PRIME MINISTER

The attached note from the Attorney General's Office is an answer to the question why the Contempt of Court Act 1981 did not prevent the recent story about Ted Heath from being reported.

The note is rather long, and you do not need to read it in detail. The point briefly is that the Contempt Act only gives powers to defer publication if it would prejudice the administration of justice in subsequent proceedings.

The final sentence of the note says that it is for consideration whether the present law strikes the correct balance between the interests of the individual and those of the open administration of justice: as a layman, I feel that it does not. To give a judge power to prevent the reporting of an allegation against a third party would not in my view damage the interests of the person being tried nearly as much as the absence of such power damages third parties who may be the victims of such allegations. The lawyers seem much more concerned with defending the abstract principles of administration of justice than with defending the rights of individuals!

F.E.R.B.

We must consider an amendment to the Data Act

MT

2 November 1983

FROM:
THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

LORD CHANCELLOR

HOUSE OF LORDS,
SW1A 0PW

21st November, 1983

The Right Honourable
The Prime Minister,
10 Downing Street.

Dear Margaret.

The Traducing of Third Parties in Judicial Proceedings.

I have seen your comment on the papers received from the Law Officers' Department. I am not surprised at your concern, which I share myself, since it represents a source of concern which I have come across several times in my professional life including my present term of office, and to which I have not so far found a complete or satisfactory answer. Briefly, the problem is that, during the course of legal proceedings the name of a third party may be seriously traduced in such a way that he suffers embarrassment, distress, or actual damage without in any way being to blame and without having an adequate remedy either to clear his name or secure compensation.

The recent case concerning Mr. Edward Heath is only one of the ways in which the situation can arise. Before I give my reasons for thinking that the Contempt of Court Act is probably not an advisable, or practical way out, I would like to share with you some of the complexities of the problem. Mr. Heath was traduced by an extraordinary character who was defendant in a trial for rape and who, throughout his trial, had behaved in an intolerable and eccentric way (including singing in the dock). The trial was ultimately halted because he made a similar outburst (happily not recorded in the press) involving the Judge (the Recorder of London) himself. It will come on for trial again before another Judge.

The first time I came across the problem was when I was still a boy in the famous "Black Book" case in which Pemberton Billing, the independent MP, was prosecuted for an obscene libel against a perfectly reputable actress at the Old Bailey (before Darling J) in respect of an article in a journal published by himself entitled "The Cult of the Clitoris". Briefly, what happened was that Pemberton Billing alleged the existence of a Black Book kept by the German Intelligence during the first world war containing allegedly the names of perverts in this country judged likely to be useful to the Germans as a sort of 5th Column. In the course of the trial (of which Darling J completely lost control) almost every prominent figure was alleged by Pemberton Billing to be in the book, including both the Judge and the two prosecuting counsel. Although the case was open and shut, the jury perversely acquitted. No permanent harm was done because the story was so obviously fabricated.

/...

The thing does not happen often. But it does happen from time to time in various ways. Looking back on my files I find that I have had to take a Judge to task for maligning the Midland Bank. But much more frequently it happens that, in the course of a defence or a plea in mitigation a third party (or in murder trials an innocent victim) is maligned by the defendant (as here) or his counsel or solicitors. I have, with some success, negotiated with the Bar Council, the judiciary and the Law Society to outlaw this kind of conduct, unless ~~they~~ lawyers have good reason for believing the truth of the allegation and its ventilation is legitimately relevant to the achievement of justice. Quite obviously this does not offer complete protection. But it has helped. I have also steadily introduced the topic in Judges' seminars with some effect. The first line of defence must clearly be the trial judge. I also corresponded with Willie Whitelaw in 1979, Mr. Justice Webster in 1981, but without being able to arrive at a satisfactory conclusion.

The inappropriateness of the proposal to solve the problem by an amendment of the Contempt of Court Act 1981 can be seen, amongst other things, from an analysis of what happened in the recent Heath incident itself. Granted that a doubt must exist as to whether power exists to make an order under s.4(2) in its existing form, the order was in fact made and was in fact obeyed. We thus have a complete paradigm of what would have happened if the proposed amendment had been made and a valid order made under it. The calumny was blurted out by a reckless and mendacious defendant. It was heard by a mixed audience of jurors, journalists, lawyers and spectators, and of course it was "all over the town" in a trice. The order was made and obeyed - in Britain. But it seeped back in through the foreign press and popular gossips. In the end it was the victim, viz. Mr. Heath himself; who found the order intolerable and received judicial dispensation to blow it sky high; in order to vindicate himself. It is therefore manifest that whatever other remedy may be appropriate an amendment to the Contempt of Court Act is worse than valueless. It simply compounds the evil.

