamation published its Report. The Committee explained that at a certain stage of their deliberations, it became apparent to them that it would be desirable to consider certain aspects of the law of contempt which were closely allied to the law of defamation, and their terms of reference where subsequently revised to embrace an examination of the law of contempt as it may concern the publication of matter relating to civil proceedings that are imminent or pending. A summary of the Report's recommendations on this subject appears in Appendix B; also set out is the Committee's draft of a Bill which would give effect to their recommendations.

Proposals in Canada

18. In the same year the Law Reform Commission of Canada published Working Paper No. 20 on Contempt of Court. It was stated to be the first part

of a general study of offences against the administration of justice, and a second Working Paper dealing with the statutory offences would follow. A summary of the Working Paper's tentative recommendations is set out in Appendix C. In passing it is interesting to note that the Commission felt that in view of the constitutional problems that would arise in Canada if there were an attempt to abolish the traditional distinction between civil and criminal contempt (Phillimore, paras. 170—176), there was little point in making such a proposal.

A Bermuda statute

19. Following recommendations made by the Law Reform Committee of Bermuda, the Bermuda legislature enacted the Administration of Justice (Contempt of Court) Act 1979 (No. 17 of 1979). The text of this statute appears in Appendix D. The Act closely followed the draft Bill drawn up by the Committee and, it will be seen, adopts many of the recommendations made in the Phillimore Report. The Act also includes a number of provisions derived from fairly recent United Kingdom legislation.

Conclusions

20. A study of these developments reveals a large measure of similarity of approach, but there are a number of interesting variations, sometimes dictated by local considerations. One such example is that whereas the Phillimore Committee had recommended that it should be a defence to an allegation of contempt to show that a publication formed part of a legitimate discussion of matters of general public interest, and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings, in view of the size of Bermuda (where any case likely to be of public interest would be known to a very high proportion of the population) the Bermuda Law Reform Committee were of the opinion that it would not be desirable to introduce such a provision into the island's legislation; such a provision might easily result in a trial by newspaper which the court could not control. The Bermuda Act also deals with contempt of tribunals.

21. Ministers may wish to discuss the principal issues involved in this important and complex area of the law, and exchange ideas and experience on their possible resolution to take account of modern conditions.

PHILLIMORE REPORT

PART V. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

GENERAL CONCLUSIONS

216.—(1) The law of contempt in England and Wales and in Scotland is required as a means of—

(*a*) maintaining the rights of the citizen to a fair and unimpeded system of justice ; and

(*b*) protecting the orderly administration of the law (paragraph 10).

(2) The operation of the law of contempt should be confined to circumstances where the achievement of its objectives requires the application of a swift and summary procedure (paragraph 21).

(3) In essentials the law of contempt, especially as it affects the press, should be the same in England and Wales and in Scotland so far as procedural differences allow (paragraph 24).

(4) The law as it stands contains uncertainties which impede and restrict reasonable freedom of speech. It should be amended and clarified by statute so as to allow as much freedom of speech as is consistent with the achievement of the objective set out in conclusion 1 (paragraphs 5-7).

(5) One area of uncertainty concerns the period of operation of the law of contempt, as to whether publications are at risk when proceedings are imminent and, if so, what period that expression covers (paragraph 84).

RECOMMENDATIONS

(6) Any conduct, including publication as described in recommendation 8, which is *intended* to pervert or obstruct the course of justice in particular proceedings should continue to be capable of being dealt with as a contempt of court, but only if the proceedings in question have started and have not yet been finally settled or concluded. However, such conduct should normally be dealt with as a criminal offence unless there are compelling reasons requiring it to be dealt with as a matter of urgency by means of summary contempt procedures (paragraphs 66 and 72).

(7) A publication, as described in the following recommendation, should be subject to the law of contempt if it creates a risk of serious prejudice (whether intentionally or not) (paragraph 74) ; but this strict liability should not apply to other conduct (paragraph 77) and should apply to publications only in accordance with recommendations 9–16 below.

(8) For the purposes of recommendations 7 and 9–16 a publication should be defined as any speech, writing, broadcast or other communication, in whatever form, which is addressed to the public at large (paragraph 80).

(9) A publication should give rise to strict liability in the law of contempt only if it creates a risk that the course of justice will be seriously impeded

or prejudiced. A definition on these lines should be provided by statute (paragraph 113).

