Challenging section 4(2) orders

Courts should recognise that a section 4(2) order could, by postponing media reporting of a case, distort or diminish the public's understanding of events.

In 2006 the head of the Metropolitan police’s counter-terrorism branch, Peter Clarke said section 4(2) orders – imposed because of argument that reports of one terrorism trial could prejudice others then pending – were causing long delays in publication of reports of these trials. He said it had led to myths that the terrorism threat had been exaggerated.

Terror cases took an average of two years to come to court, with each trial averaging 12 months, because they were so complex. Judges therefore felt compelled to impose what had become an interlocking web of orders under the Contempt of Court Act 1981 to ensure that defendants received fair trials before untainted juries, Mr Clarke said.

‘This inability to put before the public what is happening has led to some myths, like the idea that the (terror) threat was being exaggerated at the behest of the Government to justify foreign policy - that is so far off the mark,’ he told an anti-terror conference at St Antony’s College, Oxford.

In 2009 he returned to the subject of the Act, arguing that it was time to ‘trust’ jurors more in the interests of ensuring that communities were kept informed during the sometimes very long periods it took to prepare a case. ‘I think there is a link between the application of the Contempt of Court Act and the potential effectiveness of counter-terrorist policing,’ he told the BBC.

‘It is fundamental to any type of policing that communities must have confidence in what the police are doing. All too often, though, it has been two or even three years before we have been able to explain to communities why certain actions were carried out.

‘If that happens it is going to be far more difficult for those communities to have confidence in the police, to have the confidence to come forward with intelligence and information which could be absolutely vital in terms of counter-terrorism.’

Mr Clarke, who headed the Met’s Counter Terrorism Command until 2008, said a 2003 raid on Finsbury Park Mosque was a particularly acute example. ‘This was a hugely sensitive operation and we wanted to be able to explain to communities why it was we were doing something like that,’ he said, adding that an explanation could not be given until three years after the event.

The police were then accused of exaggerating the terror threat in a bid to provide support for the Iraq invasion, which harmed the force's effectiveness, he said, adding that the ‘official silence’ required by the Act ‘leaves an open court for others to roll out speculation, innuendo, sometimes deliberate lies’.

‘That unbalances the public debate and makes it very difficult for communities to know what to believe and therefore it makes it more difficult for the police to do their job.’

He questioned how often in reality there was a ‘substantial risk of serious prejudice’.

‘In an era of global communication it is unrealistic to think that jurors will sit there in complete isolation not understanding the context of what they are trying.

‘Juries are the bedrock of our judicial system - we need to cherish them and, most importantly, we need to trust them,’ he said (Media Lawyer, 15 December 2006 and 6 July 2009).
Case study: In 1994 Mr Justice Lindsay refused to make a section 4(2) order postponing reporting of civil cases involving pension funds, although criminal proceedings were pending. He said a risk of prejudice which could not be described as substantial had to be tolerated as the price of an open press and that even if the risk was properly to be described as substantial, a postponement order did not automatically follow (MGN Pension Trustees Ltd v Bank of America [1995] 2 All ER 355, Ch D).

Section 4(2) orders cannot restrict reports of events outside the courtroom
Section 4(2) refers only to postponing reports of a court’s proceedings – but some courts have tried to use it temporarily to ban reporting of an external event, or of a statement not made in the proceedings. The Court of Appeal accepted, in R v B - cited in McNae’s, p. 189 - that such use is beyond the section’s scope, and unnecessary because a media organisation can face proceedings under the Contempt of Court Act for publishing anything which creates a substantial risk of serious prejudice or impediment to an active case. The Act is explained in McNae’s chapter 18.