Amendments to the Administration of Justice (Reform of Contempt of Court) Bill

Advising agencies	*Ministry of Justice*
Decision sought	*Agreement to amend the Administration of Justice (Reform of Contempt of Court) Bill*
Proposing Ministers	*Minister of Justice*

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

The Law Commission undertook a review of contempt laws between 2014 – 2016 and recommended the common law of contempt be codified in a new Act. The Commission's draft Bill, the Administration of Justice (Reform of Contempt of Court) Bill, is currently before the Justice Select Committee. As introduced, the Bill was a Member's Bill in the name of Hon Christopher Finlayson. The Government adopted the Bill as a Government Bill in June 2018.

This regulatory impact analysis (RIA) does not assess the Bill against the common law it seeks to replace. Rather, the Bill is the counterfactual. As identified by the Law Commission in its 2017 report, there are problems with the accessibility, understandability and workability of the common law of contempt that makes it desirable to move the common law into a new Act. The Bill aims to clarify the law of contempt, make it more accessible and accommodate developments in the digital age.

We have carefully considered the Bill's provisions and propose some amendments to ensure the Bill achieves its objectives. Three of the changes we propose meet the threshold for RIA:

(1) Automatic suppression provision

The Bill provides for the automatic suppression of previous convictions and concurrent charges where a person is arrested and may be triable by a jury. The suppression starts from the point of arrest and ends at the start of the trial.

The inclusion of concurrent charges makes the application of the automatic suppression too complex and is not workable given current charging practice and media reporting. The period of application also is not clear in practice.

(2) Juror research

Under the Bill, a juror who deliberately undertakes their own research or investigation into the trial commits an offence and is liable, if convicted, to a maximum penalty of 3 months' imprisonment or a fine not exceeding $10,000.

Providing a criminal offence with a maximum penalty of imprisonment does not take into consideration that jurors are performing a mandatory civic duty and could drive the behaviour underground rather than prevent it.

(3) Untrue allegations against judges and courts

The Bill replaces the common law contempt of 'scandalising the court' with an offence of making accusations or allegations against judges and the courts that pose a real risk to public confidence in the independence, integrity and impartiality of the judiciary or the courts.

We are concerned about the impact of the offence on freedom of expression, including the risk that it will stifle legitimate criticism of judges and the courts, and have a chilling effect on academics, lawyers and others who wish to comment on the courts. The offence itself may undermine public confidence in the courts by the perception of providing judges and courts with special protection not afforded to others.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

(1) Automatic suppression provision

Compared to the Bill as introduced, the proposed approach limits the scope of the automatic suppression to prior convictions only. The automatic suppression will start at the point of charge and finish at the end of the trial.

This provides clarity and certainty as to what information is prohibited from publication for a jury trial and when that prohibition applies.

(2) Juror research

Compared to the Bill as introduced, the proposed approach replaces the criminal offence with a statutory financial penalty without a criminal conviction. This approach better recognises that jurors are undertaking a civic duty and limits the risk of driving the behaviour underground.

(3) Untrue allegations against judges and courts

The Ministry of Justice's preferred approach is to abolish and not replace the common law contempt of scandalising the court. We consider this better reflects the shift in the views and values of modern New Zealand society and reflects the importance of freedom of expression.

The proposed approach in the Cabinet paper is to retain the statutory offence in the Bill but modify it to better target the behaviour of concern and reduce the maximum penalty. In comparison to the status quo (the Bill as introduced), this approach aims to provide a better balance between protecting freedom of expression with the need to protect the rule of law.

Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

(1) Automatic suppression provision

The proposed approach will protect defendants' fair trial rights. It will reduce the number of applications from the media and parties to modify what is suppressed and the need for defendants and prosecuting agencies to respond. The proposed approach will also benefit the public by providing better and more comprehensive information about court proceedings.

(2) Juror research

The proposed approach will reinforce jurors' obligations and minimise instances of juror research. This will provide better protection of defendants' fair trial rights, which will minimise the risk of retrials based on prejudicial juror research. This approach also benefits prosecuting agencies as they do not have to bear the cost of investigating and prosecuting the offence. Jurors will not be exposed to a criminal penalty and conviction for undertaking their own research.

(3) Untrue allegations against judges and courts

The proposed approach will provide more latitude for public commentary on the performance of the courts and more protection of freedom of expression. A remedy will remain available to ensure illegitimate comment and criticism are addressed without requiring judges to take legal action personally. It will also provide additional clarity for prosecuting agencies about the boundaries of acceptable and unacceptable criticism.

Where do the costs fall?

(1) Automatic suppression provision

There may be increased costs to defendants, prosecuting agencies and courts related to applications from defendants to suppress information about concurrent charges that would otherwise have been automatically suppressed. The expected number of additional applications is small as information about concurrent charges is not usually considered prejudicial.

(2) Juror research

There are no additional costs of the proposed approach.

(3) Untrue allegations against judges and courts

The proposed approach may mean that some illegitimate criticism of judges and courts will go unanswered undermining public confidence in the courts and judiciary.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

(1) Automatic suppression provision

The Bill's suppression provisions will be applied frequently if not daily, particularly in the District Court. Our proposed approach is therefore intended to make the provision as clear and workable as possible. Nonetheless, providing an automatic suppression provision in the Bill is a significant change from the common law and the law may take some time to settle.

There will be more information available about a criminal case under the proposed approach than the current provision in the Bill. There is a slightly increased risk that this may negatively affect a defendant's right to a fair trial in some cases.

(2) Juror research

There is a risk that a statutory penalty may not be a sufficient deterrent and may lead to juror research or investigation occurring more often than if there was a criminal offence. This could undermine a defendant's right to a fair trial. However, as it is not clear how effective a criminal offence would have been as a deterrent, we consider the marginal impact of our proposed change in this respect will be minimal.