(10) Where the proceedings in question are *criminal*, strict liability for publications should only apply—

(i) in England and Wales, when the accused person is charged or a summons served ;

(ii) in Scotland, when the person is publicly charged on petition or otherwise or at the first calling in court of a summary complaint (paragraph 123).

(11) Where the proceedings in question are *civil*, strict liability for publications should only apply—

(i) in England and Wales, when the case has been set down for trial ;

(ii) in Scotland, when proof or jury trial has been ordered ;

(iii) in other civil proceedings, the equivalent stage (paragraphs 127 and 129).

(12) Strict liability for publications should cease to operate when a verdict has been returned and sentence pronounced or judgment given, or an equivalent order or decree made or given. If in a jury trial a jury fails to agree, the law should continue to apply until it is clear that no retrial is to be ordered. In the event of a new trial being ordered, the law should again apply from the date when the new trial is ordered (paragraph 132).

(13) The defence of innocent publication and distribution provided by section 11 of the Administration of Justice Act 1960 should be retained, with such modifications as will be necessary if our recommendations are implemented, for England and Wales, and should be extended to Scotland (paragraphs 133 and 154).

(14) It should be a defence to an allegation of contempt to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith (paragraph 141).

(15) It should be a defence to an allegation of contempt to show that a publication formed part of a legitimate discussion of matters of general public interest and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings (paragraph 142).

(16) A defence that a publication is for the public benefit should not be introduced into the law of contempt (paragraph 145).

(17) The existing law governing editorial and corporate responsibility for publications should be retained, with necessary modifications in regard to broadcasting and television organisations (paragraphs 149, 151 and 153).

(18) In Scotland, it should continue to be a contempt of court to publish the content of the written pleadings before the record is closed (paragraph 130).

(19) It should also be provided by statute that bringing influence or pressure to bear upon a party to proceedings shall not be held to be a contempt unless it amounts to intimidation or unlawful threats to his person, property or reputation (paragraph 62).

(20) It should no longer be a contempt to take or threaten reprisals against a witness or juror after the conclusion of legal proceedings with the intention of punishing him for his part in them. Instead, such conduct should be made an indictable offence (paragraph 157) ; with provision for the victim to recover compensation for any loss or damage he may have suffered (paragraph 158).

(21) " Scandalising the court " should cease to be part of the law of contempt. Instead, it should be made an indictable offence both in England and Wales and in Scotland to defame a judge in such a way as to bring the administration of justice into disrepute. Proof that the allegations were true *and* that publication was for the public benefit should be a defence. In England and Wales this offence should be made a branch of the law of criminal libel (paragraphs 164 and 167).

(22) All distinctions between " civil " and " criminal " contempts in England and Wales should be abolished (paragraph 176), and in particular:—

(*a*) all rules which confer privilege from process for " civil " as opposed to " criminal " contempt of court should be abolished. Parliament may wish to review the Parliamentary aspects of these rules (paragraph 170);

(*b*) the rule that waiver by an aggrieved party in civil proceedings automatically relieves the contemnor of liability should be abolished. The power of the courts to order that a breach of an order be reported to it should be confirmed (paragraph 171);

(*c*) all committals to prison for contempt should be for fixed terms (paragraph 172);

(*d*) the rules as to execution of process in civil contempt should be brought into line with those for criminal contempt (paragraph 173);

(*e*) exercise of the Royal prerogative of mercy should not be advised in any case of contempt (paragraph 174);

(*f*) the practice of the courts in requiring a breach of a court order to be proved beyond reasonable doubt should be confirmed (paragraph 175).

(23) Certain Rules of the Supreme Court which provide for committal in the event of breaches of specific court orders should be revoked, and all cases of disobedience which may be dealt with by contempt procedure left to the general provisions of Order 45, rule 5 (paragraph 180).

(24) The grounds for a motion to commit for disobedience to a court order should wherever possible be set out in detail in the supporting affidavit (paragraph 181).

(25) *Ex parte* committal orders in England and Wales should in every case include a direction that the contemnor is to be brought up before the judge making the order (or another judge if he is not available) at the earliest opportunity (paragraph 182).

(26) The right of private individuals to initiate proceedings for contempt both in England and Wales and in Scotland should continue, without prejudice to the powers of either the Attorney General or Lord Advocate to take proceedings at his own instance should he consider it proper to do so in the public interest (paragraph 187).