Still less is it possible to stop the calumny being uttered. Apart from the fact that, before it was blurted out, it was unpredictable it is vital that a defendant should be allowed to say his evidence like any other witness under cover of absolute privilege. The calumny against Mr. Heath was false - to those who knew him, even ridiculous. But it will not always be so. Statements of this kind will sometimes be true, and relevant, and necessary to the conduct of the defence.

Of course a judge ought to prevent such things being said if (i) he knows that they are going to be said and (ii) they are irrelevant. But the normal case is that he does not know (i) and therefore cannot judge (ii) until the damage has been done. He should, of course, be extremely severe on parties, solicitors, counsel, or witnesses who do such things, and should not hesitate in appropriate cases to report counsel or solicitors to their professional bodies, or send papers with a view to prosecution for perjury in the case of evidence given on oath. But, although this may discourage the abuse by others it is only a variant, so far as regards the instant case, of the well known practice of locking the stable door after the horse has been stolen.

My own view is that, although it is impossible not to sympathise wholeheartedly with the victim (in this case Mr. Heath), it is possible to exaggerate the damage. Mr. Heath's reputation has not been blemished; nor, so far as I remember, were the far more numerous reputations attacked in the notorious 'black book' case. I think it legitimate, either during, or, preferably, after, proceedings to permit the target of attacks of this kind either to give evidence or to issue a statement challenging the calumny. This was done in the case of Mr. Heath and does not need primary legislation. It is in the discretion of the judge, who, however, should be careful not to allow such a statement to prejudice the instant, or pending, proceedings (for which purpose the statement may have to be postponed until after verdict).

It is obviously desirable that, as part of the judge's preliminary training, some thought should be given to the possibility of introducing into the syllabus something on the art of keeping order in his own court, in such a way as to include discussion of this difficult topic. But what if the offender is the judge himself as in the Midland Bank[X] affair noticed above? In that case only the Lord Chancellor can act, and he, too, is compelled in the nature of the case to act after the damage has been done in the individual case. It is also vital that both branches of the legal profession should keep tight hold on the activities of advocates. It would be worse than useless, and a potential interference with the course of justice, for the law to seek to limit their freedom of action. The trial judge has ample powers to do that, and should use them in appropriate cases.

My original thought was that the problem merited a working party. I am now persuaded that it does not. The evil is a real one, but inherent in our court procedure. A working party is unlikely to yield more information or better ideas than we already possess. For the present it is enough to say I am quite clear that so far as the Heath type incident is concerned an amendment to the Contempt of Court Act would not be an appropriate, or desirable approach, and might even excite deserved ridicule of those who attempted it. Such an amendment would obviously be quite incapable of preventing the other variants of the problem I have outlined above.

I am copying this letter to Michael Havers.

yrs:

L.

[X] Since I wrote this you may have read that I have had a similar complaint abt: Mr. Recorder Goldsten in a case in wh: Messrs Woolworths were prosecuting.

MBPM

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H. Steel CMG OBE

9 November 1983

R C Stoate Esq
Private Secretary
Lord Chancellor's Office
House of Lords
LONDON S W 1

FORB

Dear Richard,

In connection with the recent rape trial at the Old Bailey in which Mr Heath's name was bandied about and an Order (of doubtful validity) prohibiting disclosure of it was made by the Recorder and subsequently revoked by Croom Johnson J., I was asked by No 10 for a note setting out the legal background. I enclose a copy of my letter of 28 October to Robin Butler and of the note which accompanied it, complying with that request. I have now received a reply from Robin (copy also enclosed) which, as you will see, reports that the Prime Minister is dissatisfied with the state of the law and has asked for consideration to be given to an amendment of the Contempt of Court Act 1981. I think that this is the responsibility of the Lord Chancellor's Department in the first instance and I should therefore be grateful if you would take it on. But the Attorney General will, of course, wish to be closely involved in the exercise.

I am sending a copy of this letter to Robin Butler.

Yours ever,

Henry

Legal Proc
July '74
Cases of Contempt
of Court

HL

10 DOWNING STREET

From the Principal Private Secretary

7 November 1983

Thank you for your letter of 28 October and for the attached note about the general principles of law covering the reporting of defamatory statements made in the course of judicial proceedings.