(3) Untrue allegations against judges and courts

There is a risk that even a narrow offence will stifle legitimate criticism of judges and courts. There is also a risk that the offence will be counter-productive in upholding the public confidence in the courts and judiciary as it may be seen as providing special protection for the judiciary.

We will monitor the impact and effectiveness of the Bill and our proposed changes as part of our standard and ongoing monitoring of the operation of all courts and tribunals and our regulatory stewardship responsibilities. We expect to receive feedback on any aspects of the new legislation causing concern through our regular contact with prosecuting agencies and the judiciary.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

There is no incompatibility with the Government's expectations for the design of regulatory systems. The Bill clarifies and modernises contempt law in New Zealand. The proposed amendments discussed in this RIA will further enhance the Bill and support its overall objectives.

Evidence certainty and quality assurance

Agency rating of evidence certainty?
Our rating of evidence certainty is medium. The Law Commission review and submissions to the Justice Committee on the Bill as introduced provide a reasonable evidence base about the problems the Bill is aiming to address and the problems with the Bill itself. There is less evidence about how codification will work in practice as codification of the common law to the extent proposed in the Bill has not been tried previously in New Zealand or elsewhere.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
The Ministry of Justice
Quality Assurance Assessment:
The RIA meets the Quality Assurance criteria.
Reviewer Comments and Recommendations:
The Ministry of Justice's RIA QA panel has reviewed the RIA: *Amendments to the Administration of Justice (Reform of Contempt of Court) Bill* prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA meets the QA criteria.

Impact Statement: Amendments to the Administration of Justice (Reform of Contempt of Court) Bill

General information

Purpose
The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for informing final decisions to proceed with policy changes to be taken by Cabinet.
Key Limitations or Constraints on Analysis
Limitations and constraints on the analysis in this document include: • The scope for decision-making is limited to the scope of the Law Commission review and the appended Bill. • The Bill was introduced as a Member's Bill and has now been adopted as a Government Bill. Therefore, we have ruled out the option of not proceeding with the Bill. The counterfactual in this RIA is the Bill as introduced. • Our analysis is limited to and focused on proposed changes that are a substantial policy change from the Bill. • The boundaries of the common law are unclear, which makes it difficult to properly assess current state and compare options. • The Law Commission review and submissions to the Justice Committee on the Bill provide a reasonable evidence base about the problem the Bill is aiming to address and the problems with the Bill itself. However, there is less evidence about how codification will work in practice as codification of the common law to the extent proposed in the Bill has not been tried previously in New Zealand or elsewhere.
Responsible Manager:
 Ruth Fairhall General Manager, Courts and Justice Services Policy Ministry of Justice 23 October 2018

Problem definition, objectives and options identification

What is the context within which action is proposed?

In March 2018, the Administration of Justice (Reform of Contempt of Court) Bill was introduced as a Member's Bill and has been referred to the Justice Committee for consideration. The Bill is the draft Bill the Law Commission prepared as part of its first principles review of the law of contempt. The Bill was appended to the Commission's June 2017 final report: *Reforming the Law of Contempt: A Modern Statute.* The Bill aims to clarify and modernise the common law of contempt and make it more accessible.

On 18 June 2018, Cabinet agreed to adopt the Bill as a Government Bill and add it to the Government's 2018 Legislation Programme [CAB-18-MIN-0278 refers]. It noted that it would give further consideration to the Bill and would likely seek to make changes.

Since the Government adopted the Bill, we have carefully considered the Bill and propose amendments to clarify some uncertainties within the Bill, improve the operation of the provisions, and better address important constitutional principles, such as the appropriate balance between citizens' freedom of expression with the need to protect the integrity of the justice system.

This document focuses on the three key areas we have identified for change that meet the threshold for RIA:

- Automatic suppression provision,
- Juror research, and
- Untrue allegations against judges and courts.

What regulatory system, or systems, are already in place?

Courts conduct more than 1,200 jury trials a year and hear more than 1,000 substantive civil cases between individuals or between individuals and the Government. The disputes resolved by the courts touch virtually all aspects of life in New Zealand. Several statutes and sets of court rules govern the functioning of courts.

Contempt laws are designed to protect the administration of justice and maintain public confidence in the justice system including a defendant's right to a fair trial. The court's power to punish for contempt (disrupting court business, interfering with fair trials, failing to comply with court orders or making false and damaging attacks on the judiciary as an institution) is fundamental to the functioning of the justice system and helps to ensure the courts operate fairly, effectively and efficiently.

Contempt law in New Zealand is a mixture of legislation (eg, the Crimes Act 1961 and the Criminal Procedure Act 2011) and case law, making the law hard to access and difficult to know how to comply with it. This is exacerbated by the law's archaic language and technical concepts, including the finer points of the limits on the courts' inherent jurisdiction, and contempt's hybrid civil and criminal elements.

The overall fitness-for-purpose of the current law of contempt was subject to a first principles review by the Law Commission between 2014 – 2016, with the Commission publishing a final report in 2017. That report identified problems and issues with the accessibility, understandability and workability of contempt laws:

- *Accessibility* – contempt law is not readily accessible because it is a mixture of legislation and case law, to be found in a number of different Acts and in court decisions, some recent and some old.
- *Understandability* – there are uncertainties around various aspects of contempt law, including the nature and scope of different types of conduct constituting contempt, the differences between criminal and civil contempt, and the relationship between various statutory provisions and common law. The antiquated language and technical legal meaning of several expressions used in contempt law create further understandability problems.
- *Workability* – in several significant respects the law is no longer working adequately. In particular, it has not kept pace with the digital age, i.e., the growth of the internet and social media platforms and their widespread use to access and publish information can significantly affect the practical application of contempt laws.