(27) In all contempt proceedings which a private individual seeks to institute, other than those for the enforcement of a court order made in his favour, he should be required to serve notice of these proceedings on the Attorney General or Lord Advocate as the case may be (paragraph 187).

(28) In cases of contempt in the face of the court—

(*a*) the judge should always ensure that the contemnor is in no doubt about the nature of the conduct complained of, and give him an opportunity of explaining or denying his conduct, and of calling witnesses (paragraph 32);

(*b*) before any substantial penalty is imposed there should be a short adjournment, with power to remand the contemnor in custody. The judge should have power to obtain a background report on the contemnor, and the contemnor should be entitled to speak in mitigation of sentence (paragraph 33);

(*c*) for the purposes of defending himself and of making a plea in mitigation the contemnor should be entitled to legal representation, and the court should have power to grant legal aid immediately for this purpose where appropriate (paragraphs 32 and 33);

(*d*) if the contempt also amounts to a criminal offence, the judge should consider referring it to the prosecuting authorities to be dealt with under the ordinary criminal law, and should so refer it in serious cases unless reasons of urgency or convenience require that it be dealt with summarily (paragraph 34).

(29) Magistrates in England and Wales should be given power to impose penalties for contempt in the face of the court, subject to the limits proposed in recommendation 37 below (paragraph 37).

(30) Bankruptcy Registrars in the High Court in England should be given the same powers as county court judges to punish contempts in the face of the court (paragraph 38).

(31) For the purposes of section 41 of the Criminal Justice Act 1925 (prohibition on use of cameras in courts and their precincts) a map or plan should be displayed wherever practicable indicating the boundaries of the precincts of the court (paragraph 41).

(32) Regulations should be made governing the unofficial use of tape-recorders in court, and of recordings obtained thereby. Breach of the regulations in court should be punishable as a contempt (paragraph 43).

(33) There should be created a right of appeal to the Court of Criminal Appeal in Scotland by way of Note of Appeal from a finding of contempt in a criminal trial on indictment (paragraph 198).

(34) In superior courts both in England and Scotland the power to fine should remain unlimited but the power to imprison should be limited to a maximum period of two years. All courts should in addition have appropriate powers to deal with mentally disordered offenders (paragraphs 201–2 and 206).

(35) The powers of judges in county courts to impose penalties for contempt in the face of the court (under section 157 of the County Courts Act 1959) should be increased to a fine of £150 or three months' imprisonment (paragraph 204).

(36) The powers of sheriffs in Scotland to impose penalties for contempt in the face of the court should be limited to a £150 fine or three months' imprisonment (paragraph 207).

(37) Both in England and Scotland the powers of magistrates and justices of the peace to impose penalties for contempt in the face of the court should be limited to a £20 fine or seven days' imprisonment (paragraphs 205 and 208).

(38) Powers of both sheriffs and magistrates in Scotland and of magistrates in England to certify more serious cases of contempt in the face of the court to the High Court of Justiciary or the Inner House of the Court of Session and the Divisional Court respectively should be given or confirmed as the case may be (paragraphs 205 and 208).

(39) All sentences of imprisonment for contempt of court in England and Wales should be for fixed terms, but the power to review a case and order release before the full sentence is served should be retained (paragraph 172).

(40) Prison regulations in England and Wales should be amended to require notification to be given to the Official Solicitor of prisoners committed for contempt by county courts for fixed terms of less than six weeks, in the same way as for other contempt prisoners (paragraph 190).

(41) The machinery for the enforcement of fines in the High Court and Restrictive Practices Court in England and Wales should be replaced by a system on the lines of that provided by the Criminal Justice Act 1967 (paragraph 188).

NEW ZEALAND REPORT

Summary of recommendations

(a) A statutory definition of contempt of court in relation to publications should *not* be enacted. Instead the approach to definition should be by way of exclusion.

(b) It be enacted that it should not be a contempt of court to publish material which relates to matters in issue in civil proceedings when that material does not include any direct reference to the proceedings and publication takes place prior to the setting down of the action for trial or the fixing of a date which is intended to be the date of hearing in the Magistrate's Court.

(c) In the case of criminal proceedings in both the Magistrates' and Supreme Courts the law of contempt should cease to apply after the time for giving notice of appeal has expired.

(d) In the case of civil proceedings the law of contempt should cease to apply from the date of delivery of the judgment, or when there is a jury, from the date judgment is given.