The Prime Minister read these papers over the weekend. She has commented that she does not agree that the balance struck by the present law between the interests of an individual who may be defamed and those of the open administration of justice is at present right. She has commented: "we must consider an amendment to the Contempt Act".

I should be grateful if you could arrange for the matter to be considered further in the light of the Prime Minister's comment.

FERB

Henry Steel, Esq., C.M.G., O.B.E.,
Law Officers' Department.

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H. Steel CMG OBE

28 October 1983

F E R Butler Esq
Principal Private Secretary
Prime Minister's Office
10 Downing Street
LONDON S W 1

Dear Robin,

I promised earlier this week to let you have a note on the legal background to the unfortunate situation arising out of the allegations made against Mr Heath by the accused in the recent rape trial at the Old Bailey. As I understand it, you wanted my note to concern itself not with the particular circumstances of that case but rather with the general principles of law involved. I now enclose such a note which I am sorry not to have been able to get to you earlier. Public and Parliamentary interest in this matter has no doubt subsided from the level which it seemed to have reached earlier in the week but the basic problem has of course not gone away. You will no doubt have seen the leader on it in today's "Times" and there is also a small item on the same topic in the "Express". I may say that I think that the "Times" leader gives a very fair analysis of the problem though I am not sure that I agree with the conclusion that "something is lacking in our legal system". My personal view is that the law as it now stands has got the balance about right. But this is essentially a subjective judgment.

Yours ever,

Michael

I have shown my note to the AG and it includes incorporates some changes that he suggested. M.

DEFAMATORY STATEMENTS MADE IN THE COURSE OF JUDICIAL PROCEEDINGS, AND RESTRAINTS ON THEIR PUBLICATION

The law on this topic reflects the combined effect of three separate principles, each of them firmly established in our legal tradition as an important constitutional safeguard for the fair and open administration of justice:

(a) that justice must be administered in public;

(b) that participants in judicial proceedings should be free to make out their case (or carry out their duties) in whatever way seems necessary to them without fear of punishment or civil liability; and

(c) that the press has the right, without fear of punishment or civil liability, to report freely what has taken place in open court in the course of judicial proceedings.

In their practical application, each of these principles has become subject to a number of qualifications or exceptions.

(a) Hearings in public

There are a number of recognised exceptions which permit a court to conduct proceedings in camera or to restrict the availability of certain details of the evidence or to refuse to allow certain evidence to be adduced. These exceptions may be invoked where national security is involved or in certain cases in the field of family law or where the exclusion or restricted circulation of the evidence is necessary for the proper administration of justice itself, e.g. in blackmail cases or to prevent the identity

of a police informant being revealed. But the courts, the legal profession and the press are all vigilant to ensure that these exceptions are not unwarrantably extended. In particular, it is firmly established that proceedings may not be held in camera and that evidence given in open court may not be withheld from those present (and thus become not publishable) merely to protect the reputation or sensitivities of persons mentioned in it and especially not merely because those persons are persons in the public eye.

(b) No restrictions on what may freely be said in court

The law, as long established, is that there is no civil or criminal liability attaching to judges, counsel, members of the jury, witnesses or parties for words spoken by them in the ordinary course of any proceedings before any court. There are obvious exceptions to this for perjury committed in the course of giving evidence and for contempt committed in the face of the court, but these are not relevant for present purposes.

In addition, courts do have an inherent power to prevent witnesses or parties (or their legal representatives) from making statements or comments which are damaging to others and are irrelevant to the issues before the court, and the making of which would therefore be an abuse of the process of the court. Moreover, it is recognised that counsel have a special professional duty to exercise restraint in making serious allegations to the detriment of third parties in the course of proceedings in open

court. But none of this prevents the making of a damaging assertion about a third party if that assertion could reasonably be thought to be relevant to the issues before the court (as was the case in the recent rape trial).

(c) Free publication of reports of proceedings in open court

This is a corollary of the proposition that, subject only to the law of defamation and to express statutory restrictions, our press is free to publish any inforamtion that it wishes. So far as defamation is concerned, it has been the law, as established by statute for almost 100 years, that absolute privilege (i.e. not defeasible even on proof of actual malice) attaches to fair and accurate contemporaneous reports of legal proceedings. Accordingly, a newspaper is not liable for faithfully reporting what was said in open court even if what was said was both defamatory and untrue.