The Law Commission recommended moving the common law of contempt into a new Act. The Commission considered this was desirable to clarify the law of contempt, make it more accessible and accommodate developments in the digital age.

Are there any constraints on the scope for decision making?

The Administration of Justice (Reform of Contempt of Court) Bill was introduced as a Member's Bill in March 2018 following the Law Commission's first principles review of the law of contempt. Cabinet agreed to adopt the Bill as a Government Bill in June 2018. We have therefore ruled out not progressing with the Bill as an option. The starting point for analysis and scope for decision making is limited to the introduction version of the Bill and the Law Commission review of contempt law. The Bill covers the main areas of contempt law:

- Publication contempt in criminal cases,
- Disruptive behaviour in the courtroom (historically known as 'contempt in the face of the court'),
- Juror contempt,
- Enforcement of court orders, and
- Publication of untrue allegations or accusations against the judiciary (historically known as 'scandalising the court').

See also the comments above under 'Key limitations or constraints on analysis'.

(1) Automatic suppression provision

What is the policy problem or opportunity?
The power for the court to control information in the lead up to, and during, a criminal trial is fundamental to protecting the integrity of the process and the defendant's right to a fair trial. Publication of prejudicial material could lead to a miscarriage of justice or may cause a trial to be abandoned in order to prevent a miscarriage from occurring. The Law Commission found that the court's current suppression powers were uncertain in their scope and difficult to understand and apply. It recommended replacing the common law with new statutory provisions to provide clarity and certainty in the law. Under the Bill, if a person is arrested for a category 3 or 4 offence and therefore may be triable by a jury, their prior convictions and other offences for which they are charged (concurrent charges) are automatically suppressed. The automatic suppression would start from the point of arrest and would be lifted at the start of the trial. Automatically suppressing details of concurrent charges extends rather than codifies the current law and provides a level of complexity that is not workable as a matter of law and practice. While publishing details of a defendant's bad character is contempt under the common law, it is not clear that this extends to the publication of concurrent charges or that suppression of this information is necessary to protect a defendant's right to a fair trial. Also, it is common for a person to be charged with more than one offence at one time, to be charged with more offences after being charged with the first offence as more evidence is gathered, or for an initial charge to be filed in anticipation of a more serious one being filed later. Media typically publicise these details but that information is not usually considered prejudicial, at least not in a way that could affect the fairness of a trial. However, under the Bill, only the very first charge filed could be publicised, which means what information may be suppressed will depend on the order charges are filed by Police. This is likely to distort accurate reporting by the media and would require the media to apply to the court to vary what is suppressed to report the defendant's appearance accurately. It would also result in much less information being publicised than currently and place unnecessary restrictions on freedom of expression. It is also unclear when the automatic suppression would apply in practice. The Bill sets the starting point as the point of arrest. However, a person charged with a category 3 or 4 offence will usually but not always be arrested. Instead, they may be summonsed to court or be on remand on other charges when the new charges are filed. Also, the period of time when a person is under arrest can be very short in practice (eg, a person stops being under arrest as soon as they are released on police bail or appear in court) which may inadvertently restrict the application of the provision.

What do stakeholders think?

The Law Commission consulted widely on an issues paper in 2014, including with: New Zealand Police; the Crown Law Office; the Judicial Conduct Commissioner; the judiciary; the New Zealand Law Society; the Auckland District Law Society; and selected media organisations and academics. It conducted a more targeted consultation in 2016 to prepare its final report.

Some submitters to the Law Commission review opposed the automatic suppression provision. For example, some considered that a blanket prohibition would be too blunt an instrument as concurrent charges or previous convictions will not always be prejudicial. Some also raised concerns around the uncertainty over when the automatic suppression should start and end. Other submitters supported the automatic suppression provision, suggesting it would clarify the law and partially address the significant inequality of arms between the state and news media and the defendant.

The Contempt Bill is currently before the Justice Committee. 62 submissions have been received on the Bill.

Media organisations and the Auckland District Law Society identified the need for a clearer start point and end point for the automatic suppression provision. Media organisations were also concerned about inadvertently breaching the suppression and how they would know it was in place and which charges were concurrent. They questioned whether the inclusion of concurrent charges was workable. The concerns about workability were reinforced by submissions from the judiciary. The Chief District Court Judge's submission was that the provision lacks clarity and further guidance is required in the Bill about how it is to operate.

What options are available to address the problem?

Three options were considered to address the problems identified with the current provision in the Bill:

<u>Option 1 – No suppression powers (both automatic and temporary) in the Bill (current law)</u>

- The suppression provisions would be removed from the Bill.
- Courts would rely on their inherent powers to supress information in the lead up to and during a criminal trial.

<u>Option 2 – No automatic suppression power in the Bill</u>

- The automatic suppression provision would be removed from the Bill.
- Courts would rely on the temporary suppression order powers in the Bill to control publication in the lead up to and during a criminal trial.

<u>Option 3 – Automatic suppression of previous convictions only, starting from point of charge and ending when the trial ends (proposed approach)</u>

- Publication of a person's prior convictions would be prohibited.
- Prohibition would start from the time of charge, and remain in place until the end of the trial.
- Courts could temporarily suppress information not automatically supressed.

(2) Juror research

What is the policy problem or opportunity?

The Bill of Rights Act 1990 enshrines the right to a fair trial, which requires, among other things, that the jury decide the case solely on the evidence presented in court. At common law, a juror who intentionally researches information relevant to the trial is likely to be in contempt of court. The Law Commission recommended replacing the common law with a statutory offence to dissuade jurors from undertaking their own research. The offence would clarify the law and send a clear message to jurors that research is simply not permitted.