(e) When an appeal is brought, the law of contempt should again apply so as to prevent any direct discussion of the issues arising in the particular appeal or the decision the appellate court should reach. It should cease to apply from the date of delivery of judgment of the appeal.

(f) It be enacted that it should not be a contempt of court to publish the proceedings on an interlocutory application or the reasons for a decision made in the course of such proceedings unless the judge orders otherwise.

(g) It be enacted that the publication of a fair and accurate report of the pleadings of all parties to a civil action shall not be a contempt of court.

(h) A provision similar to section 11 of the Administration of Justice Act 1960 (United Kingdom) be enacted.

(i) It be enacted that the question whether there was a risk of prejudice shall be determined in the light of the known or ascertainable facts at the time of the publication and not at any time thereafter.

(j) It be enacted that it is a defence to contempt proceedings to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith.

(k) A defence of general public discussion be enacted in a form similar to that enunciated by Chief Justice Jordan in *Ex parte Bread Manufacturers* and approved in *A.G.* v. *Times.*

(l) It be enacted that an editor or other person responsible for the control of a publication or a broadcast shall not be liable unless he approved publication of the offending article or was on duty at the time it was prepared for publication.

(m) There be no extension of editorial responsibility to executives or officers of a company who have not personally been a party to, or connived at, a contempt.

(n) Consideration should be given to making it possible for a charge of contempt to be brought either by a motion supported by affidavits or by indictment. In the former case the courts should not have power to impose a term of imprisonment.

JUDICATURE AMENDMENT

ANALYSIS

DRAFT OF A BILL INTITULED

An Act to amend the Judicature Act 1908

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Judicature Amendment Act 1978, and shall be read together with and deemed part of the Judicature Act 1908* (hereinafter referred to as the principal Act).

2. New provisions relating to contempt of Court—The principal Act is hereby amended by inserting, after section 86 but before the subheading "*Interest on Money*", the following subheading and sections:

*1908, No. 89
Amendments: 1958, No. 40; 1960, No. 109; 1961, No. 11; 1963, No. 133; 1965, No. 62; 1966, No. 67; 1968, No. 18; 1968, No. 59; 1969, No. 86; 1970, No. 72; 1972, No. 130; 1973, No. 8; 1973, No. 69; 1974, No. 57; 1976, No. 134; 1977, No. 32

"86A. **Limitation on meaning of 'contempt of Court' in respect of publications**—(1) No person is guilty of a contempt of Court, on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, by reason only that—

"(a) Before the proceeding is set down for trial, he publishes any matter relating to the proceeding (being a matter that does not contain a direct reference to the proceeding); or

"(b) In the case of an interlocutory proceeding where no order has been made prohibiting publication of the details of the proceeding or of the reasons for any decision in the proceeding, he publishes those details or reasons; or

"(c) In any case where all the pleadings of the parties to the proceeding have been completed, he publishes a fair and accurate report of all of those pleadings.

"(2) In this section, the setting down of a proceeding for trial includes, in relation to any Court other than the Supreme Court, the fixing of a date on which the proceeding may be heard.

"86B. **Limitation on time of application of law of contempt in respect of publications**—(1) No person is guilty of a contempt of Court, on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, where—

"(a) The publication is made after the date of judgment; and

"(b) At the time of the publication, no party has filed a notice of appeal in respect of the proceeding.

"(2) In this section, 'the date of judgment' means—

"(a) In relation to a proceeding that is tried before a Judge or any other judicial officer alone, the date on which judgment is delivered; and

"(b) In relation to a proceeding that is tried before a Judge and jury, the date on which judgment is given; and

"(c) In relation to a proceeding by way of appeal, the date of delivery of the judgment on appeal.

"86C. **Defence of innocent publication or distribution**—(1) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that at the time of publication (having taken all reasonable care) he—

"(a) Did not know; and

"(b) Had no reason to suspect—

that the proceeding was pending, or was imminent, as the case may be.

"(2) Where a person is charged with a contempt of Court on the ground that he has distributed a publication containing any matter referred to in subsection (1) of this

section, it shall be a defence to the charge if he proves that at the time of distribution (having taken all reasonable care) he—

"(a) Did not know; and

"(b) Had no reason to suspect—

that the publication contained or was likely to contain such matter.