There are, however, certain restrictions imposed by statute on the publication of reports of court proceedings. For example, the Sexual Offences (Amendment) Act 1976 in general restricts the publication of matter likely to lead to the public identification of the complainant or the accused in a rape case. More generally, s.4(2) of the Contempt of Court Act 1981 permits a court to order the postponement of the publication of a report of the proceedings, or part of the proceedings, before it if it considers that necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings or in any other

proceedings pending or imminent. This power would probably not have been available in the recent rape case (and it was apparently not relied on by the Recorder when he gave his direction) because it could not have been maintained that the disclosure of the name of the person whom the accused had himself named in open court (as the man for whose protection he was being "framed") would constitute a serious prejudice to the administration of justice in those or in other pending or imminent proceedings.

Mention should also be made of s.11 of the Contempt of Court Act 1981, which is in the following terms:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

It will be noted that the power conferred by this section is not a power to prevent publication of what has been said in the public hearing in open court but rather a power to prevent publication of what has <u>not</u> been allowed to be so said. It apparently was the power on which the Recorder relied in the recent rape case. But since the name then mentioned had in fact been stated in the public hearing in open court and the Recorder had not given any direction that it should be withheld from the public, it is questionable whether he had power to give the direction that he did. In any event, it is clear that s.11 is not itself a basis for ordering the withholding and non-publication of a person's name merely because what has been said about him is damaging to him.

It will be seen that the law as it at present stands does not prevent, and does not even seek to prevent, the unfortunate situation which arose in the recent rape case, i.e. the making of damaging allegations in open court about a person who is not himself a party to the proceedings, or the publication in the press of a report of such an allegation. There is no question but that such a situation operates very harshly on the person concerned, who cannot usually rebut the allegation (at any rate with hope of equal publicity) unless he himself gives evidence in the proceedings or until the proceedings are over and he is free to issue a public denial without risk of prejudicing them. But this (like, for example, the rule conferring absolute privilege on fair and accurate reports of judicial proceedings) is the result of our law subordinating the interests of the individual to those of the open administration of justice. It is perhaps for consideration whether the balance it strikes in this respect is the correct one, although there would be many difficulties in giving a Court the power to withhold publication of a name given in evidence or by way of cross-examination when that might, for example, reflect upon the weight of the case for the Defence, as could have happened in the case under review.

Original filed Parl. (Leg Prog) Pt 4

Legal Procedure

Ref: A01727

CONFIDENTIAL

PRIME MINISTER

Legislation Programme - (C(80) 22)
Contempt of Court Bill - (C(80) 21)

BACKGROUND

The Cabinet last discussed this Session's legislative programme in January (CC(80) 3rd Conclusions, Minute 1), when they noted that the position in the House of Commons was reasonably satisfactory but that there was a risk of serious congestion in the House of Lords. Since then the business managers have had to accommodate the Health Services (Invalid Direction) Bill and the Social Security (No. 2) Bill. They have become increasingly conscious of the problems in the Lords, about which the Minister of State, Ministry of Agriculture, Fisheries and Food, sent you a minute on 29th February. The discussion between Ministers, which you then suggested should be held, has clarified but not resolved the issues, and a recent meeting of Legislation Committee failed to agree on the future of the Contempt of Court Bill.

2. The Chancellor of the Duchy of Lancaster and the Minister of State, Ministry of Agriculture, Fisheries and Food, raised two sets of issues in their memorandum C(80) 22:-

(a) Can those Bills whose introduction, for whatever reason, has been delayed (and in particular the Contempt of Court Bill) now be added to the programme?

(b) What should be the order of priority in the Lords and for Royal Assent of the major Bills now before the Commons?

The Lord Chancellor argues in C(80) 21 that the Contempt of Court Bill should be introduced into the Lords even though its chances of becoming law are uncertain. There are no policy issues outstanding. The Bill is ready for introduction.

HANDLING

3. When the Chancellor of the Duchy has introduced his paper, and the Minister of State, Ministry of Agriculture, Fisheries and Food (Lord Ferrers) has explained the problem in the Lords and the constraints on the timetabling of Bills there, you may find it convenient to take the two sets of issues separately.

4. On additions to the Programme, you may like to ask the Lord Chancellor to argue the case for the Contempt of Court Bill. The Home Secretary may support him. There is Press interest, led by the Sunday Times, in some provisions of the Bill. The Paymaster General may have views on whether it is better to introduce the Bill even though it may not become law or to defer it. Would the publication of the Bill in the form of a White Paper be helpful? The Chief Whip will want to support the general proposition that the Government should not introduce Bills which are unlikely to receive Royal Assent. While this proposition is normally right, other members of the Cabinet may want, in this instance, to support the Lord Chancellor.