Under the Bill, a juror who deliberately investigates or researches information relevant to the case before the jury would commit an offence and be liable, if convicted, to a maximum penalty of 3 months' imprisonment or a fine not exceeding $10,000.

The fear of a criminal prosecution may deter jurors from reporting their own research, or reporting offending behaviour by other jurors. Consequently, the impact of research on a defendant's right to a fair trial would be unknown and not identified. Overseas cases indicate that jurors who undertake research are normally keen to do a good job rather than deliberately wanting to cause any injustice. Academic research suggests that when jurors are unsure about something the judge has said, it is second nature to look it up. Convicting a citizen when he or she is undertaking a civic duty could be viewed as harsh, particularly where the person has simply been overzealous about trying to do a good job. It is already a significant burden for a citizen to serve on a jury, and jury service should not be made more onerous.

What do stakeholders think?

Most submitters to the Law Commission review supported having a statutory offence covering juror research. This was because a statutory offence would clarify the law.

Only two submitters on the Bill commented on the juror research offence. The Auckland District Law Society endorsed the offence in the Bill and said it considered the penalty appropriate. The Wellington Community Justice Project supported having the offence in legislation because it is more accessible than the common law, but stressed the importance of preventative measures also being adopted rather than a punitive approach.

What options are available to address the problem?

Two options were considered to address the problems identified with the current provision in the Bill:

<u>Option 1 – No statutory offence for juror research or investigation (current law)</u>

- The juror research offence would be removed from the Bill.
- A juror who undertakes their own research would commit a common law contempt and be liable to up to 2 years' imprisonment (the common law maximum penalty for contempt).
- A juror who conducts research when the trial judge has instructed the jury not to do so may be found liable under the Bill's statutory contempt in the face of the court provisions for disobeying the judge (not for doing the research).

Option 2 – A statutory penalty for jurors who conduct their own research or investigation (proposed approach)

- A juror who deliberately undertakes their own research or investigation would be subject to a maximum penalty of $5,000.
- A juror would not be convicted, so would not have a criminal record.
- A juror would not be prosecuted; instead a summary process would be available to the judge to determine whether the juror should be penalised. Safeguards will be built into the process so the juror has a reasonable opportunity to take legal advice and explain their actions.

(3) Untrue allegations against judges and courts

What is the policy problem or opportunity?

Historically, there has been a contempt known as 'scandalising the court' which punishes 'scurrilous' verbal attacks on the courts or judiciary. This form of contempt aims to uphold public confidence in the administration of justice by protecting the independence, integrity and impartiality of the courts and judiciary. However, the current law is unclear (eg, at what point criticism is considered to have gone too far, whether the person needs to intend harm to the public reputation of the judiciary, what defences are available) and outdated.

The Law Commission recommended replacing the common law contempt of scandalising with a statutory offence, rather than simply abolishing it. In the Commission's view:

- Maintaining public confidence in the judiciary as an institution is essential for upholding the rule of law in New Zealand. A statutory offence is therefore needed as a deterrent.
- Abolishing the common law entirely would leave a gap in the law. Other general remedies available under the law (defamation, trespass, harassment, and harmful digital communications) are inadequate because they do not address the essential element of maintaining public confidence in the judiciary as an institution.

The Bill therefore includes a new statutory offence that criminalises the publication of an allegation or accusation against a judge or court where there is a real risk the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court. The offence is a strict liability offence and truth is a defence to the offence. The onus of proof of establishing truth would be on the defendant. There is also an innocent publication defence for online content hosts. The High Court can make various orders (eg, to take down online material) before a prosecution is commenced.

We have concerns about the impact of the offence proposed in the Bill on the right to freedom of expression, and its potential chilling effect on legitimate criticism of the courts and court decisions.

We are also concerned that the offence may not be the best way to uphold public confidence in the independence and integrity of the judiciary and the rule of law. There has been a shift in the views and values of modern New Zealand society, even since the last prosecution for common law scandalising in 2004, and it is questionable whether this sort of provision reflects current social values. Judicial independence is firmly established and is not affected by robust criticism.

The offence would also leave New Zealand out-of-step with comparable jurisdictions as there has generally been a move towards abolishing scandalising, especially in countries (England and Wales, Canada) with rights legislation. In Canada, while scandalising still technically exists, it has been found to be incompatible with the Canadian Charter of Rights and Freedoms. In England and Wales, the contempt was completely abolished by the Crime and Courts Act 2013, following the recommendations of the Law Commission. Scandalising had fallen into disuse, with the last successful prosecution there being in 1931. The common law offence of scandalising continues to exist in the common law in Australia, Scotland and Ireland. It is currently being reconsidered in Ireland.

What do stakeholders think?

Some submitters to the Law Commission supported a new statutory offence because they considered the objective of the contempt of scandalising remained important to protect the rule of law. While there were likely to be few (if any) prosecutions, it was beneficial to have a clear statement of what was not acceptable in terms of attacks on the courts and judiciary.

Other submitters, including the New Zealand Law Society, considered scandalising obsolete and favoured abolition. These submitters considered that defamation laws and the framework under the Harmful Digital Communications Act 2015 would be sufficient. The Commission reported that some judges they consulted considered that, even where scandalising penalised only the worst conduct, it had no place in our society any more.

Approximately 40 submissions to the Justice Committee were against the offence, including submissions from several academics and the external sub-committee of the Legislation Design and Advisory Committee. They expressed concern about the impact of the offence on freedom of expression, including the risk it would stifle legitimate criticism of judges and the courts and have a chilling effect on academics, lawyers and others who wish to comment on the courts. They also considered the offence may itself undermine public confidence in the courts by providing the courts with special protection not afforded to others.