"86D. **Defence in cases of editorial responsibility**—(1) Where a person is charged with a contempt of Court on the ground that he is the editor of a publication containing any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

"(a) He was not the author of the publication; and

"(b) He did not specifically approve the publication; and

"(c) He had taken all reasonable steps to ensure that the content of the publication would be examined and approved by a responsible person before it was published; and

"(d) At the time of publication, he was absent from duty as an editor, and was unaware of the content of the publication.

"(2) In this section, 'editor' includes a person who is responsible for the control of the content of a publication.

"86E. **Other defences in proceedings for contempt**—(1) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

"(a) The publication was made in good faith; and

"(b) The publication was a fair and accurate report of any proceeding conducted in open Court; and

"(c) The publication was made contemporaneously with or within a reasonable time after the proceeding referred to in paragraph (b) of this subsection.

"(2) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

"(a) The publication was made in the course of a discussion of public affairs, or of a denunciation of a public abuse (whether real or supposed); and

"(b) In publishing the matter, he did not intend to prejudice any party to that proceeding.

"86F. **Determination of risk of prejudice**—Where a person is charged with a contempt of Court on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, the issue whether there is any risk of prejudice to the course of justice shall be determined on the facts known or ascertainable at the time of publication."

CANADIAN WORKING PAPER

Summary of Principal Recommendations

A complete draft of all the offences against the administration of justice will be presented in our second Working Paper dealing with the statutory offences presently found in the *Criminal Code*. Somewhat archaïc expressions like "scandalizing the court" or even "misbehaving in court" should disappear.

However, before this is done, it is extremely important for the Commission to obtain the reaction of the public and of the legal profession to the outline of the proposed reform of the law of contempt of court, as well as to suggested legislative definitions of the offences.

So that this paper might be more easily used, we thought it useful to include here a list of its principal recommendations.

A. GENERAL RECOMMENDATIONS

1. That the totality of offences against the administration of justice be included in legislation and that the common law offence of contempt of court referred to in s. 8 of the *Criminal Code* thereby disappear.

2. That the customary forms of contempt of court known as misbehaving in court, disobeying a court order, scandalizing the court, obstructing justice, and attempting to influence the outcome of a trial be defined in the *Criminal Code*.

3. That these new statutory offences and those presently included in the *Criminal Code* be grouped together in a single Part of the Code dealing with offences against the administration of justice.

4. That the new texts be drafted in simple language, clearly expressing the rules found in the cases and practice, yet remaining flexible enough that the courts can adapt them to the particular circumstances of each case.

5. That a *mens rea* of intent or recklessness be required for all codified forms of contempt of court.

6. That the law contain the principle that the ordinary procedure remain the general rule, except for cases of misbehaving in court.

7. That the law nevertheless recognize the exceptional possibility of having recourse to a new summary procedure more compatible with basic rights, when the interest of justice so requires.

B. SPECIFIC RECOMMENDATIONS

Misbehaving in court

8. That an offence dealing with courtroom misbehaviour be created to be defined as follows:

Anyone who, by disorderly, insolent or harmful behaviour, disturbs or disrupts the normal conduct of judicial proceedings in the presence of the court is guilty of an offence.

9. That the principle be recognized that any judge, magistrate or justice of the peace may make any necessary orders to suppress disorder in his court, or warn or expel anyone who disrupts a hearing, subject to the provisions of s. 577 of the *Criminal Code*.

Disobeying a court order

10. That the existing offence of disobeying a court order contained in s. 116 of the *Criminal Code* be retained.

11. That the specific offences of disobeying interlocutory orders to testify, to take the oath, etc. contained in the *Criminal Code* (ss. 472, 533(1), 633, 636, etc.) be retained.

C. SCANDALIZING THE COURT

12. That an offence be created, to be defined as follows:

Anyone who insults a judge in the exercise of his functions, or who attacks the integrity, independence or impartiality of the judicial process is guilty of an offence.

13. That the specific defence of truth of the facts and of public interest to disclose them be recognized as a valid defence to a charge of scandalizing the court.

14. That a trial for scandalizing the court be presided by a judge other than the one involved and that it may proceed by way of direct preferred indictment signed by the Chief Justice of the court to which the judge concerned belongs and be heard by the Chief Justice or any other judge to whom it is referred by him.