5. There should be no dispute about the introduction of the Coal Industry Bill (deferred because of the steel strike), a one-clause Pill on the White Fish Authority, or of the Port of London (Financial Assistance) Bill. Each is quite short and restricted to finance. You may, however, want to ask the Minister of Transport why his Bill is not yet ready. The Secretary of State for Energy may wish to argue for the full Energy Conservation Bill, and the Secretary of State for Trade for the full Films Bill. Cabinet has not, however, the arguments for or against these Bills before them, and you may prefer, as the paper suggests, to remit the matter to Legislation Committee, with an indication that the Bills, so far as practicable, should be restricted to financial provisions.

6. As regards orders of priority, the Chancellor of the Duchy of Lancaster and the Minister of State, Ministry of Agriculture, Fisheries and Food, have suggested two possibilities. They differ only in that the first (paragraph 6) aims to secure the Housing and Tenants' Rights (Scotland) Bills before the summer recess, and the Local Government, Planning and Land Bill after it. The alternative (paragraph 8) defers the Housing, and the Tenants' Rights Bills in favour of the Local Government, Planning and Land Bill. You will want to ask the Secretary of State for the Environment for his views. He is likely to support the first order of priority, arguing the political importance of securing the council house provisions of the Housing Bill as soon as possible. The Minister of State, Ministry of Agriculture, Fisheries and Food might be asked

to assess the risk of the Government defeats over the block grant provisions in the Local Government Bill. Are they really increased if the Bill is not law before the Party Conference? Are the business managers over-reacting to the recent defeat on school transport?

7. Given the length and complexity of the Local Government, Planning and Land Bill and the fact that it was introduced into the Commons after the Housing Bill, the Cabinet may prefer the first order of priority rather than the second. In either event, the Secretary of State for Social Services will protest at the suggestion that the Health Services Bill cannot become law until October. There are good reasons in paragraph 3 of the Annex to C(80) 22 for it to become law earlier. You may want to press the Minister of State, Ministry of Agriculture, Fisheries and Food, on the possibility of time being found for it. If something else has to give way, how strong is the argument put by the Secretary of State for Scotland that the Tenants' Rights (Scotland) Bill must not slip seriously behind the Housing Bill? Other Ministers are likely to be content with what is proposed, which meets the arguments set out in Annex A for particular Bills. It would be helpful if the Secretary of State for Employment could accept the Employment Bill becoming law by the end of July instead of by 10th July as he wishes. Would three weeks really have the effect suggested in paragraph 2 of Annex A?

8. Finally, Cabinet may wish to endorse the view provisionally taken in January that, despite the difficulties caused for Scottish members, the summer recess should not begin until 8th August. The exact length of the spillover in October can be settled later, when the Lord President has reassessed the situation on his return from Rhodesia.

CONCLUSIONS

9. Subject to the discussion, you might guide the Cabinet:-

(i) to agree to the introduction in the House of Lords of the Contempt of Court Bill;

(ii) to remit the Energy Conservation and Films Bills to Legislation Committee, with a strong indication that their provisions must be limited to financial matters not requiring lengthy debates in the Lords;

(iii) to endorse the order of priority in paragraph 6 of C(80) 22, giving priority to the Housing Bill rather than to the Local Government, Planning and Land Bill;

(iv) to urge the business managers to try and find time for the Health Services Bill in the Lords before the summer recess, but not at the expense of the Bills in (iii) above.

ROBERT ARMSTRONG

(Robert Armstrong)

17th March 1980

PRIME MINISTER overtaken MS

The Chief Whip will no doubt want to raise other matters with you as well, but he wanted a word before you see the Lord Chancellor so that he can brief you on the Contempt of Court Bill.

You will remember that the Lord Chancellor put in a very strong bid to take the Bill through all its stages during this session, but that Lord Ferrers, in his review of the Lords programme as a whole, was doubtful whether it could be fitted in.

At the meeting of Legislation Committee today, there was a great row between the Lord Chancellor and the Chief Whip and others about the prospects for the Contempt of Court Bill. The Lord Chancellor said that it was essential to get it through; the Chief Whip that it could not be done without dropping something else.

Any decision has ramifications for others and I am sure that the question should be discussed by Cabinet. The best day for doing this would be next Tuesday since Thursday this week would be too soon and Thursday next week is already crowded.

I hope that you will be content simply to listen to the Chief Whip and the Lord Chancellor tomorrow and to tell them both that Cabinet will have to reach a decision on the matter on Tuesday 18 March.

MS

11 March 1980