The only submission in support of the offence was the Chief Justice submitting on behalf of the Senior Courts. She supported the offence (but with some modifications) to protect the rule of law. She commented that judges should not be left to act privately to protect the rule of law.

What options are available to address the problem?

Three options were considered to address the problems identified with the current provision in the Bill:

Option 1 - Abolish the common law contempt of scandalising the court and replace it with a narrower statutory offence with a lesser maximum penalty (proposed approach)

- It would be an offence for a person to make a false statement about a judge or a court that the person knew, or ought reasonably to have known, could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or the courts, and there is a real risk the statement could do so.
- The maximum term of imprisonment that could be imposed on an individual would be 6 months' imprisonment.

Option 2 – Abolish the common law contempt of scandalising the court

- The common law contempt of scandalising the court would be abolished and not replaced in the Bill.

Option 3 – Leave the common law contempt of scandalising the court in place with no codification in the Bill (current law)

- The common law contempt of scandalising the court would remain available for any accusations or allegations against the court or the judiciary that pose a real risk of undermining the public confidence in the courts and the judicial system.

What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

The nature of the Bill's subject-matter requires consideration of fundamental constitutional principles, including how to balance citizens' rights to freedom of expression (for example, to criticise court decisions) with the need to protect the integrity and efficient operation of the justice system. We have focussed our options analysis on how to achieve the best possible balance between these two important principles. To this end, we have identified the following criteria:

Proportionate – the option captures the appropriate balance between competing rights and freedoms

Effectiveness – the extent to which the option addresses the identified problem

Efficient – the option promotes the efficient operation of the justice system

Fit-for-purpose – the option makes the law accessible, clear, modern and future-proofed.

What other options have been ruled out of scope, or not considered, and why?

We have ruled out the option of not progressing the Bill at all. The Government adopted the Bill as a Government Bill accepting the Law Commission view that contempt law as it currently stands is hard to access, difficult to understand and comply with, and has not kept up to date with technological developments.

Impact Analysis

Marginal impact: How does each of the options identified compare with the counterfactual (the Bill as introduced), under each of the criteria set out?

Key:	
++	much better than doing nothing/the status quo
+	better than doing nothing/the status quo
0	about the same as doing nothing/the status quo
-	worse than doing nothing/the status quo
- -	much worse than doing nothing/the status quo

Automatic suppression provision

Criterion	**Status quo** – provision in the Bill	**Option 1** – No suppression powers (both automatic and temporary) in the Bill	**Option 2** – No automatic suppression powers in the Bill (but retain power to make temporary suppression orders)	**Option 3** – Automatic suppression provision suppresses previous convictions, starting from point of charge and ending when the trial ends
Proportionate – captures the appropriate balance between a defendant's right to a fair trial and freedom of expression	**0**	- - Having no blanket suppression is less restrictive on freedom of expression. However, there is inadequate protection of the right to a fair trial, which is considered by the courts to be close to an absolute right. Ensuring prejudicial material is not published relies on the media, social bloggers or anyone else who wishes to publish information correctly assessing in each case whether the information may pose a real risk of interfering with a fair trial. If their assessment is wrong and prejudicial material is published, a defendant's fair trial rights may be compromised.	- Temporary suppression orders would be less restrictive on freedom of expression. However, until those orders are made the media and other publishers must assess what information can be published and this poses a risk to a defendant's right to a fair trial.	+ Good balance – a defendant's right to a fair trial is adequately protected without restricting freedom of expression unnecessarily because only the information that is most prejudicial to the defendant is automatically suppressed.

		Imposing sanctions after publication cannot adequately remedy the breach.		
Effective – makes it clear what information can be published and when	**0**	- Until the court makes an order under its inherent powers, it will be difficult for the media to know whether they are committing an offence of publication contempt by publishing previous convictions and concurrent charges.	- Until the court makes a temporary suppression order, it will be difficult for the media to know whether they are committing an offence of publication contempt by publishing previous convictions and concurrent charges.	+ The statutory prohibition applies and it is clear from the point of charge what and when the media can publish, enabling media to accurately report on court proceedings.
Efficient – promotes the efficient operation of the justice system	**0**	- Requires the court to consider what information should be suppressed in each case and make specific orders to that effect. Requires the media and other publishers to enquire whether orders have been made and to assess case-by-case what can be published without committing contempt of court.	- Requires the court to consider what information should be suppressed in each case and make specific orders to that effect. Requires the media and other publishers to enquire whether orders have been made and to assess case-by-case what can be published without committing contempt of court.	++ The suppression applies automatically so the court does not need to address the question of whether an order should be made in every case. It is clear the prohibition applies and its scope is clear. The media will know that the suppression is in place from the time the person is charged providing greater clarity over what it can report.
Fit for purpose – the law is accessible, clear, modern and future-proofed	**0**	- - There has been uncertainty over the extent to which the courts are able to suppress information under their inherent powers. The scope and nature of the powers are located in case law so are not clear or accessible. The option does not clarify the uncertainty around what information can and cannot be published.	- Makes the law accessible in relation to court's power to temporarily suppress information but uncertainties remain around what information can and cannot be published for every case.	++ Accessible, clear, modern and future-proofed – clarifies uncertainties identified with status quo. Provides the greatest clarity about what information is suppressed and when. Including the rules in legislation makes the law more accessible.