D. OBSTRUCTING JUSTICE

15. That the existing offences contained in s. 107 *et seq.* of the *Criminal Code* be retained.

E. ATTEMPTING TO INFLUENCE THE OUTCOME OF A TRIAL

16. That an offence of attempting to influence the outcome of a trial be created, to be defined as follows:

Anyone who, wilfully or through recklessness, publishes or allows to be published anything that constitutes a serious risk of obstructing or influencing the impartial development of a judicial proceeding is guilty of offence.

17. That ignorance of the fact that a trial is pending, the burden of proof of which is on the accused, be recognized as a valid defence to the charge of attempting to influence the outcome of a trial.

18. That in criminal matters, a trial be considered pending from the moment the information is laid until the date at which judgment on the sentence becomes final.

19. That in civil matters a trial be considered pending from the moment it is set down for trial until the date at which judgment becomes final.

BERMUDA

1979 : No. 17

THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT) ACT 1979

[Date of Assent 25th June, 1979]

[Operative Date 25th June, 1979]

WHEREAS it is expedient to make further and better provision to ensure the maintenance of dignity and order in courts and tribunals and to ensure obedience to their orders:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the Administration of Justice (Contempt of Court) Act 1979.

Interpretation.

2. In this Act unless the context otherwise requires —

"civil proceedings" shall include proceedings before a tribunal;

"court" includes the Court of Appeal for Bermuda, the Supreme Court and a court of summary jurisdiction;

"court of summary jurisdiction" includes a special court;

"judicial proceeding" includes any proceedings in which evidence may be taken on oath before a court or tribunal including interlocutory proceedings;

"officer of the court" includes a barrister and attorney present during a sitting of a court or tribunal;

"tribunal" means a tribunal, other than a court, before which evidence may be taken on oath.

Beginning and end of proceedings.

3. (1) For the purposes of this Act judicial proceedings shall be deemed to begin —

(a) in criminal proceedings when an accused person has been arrested or charged before a court or a summons requiring his attendance at a court has been issued; and

(b) in civil proceedings when the date of the trial or hearing of the proceedings has been fixed.

(2) For the purposes of this Act judicial proceedings shall be deemed to end —

(a) in criminal proceedings —

(i) in the case of a conviction when sentence has been passed or the accused person has been otherwise dealt with;

(ii) in the case of an acquittal when the accused person has been released or discharged;

(iii) in a trial when no verdict is recorded when the prosecution states that there will be no further prosecution in relation to the same facts; and

(iv) in the case of the accused being found unfit to plead at the time of recording such finding;

(b) in civil proceedings on the conclusion of the trial or interlocutory hearing at first instance.

Power of court to punish for contempt in the face of the court.

4. (1) Subject to subsection (6) when a court is satisfied that a person has been guilty of contempt in its face it may order that he shall be detained until the next sitting of the court, but for no longer than forty-eight hours, or released on bail on such security as it shall think proper to appear before it at the next sitting.

(2) At the next sitting after making of an order under subsection (1) the court may —

(a) if the offender purges his contempt to the satisfaction of the court order his release;

(b) punish the offender by committing him to prison for a period not exceeding thirty days or by imposing a fine on him not exceeding five hundred dollars or

requiring him to give security for his good behaviour; or

(c) prefer a bill of indictment against him charging him with an offence under this Act or under the Criminal Code or may order his summary trial for the offence.

(3) An order for a summary trial under subsection (2) shall be deemed to be an information for the purposes of section 3 of the Summary Jurisdiction Act 1930.

(4) If any person released on bail under subsection (1) fails to appear at the time ordered the court may order his arrest and so soon as convenient after his arrest he shall be brought before the court and dealt with under subsection (2).

(5) A court may, on the application of any person committed to prison or ordered to pay a fine under subsection (2) suspend or remit such punishment on such terms and conditions as it may specify.

(6) A court of summary jurisdiction shall not take action under this section if it can act under sections 36 and 37 of the Magistrates Act 1948.

Failure to obey or comply with order of a court.

5. (1) If any person disobeys or fails to comply with an order of a court the court may, on its own volition or on the application of the Attorney-General or of any person affected by the disobedience or failure to comply, order him to be arrested and brought before the court or may issue a summons requiring his attendance before the court at a date and time specified in the summons.

(2) If any person fails to obey a summons issued under subsection (1) the court may order him to be arrested and brought before the court.

(3) When any person is brought before a court pursuant to subsection (1) or (2), the court on being satisfied that such person has disobeyed or failed to comply with an order of the court, shall have the same powers in respect of such person as are provided in subsection (2) of section 4.