Overall assessment	**0**	**- -** This option does not provide clarity on what information can be published when. The law is not accessible and does not provide adequate protection of a defendant's right to a fair trial.	**-** This option codifies the court's power to temporarily suppress information, making the law more accessible. However, it does not provide those who wish to publish information with clarity and certainty about what they can publish when.	**++** This option addresses the main difficulties with the Bill's provisions to ensure the provisions are workable and clear for the courts, defendants and the media. It provides a clearer, accessible rule on what information should be prohibited from publication and when that prohibition should apply. It appropriately balances a defendant's right to a fair trial and freedom of expression.

Juror research

Criterion	**Status quo** – provision in the Bill	**Option 1** – No statutory offence for juror research or investigation	**Option 2** – A statutory penalty without a criminal conviction for jurors who conduct their own research or investigation
Proportionate – does not unduly punish jurors who are performing their mandatory civic duty	**0**	**- -** The level of punishment (whether under common law contempt of court (up to 2 years' imprisonment) or under statutory contempt in the face of the court provisions (up to 3 months imprisonment)) is too high under this option, and does not take into consideration that jurors are performing a mandatory civic duty.	**++** Less punitive as no conviction - more appropriately reflecting that jurors are performing a mandatory civic duty with other measures to ensure a defendant's right to a fair trial is protected. Addresses the concern that a criminal offence may drive the behaviour underground, meaning that juror research that impacts on a defendant's right to a fair trial does not come to light.

Effective – deters jurors from undertaking research or investigation without driving the behaviour underground	**0**	**-** There would be less public awareness if the current law is left as is and not codified. It is not a preventative approach and would not deter jurors from undertaking research or investigation as a statutory offence would.	**++** Avoids potential public concern about the prosecution of jurors. Recognises that jurors have a natural and instinctive tendency to seek out information, making a criminal offence and conviction an inappropriate and ineffective remedy. A statutory penalty would act as a deterrent while minimising the risk of driving the behaviour underground.
Efficient – promotes the efficient operation of the justice system	**0**	**-** The common law is not accessible as this form of contempt has never been prosecuted in New Zealand. It is unlikely to act as a deterrent. This means there is a higher risk of mistrials or retrials due to a juror undertaking research that leads to a defendant not receiving a fair trial.	**++** A summary process will be less costly, and enable a more timely imposition of sanctions. A statutory penalty would act as a deterrent and reduces the risk of mistrials or retrials.
Fit for purpose – the law is accessible, clear, modern and future-proofed	**0**	**- -** The common law is not clear or accessible. This form of contempt has never been prosecuted in New Zealand so the state of the law and its scope is unclear.	**+** A statutory penalty provides a clearer and accessible rule than the common law. An approach that is less punitive responds to emerging research that jurors are more inclined to undertake their own research given the way that people use the internet in the digital age.
Overall assessment	**0**	**-** This option relies on the current law which remains unclear and inaccessible. The maximum penalty under the common law contempt of court is higher than the status quo and does not acknowledge that jurors are performing a mandatory civic duty.	**++** This option provides a better balance between protecting a defendant's right a fair trial and acknowledging that jurors are performing a mandatory civic duty. The lower penalty recognises that not all research will be harmful or prejudicial (some jurors may be overly conscientious).

Untrue allegations against judges and courts

Criterion	**Status quo** – provision in the Bill	**Option 1** – Abolish the common law contempt of scandalising the court and replace it with a narrower statutory offence with a lesser maximum penalty	**Option 2** – Abolish the common law contempt of scandalising the court	**Option 3** – Leave the common law contempt of scandalising the court in place with no codification in the Bill
Proportionate – does not unduly restrict freedom of expression	**0**	+ Better targeted at the behaviour of concern to ensure rule of law is maintained. Potential to stifle legitimate criticism and public discussion.	++ No undue restriction on freedom of expression; ensures academics, lawyers and the public can comment on the courts, whether in traditional media, blogs or in scholarship.	+ Prosecution has been rare and criticism and critical debate about the judicial system has not been prohibited under the common law, but there are uncertainties about where to draw the line.
Effective – the law promotes public confidence in the courts and judicial system and protects the administration of justice	**0**	+ Better targeted at the behaviour of concern, to ensure it addresses the essential element of maintaining public confidence in the judiciary. Continues to provide a remedy when accusations or allegations are made against the courts or judiciary that risk undermining public confidence. Risk that offence will be counter-productive; that is, public confidence in the courts and respect for the law will be undermined by prosecuting people and the perception of providing special protection for the judiciary.	+ Could leave a gap in being able to deter and punish behaviour that has a real risk of undermining public confidence in the judiciary but better reflects the shift in views and values of modern New Zealand.	+ Ensures that behaviour that has a real risk of undermining public confidence in the judiciary as an institution does not go unanswered. However, prosecution has been rare and the common law is considered virtually obsolete in New Zealand. Question about whether retaining the common law adds any value in promoting public confidence in the courts and judicial system.

Efficient – promotes the efficient operation of the justice system	**0**	**0** There are costs and court resources involved in prosecuting this behaviour but prosecution is likely to be rare.	**-** Rarity of prosecution (last prosecution was in 2004) means negligible impact on efficiency. Without an offence as a deterrent, the Solicitor-General and Attorney-General may find it difficult to effectively discharge their constitutional function of defending the judiciary as an institution.	**0** There are costs and court resources involved in prosecuting this behaviour but prosecution is likely to be rare.
Fit for purpose – the law is accessible, clear, modern and future-proofed	**0**	**+** Statutory offence is clearer and more accessible than common law. Question about whether offence reflects current social values.	**++** Accessible, clear, modern and future-proofed – better reflects the shift in the views and values of modern New Zealand society and aligns with other comparable jurisdictions (eg, England and Wales).	**+** Common law unclear (eg, at what point does criticism go too far) and not accessible. Leaving the common law in place raises questions about whether it reflects current social values, however, the common law can be evolved by the courts to reflect modern values.
Overall assessment	**0**	**+** This option provides a clearer and better targeted description of what conduct constitutes an offence, which is less likely to undermine public confidence in the courts and judicial system. However, it may still stifle legitimate criticisms and public discussions.	**++** This option is clear and modern, reflecting the shift in the views and values of modern New Zealand society, and upholds the importance of freedom of expression.	**+** This option leaves the common law in place, which leaves the law unclear and inaccessible. It does provide an avenue to address behaviours that pose a real risk of undermining public confidence in the judiciary as an institution that other general remedies may not address, but could be seen as restricting freedom of expression.