(4) The powers of the court under this section may be exercised from time to time in respect of any person disobeying or failing to obey the order until such time as he obeys or complies with such order.

Appeals.

6. (1) Subject to subsection (2) an appeal shall lie against an order made under subsection (2)(b) of section 4, whether the order has been made pursuant to section 4 or section 5 as if it

were a criminal conviction and the statutory provisions relating to the release of an offender on bail pending a criminal appeal shall likewise apply.

(2) Notwithstanding subsection (1) no appeal shall lie against an order made by the Court of Appeal whether acting in its original or appellate capacity.

Power of a tribunal to report contempt to Supreme Court.

7. (1) Where any person is guilty of contemptuous conduct in the face of a tribunal the person presiding may order his arrest by a police officer and shall forthwith report the conduct to the Supreme Court.

(2) When a report under subsection (1) is made to the Supreme Court it shall order the offender to be brought before it and, after hearing such evidence as it considers necessary shall, if it is satisfied that there has been contemptuous conduct, deal with the offender under subsection (2) of section 4.

(3) When a person is arrested under subsection (1) and cannot immediately be brought before the Supreme Court he shall within twenty-four hours be brought before a magistrate, or a police officer entitled to release persons on bail by virtue of section 462 of the Criminal Code, who may release him on bail or may order his continued detention until he can be brought before the Supreme Court.

Definition of spoken or written contempt.

8. Words written or spoken not in the face of a court or a tribunal which do not impugn the character or conduct of any person before whom a judicial proceeding was or is being held shall only be deemed to be contemptuous if they create a risk that in a judicial proceeding the course of justice will be impeded or prejudiced.

Innocent publication and distribution.

9. (1) A person shall not be guilty of contempt of court if at the time he spoke or wrote the words complained of, having taken all reasonable care, he did not know or had no reason to suspect that the proceedings had begun as provided in section 3.

(2) A person shall not be guilty of contempt of court on the ground that he has distributed a publication if at the time of distribution, having taken all reasonable care, he did not know that it contained any contemptuous matter and had no reason to suspect that it was likely to do so.

(3) The burden of proof of any fact tending to establish defence afforded by this section to any person shall lie upon that person.

Publication of information relating to proceedings in camera.

10. (1) The publication of information relating to proceedings held in camera shall not of itself be regarded as contempt of court except in the following cases, that is to say —

(a) where the proceedings relate to the wardship or adoption of a person under sixteen years of age or wholly or mainly to the guardianship, custody, maintenance or upbringing of such a person, or rights of access to such a person;

(b) where the proceedings are brought under Part V of the Mental Health Act 1968 or under any provision of that Act authorizing an application or reference to be made to a mental health review tribunal or to a court;

(c) where the information relates to proceedings or part of them held in private for reasons of national security;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) where a court, having power under section 6(10) of the Constitution to do so, expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in camera shall not of itself be contempt of court except where the court, having power under section 6(10) of the Constitution to do so, expressly prohibits the publication.

Publication of a report of proceedings when similar proceedings outstanding.

11. The publication of a fair and accurate report of judicial proceedings held in open court contemporaneously with those proceedings shall not be contempt of court notwithstanding that other similar proceedings may be outstanding.

Responsibility for written and broadcast publications.

12. (1) In addition to the author, the editor and publisher, if any, of any written publication shall be deemed to be responsible for any matter contained therein.

(2) Where proceedings for contempt of court have been commenced against any broadcasting organization such organization shall, on the application of a court or of any party to the proceedings, specify who in the organization at the time of the

publication had editorial responsibility. Such person shall be deemed to have the same responsibility as the editor of a written publication.

Directors and partners with no knowledge not guilty.

13. In any case where a company or partnership is guilty of contempt no director or officer of the company or partner in the partnership shall likewise be guilty if he can show that he had no knowledge of the contempt and that in the ordinary course of business he could not have been expected to have such knowledge or if he can show that the contempt was committed contrary to his expressed wishes.

Punishment for contempt of court.

14. Subject to the other provisions of this Act any person who —

(a) wilfully insults any person before whom a judicial proceedings is being held or any officer of a court or tribunal during the sitting of a court or tribunal or during such time as the person or officer is present on the premises where the court or tribunal is sitting or is going to or returning from such premises;

(b) wilfully interrupts the proceedings of a court or tribunal or otherwise misbehaves in the premises where the court or tribunal is sitting;

(c) while a judicial proceeding is being held makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person concerned with such proceeding in favour of or against any party to such proceeding or calculated to lower the authority of any person before whom such proceeding is being held; or

(d) publishes without permission of the court a report of evidence taken in any judicial proceedings held in camera,

is guilty of a misdemeanour and is liable, on conviction by a court of summary jurisdiction to imprisonment for a term not exceeding twelve months or to a fine not exceeding two thousand dollars or to both such imprisonment and fine or on indictment to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand dollars or to both such imprisonment and fine.

Failure of witness to attend.

15. (1) If any witness who has been summoned to give evidence before any court fails to attend at the time and place appointed, it may issue a warrant to arrest him and bring him before the court.

(2) If any witness who has been summoned to give evidence before a tribunal fails to attend at the time and place appointed and the tribunal is not empowered to compel the attendance of witnesses, the tribunal may report the circumstances to the Supreme Court and a judge on receiving such report, and hearing in chambers a member of the tribunal if he considers it necessary, may issue a warrant to arrest the witness and bring him before the tribunal.

(3) A court may punish a witness failing to attend the court at the time and place appointed in a summons in the manner provided in subsection (2) of section 4 and the Supreme Court may so punish a witness failing to attend a tribunal.

(4) An appeal shall lie against an order made under this section and the provisions of section 6 shall apply to any such appeal.

Refusal of witness to give evidence etc.

16. (1) If any witness, during any judicial proceedings, without offering a lawful excuse, refuses to give evidence when required or refuses to be sworn or affirmed, or having been sworn or affirmed refuses to answer questions properly put to him the court may order, unless he consents to give evidence, or to be sworn or affirmed, or to answer questions put to him, as the case may be, that he be detained in custody for any period not exceeding seven days, and may issue a warrant for his arrest and detention in accordance with the order.

(2) If the person so detained, on being brought up again during the proceedings, again refuses to give evidence or to be sworn or affirmed, or having been sworn or affirmed to answer any questions put to him the court, if it thinks fit may again direct that the witness be detained in cusody for a like period, and so again from time to time until he consents to give evidence, or to be sworn or affirmed or to answer as aforesaid.

(3) If any witness during proceedings before a tribunal without offering a lawful excuse refuses to give evidence when required, or refuses to be sworn or affirmed or refuses to answer questions and if the tribunal is not empowered to make the witness give evidence, be sworn or affirmed or answer questions, the tribunal may report the circumstances to the Supreme Court which may after hearing the witness, make an order as if the refusal had been in proceedings in a court.

(4) Nothing in this section shall limit the power and authority of a court under sections 4 and 5.

(5) An appeal shall lie against an order made under this section and the provisions of section 6 shall apply to any such appeal.

Repeals.

17. The following provisions are repealed —

Section 17 of the Supreme Court Act 1905;

Section 5 of the Evidence Act 1905;

Sections 9 and 10 of the Summary Jurisdiction Act 1930; and

Section 133 of the Criminal Code.

Amends the Criminal Code.

18. The Criminal Code is amended —

A. By the addition in section 118 of the following expression immediately after the expression "to be done" in paragraph (c) "or that has been done";

B. By renumbering subsection (2) of section 125 as subsection (3) and by the addition of the following subsection —

"(2) Any person —

(a) who gives, confers, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for any person, because such person gave false testimony or withheld true testimony in a judicial proceeding; or

(b) who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or for any person because he has given false testimony or withheld true testimony in a judicial proceeding,

is guilty of a misdemeanour, and is liable to imprisonment for a term not exceeding three years."; and

C. By the addition of the following two sections immediately after section 125.

125A. Any person who —

(a) threatens, intimidates or restrains;

(b) uses violence to or inflicts injury on;

(c) causes or procures violence, damage, loss or disadvantage to; or

(d) causes or procures the punishment of, or loss of employment of,

a person for or on account of his having appeared or being about to appear, as a witness in a judicial proceeding is guilty of a misdemeanour and shall be liable on conviction to imprisonment for a period not exceeding five years.

125B. Any person who insults a person for or on account of his having appeared or being about to appear, as a witness in a judicial proceeding is guilty of a summary offence and shall be liable on conviction to imprisonment for a period not exceeding twelve months.".