Conclusions

What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Automatic suppression provision

The Ministry's preferred option and the option proposed in the Cabinet paper is Option 3, which is to limit the scope of the automatic suppression to a person's prior convictions only. This option ensures that the least information possible is subject to a blanket and automatic suppression. It provides better clarity for the media than the other two options as to what information can be published.

This option will also set the start of the automatic suppression at the time of charge and the end of the suppression as when the trial ends. This provides better clarity on when the provision applies, taking into account that defendants are not always arrested when a prosecution is commenced. Extending the automatic suppression to the end of the trial means the restriction on freedom of expression will last longer than in the Bill. However, the period of time between the start and end of a trial may only be a few days up to a few weeks.

Juror research

The Ministry's preferred option and the option proposed in the Cabinet paper is Option 2, which is to replace the criminal offence with a statutory penalty that would allow a juror to be fined up to a maximum of $5,000 for undertaking their own research but not convicted. A summary process would be available to the judge, instead of prosecution by Police, to determine whether a juror is guilty of the offence. We consider that a statutory penalty would sufficiently deter jurors from undertaking their own research without driving the behaviour underground and provides a better balance between competing interests than the status quo (current provision in the Bill).

Untrue allegations against judges and courts

The Ministry's preferred option is Option 2, which is to abolish the common law contempt of scandalising the court and not replace it with a statutory offence.

Retaining this offence risks a negative impact on the right to freedom of expression and could have a chilling effect on legitimate criticisms of the courts and court decisions. Freedom of expression should not be infringed unless there is a strong reason for doing so. It is questionable whether retaining the offence reflects current social values and doing so may leave New Zealand out of step with some comparable jurisdictions.

Abolishing the common law contempt could leave a gap in being able to appropriately deter and, if necessary, punish publication of allegations and accusations that are not true and carry a real risk of undermining public confidence in the judiciary as an institution. However, there are existing laws (eg, law of defamation, Harassment Act and the Harmful Digital Communications Act) that provide alternative remedies.

The option proposed in the Cabinet paper is Option 1. Option 1 gives greater precedence to the potential role of the offence in protecting the rule of law. It recognises that members of the judiciary currently experience unwarranted attacks and abuse. Leaving this behaviour unchecked risks undermining public confidence in the courts and the administration of justice. It also recognises the practical difficulties for judges to use alternative remedies.

In comparison to the status quo, Option 1 provides a clearer and better targeted description of the behaviour of concern and reduces the maximum penalty. It removes the onus on the defendant to prove their statement was true and instead makes the falsity of the allegations or accusations an element of the offence to be proved by the prosecution beyond reasonable doubt. These changes provide a better balance than the status quo between protecting freedom of expression with the need to protect the rule of law and uphold public confidence in the courts and the administration of justice.

Summary table of costs and benefits of the proposed approach in the Cabinet paper

Below, we have summarised the costs and benefits of the proposed options. We have categorised the relevant affected parties' marginal costs and benefits as low, medium or high, in the context of likely costs under the counterfactual (the Bill as introduced).

Affected parties	**Comment***:*	**Impact**	**Evidence certainty**
Additional costs of proposed approach, compared to taking no action			
Court users – defendants, victims, jurors	**Automatic suppression**: defendants will need to apply to supress information about concurrent charges that would previously have been automatically suppressed. As information about concurrent charges is not usually prejudicial, the expected number of additional applications will be small. **Juror research**: none. **Untrue allegations against judges and courts**: none.	Low	Medium
Courts and judiciary	**Automatic suppression**: the courts will need to hear applications to suppress information about concurrent charges that would previously have been automatically suppressed. As information about concurrent charges is not usually prejudicial, the expected number of additional applications will be small. **Juror research**: none. **Untrue allegations against judges and courts**: none.	Low-medium	Medium
Media	**Automatic suppression**: none. **Juror research**: none. **Untrue allegations against judges and courts**: none.	Low-medium	Medium
Prosecuting agencies (Police and Crown Law)	**Automatic suppression**: prosecuting agencies will need to respond to applications to suppress concurrent charges that previously would have been automatically suppressed. As information about concurrent charges is not usually prejudicial, the expected number of additional applications will be small. **Juror research**: none. **Untrue allegations against judges and courts**: none.	Low	Medium

Govt and wider society	**Automatic suppression**: none. **Juror research**: none. **Untrue allegations against judges and courts**: narrowing the offence may mean that some illegitimate criticism of judges and courts will go unanswered undermining public confidence.	Low-medium	Low
Total Monetised Cost	Unknown	-	-
Non-monetised costs	Ongoing	Low-medium	Medium

Expected benefits of proposed approach, compared to taking no action			
Court users – defendants, victims, jurors	**Automatic suppression**: for defendants, narrowing the automatic suppression rules will reduce the need to respond to applications from the media to modify what is suppressed. **Juror research**: jurors will not be exposed to a criminal penalty and conviction for undertaking their own research. To the extent a criminal offence might deter reporting of instances of juror research, our preferred approach should increase the likelihood juror research comes to light and provide greater protection for defendants' fair trial rights. **Untrue allegations against judges and courts**: narrowing the offence better protects court users' right of freedom of expression and ability to comment publicly on the courts. Offenders convicted of the offence will be subject to a lower maximum penalty.	Low-medium	Medium - high
Courts and judiciary	**Automatic suppression**: narrowing the automatic suppression will provide a clearer rule that is more workable for the courts to apply. There will be a reduction in the number of applications from the media and parties to modify what is suppressed. **Juror research**: there will continue to be a penalty available to the courts to impose in appropriate cases. Better protection of defendants' fair trial rights minimises the risk of retrials based on prejudicial juror research. **Untrue allegations about judges and courts**: narrowing the offence lessens the risk the offence will itself undermine public confidence in the courts/judiciary. A remedy remains available in cases of illegitimate comment and criticism so judges do not have to take legal action personally to address allegations.	Low-medium	Medium

Media	**Automatic suppression**: narrowing the automatic suppression rules will reduce confusion about what the media can publish and reduce applications from the media to modify what is suppressed. **Juror research**: none. **Untrue allegations about judges and courts**: narrowing the offence provides greater latitude for the media about what it can publish and reduces the chilling effect the offence may have on legitimate criticism.	Medium	Medium
Prosecuting agencies	**Automatic suppression**: narrowing the automatic suppression rules will reduce the need to respond to applications from the media to modify what is suppressed. **Juror research**: proposed changes to the offence means prosecuting agencies will not bear the cost of prosecuting the offence. **Untrue allegations about judges and courts**: narrowing the offence provides additional clarity for prosecuting agencies about the boundaries of acceptable and unacceptable criticism.	Low	Medium
Government and wider society	**Automatic suppression**: less restriction on what is automatically suppressed will provide better and more comprehensive information for the public about court proceedings. **Juror research**: removal of the criminal offence and penalty better reflects that jurors are undertaking a civic duty and thus should not be subject to criminal prosecution. **Untrue allegations about judges and courts**: narrowing the offence provides more latitude for public commentary on the performance of the courts and more protection of freedom of expression. To the extent the offence deters illegitimate comment and criticism, public confidence in the courts and judiciary will be enhanced.	Medium	Medium
Total Monetised Benefit	Unknown	-	-
Non-monetised benefits	Ongoing	Low-medium	Medium

What other impacts is this approach likely to have?

The courts' powers to punish for contempt are central to ensuring the integrity of the justice system and maintaining public confidence in the administration of justice. In this way, the law of contempt contributes directly to the rule of law. While it will be possible to monitor court decisions, including the number and outcomes of prosecutions or other enforcement action under the Bill, it will be more difficult to monitor the impact of the Bill, and the proposed changes analysed in this paper, on public confidence in our courts and judiciary or the rule of law. Nor will it be possible to easily assess the marginal impact of our proposed changes on constitutional principles, including the right to freedom of expression.

There is a small volume of contempt proceedings under the common law, with juror research and scandalising offences rarely, if ever, prosecuted. There is a small but unknown financial risk that codification and the greater certainty this brings may increase prosecutions for contempt with a consequential impact on the criminal justice pipeline.

Are the preferred options compatible with the Government's 'Expectations for the design of regulatory systems'?

The preferred options are compatible with the Government's 'Expectations for the design of regulatory systems'. The Bill as introduced includes reforms to clarify the law of contempt, make it more accessible and accommodate developments in the digital age. The additional reforms discussed in this RIS aim to address concerns about the workability of aspects of the Bill for the courts, court users and the media and achieve a better balance between important constitutional principles (eg, freedom of expression and a defendant's fair trial rights).

Implementation and operation

How will the new arrangements work in practice?
The proposed changes to the Bill will be progressed through the Departmental report to the Justice Committee. As the Bill continues through Parliament, the Ministry will continue its preparation to implement the Bill. Within the Ministry, this will include updates to internal processes and knowledge bases, revisions of guidance and educative material for jurors and development of the necessary changes to court rules and regulations. The Ministry will work with key stakeholders, including the Police, Crown Law Office and Department of Corrections to ensure agencies are ready for the Bill's enactment and commencement. The Ministry will also liaise with the judiciary to provide any necessary support to implement the Bill.

What are the implementation risks?
Media submissions have raised concerns about the adequacy of current processes for finding out what suppression orders are in place, and the media's potential exposure to prosecution for inadvertent breaches of the provisions. In light of the codification of additional suppression powers for the courts, the Ministry plans to review its processes for notifying the media of suppression orders as part of its work to implement the Bill. There is a small risk of an unexpected increase in prosecutions for the new criminal offences, creating pressure on the workload of prosecuting agencies and the courts. There is only a very small number of contempt proceedings taken currently, and the Ministry is not expecting the Bill to result in any significant increase. The Ministry intends to keep prosecution volumes under review post the Bill's enactment as part of its standard monitoring of courts and tribunals.

Monitoring, evaluation and review

How will the impact of the new arrangements be monitored?
The Ministry will monitor the impact and effectiveness of the Bill as part of its standard and ongoing monitoring of the operation of all courts and tribunals and its regulatory stewardship responsibilities.

When and how will the new arrangements be reviewed?
No formal evaluation of the Bill after enactment is planned as the Ministry will monitor the impact and effectiveness of the Bill as part of its standard and ongoing monitoring of the operation of all courts and tribunals and its regulatory stewardship responsibilities. The Ministry expects to receive feedback on any aspects of the new legislation causing concern through its regular contact with prosecuting agencies and the judiciary.