

# How the Official Solicitor could have assisted in Tommy Robinson's case; had she not been stripped of the responsibility after 182 years

By Esmerelda Weatherwax

Readers will be well aware that Tommy Robinson is currently in prison serving a sentence of 18 months in prison for Contempt of Court, ie breach of a Civil injunction concerning the showing of his documentary Silence.

Thankfully he does have an experienced firm of solicitors acting for him, and the support of Rebel [Media in the person of Ezra Levant](#).

Tommy is a Civil Contemnor and thus should be subject to a prison regime different from a convicted criminal prisoner. However due to his profile (and, I fear the enmity of the authorities) he was moved at minutes notice from Belmarsh Prison to HMP Woodhill, not an appropriate prison for a Civil Contemnor. There he is in the segregation unit, effectively solitary confinement, which has mental health and human rights considerations. His solicitor is working on this, but how effective they will be remains to be seen.

Had this happened 12 years or longer ago there was an office of the Ministry of Justice which could have had a beneficial input into his case.



The Official Solicitor to the Supreme Court was founded in 1871 to replace the Solicitor to the Suiters Fund who had replaced the 17<sup>th</sup> century Office of the Six Clerks. These sound arcane to our modern ears but they had the duty to look out for “destitute

litigants, lunatics and infants” in legal cases, Other responsibilities included men (usually men) languishing in the Fleet Debtors prison with no chance of paying their debts and release.

Another duty evolved upon him (he until 2019, the current office is now held by a woman, Sarah Castle) that of looking into committals to prison for Contempt of Court in Civil cases. Exactly Tommy’s situation.

Lord Justice Munby (now retired) as a practicing barrister and later a Judge of the High Court and Court of Appeal took a great deal of interest in this area of the law.

He sets out the history and responsibilities of the Official Solicitor better than anyone else still alive could in his judgement [here in the case](#) of Justice for Families Limited – and Secretary of State for Justice

*47) The duties of the Official Solicitor in relation to contemnors had their informal origins even before 1842, when they were put on a formal, albeit non-statutory, basis following the appointment of J J Johnson as Solicitor to the*

*Suitors Fund (as the Official Solicitor was then called). They were put on a statutory basis by the Court of Chancery Act 1860. From 1963 they were to be found spelt out in a Direction to the Official Solicitor issued by Lord Dilhorne LC on 29 May 1963, requiring the Official Solicitor to: "review all cases of persons committed to prisons for contempt of Court, ... take such action as he may deem necessary thereon and ... report thereon quarterly on the 31st day of January, the 30th day of April, the 31st day of July and the 31st day of October in every year." That Direction remained in force until revoked by the Lord Chancellor on 5 November 2012. Accordingly, as I understand it, the Official Solicitor no longer has a role to play in relation to committal orders which result from contempt of court.*

*Earlier at 44)*

*The latest figures from the Ministry of Justice of receptions into prison for contempt of court, show that in the twelve months from April 2013 to March 2014, a total of 116 contemnors arrived in prison (monthly totals 15, 11, 8, 13, 14, 7, 12, 7, 6, 8, 7, 8). These figures are broken down into County Court (aggregate total 36), Crown Court (5), Magistrates (4), High Court (5) and "Not recorded" (66). Mr Hemming's point, which appears to be borne out by an analysis he has conducted for us of the committal cases which appear on BAILII, is that for a very large number of these committals there is no judgment to be found on BAILII. This, if true, and every indication is that unhappily it is true, is a very concerning state of affairs.*

I have an [on-line transcript of the direction of Viscount Dilhorne](#). It is below, minus the handwritten signature.

"The General Direction dated 29th May, 1963"

"I, THE RIGHT HONOURABLE REGINALD EDWARD, BARON DILHORNE, do hereby DIRECT that the Official Solicitor to the Supreme Court of Judicature do review all cases of persons committed to prisons for contempt of Court, do take such action as he may deem necessary thereon and do report thereon quarterly on the 31st day of January, the 30th day of April, the 31st day of July and the 31st day of October in every year."

"Dated the 29th day of May 1963."

"Dilhorne"

Two years later Munby LJ was concerned again at the loss of this safeguard for contemnors and he said so to the court at greater length. This is the case of [Devon County Council -v- Kirk \[2016\]](#)

Mrs Kirk was a mature lady of good character who was challenging her local authority over the placement in care of an elderly friend or relative with dementia. She didn't accept the council's decisions about him and refused to sign documents the council wanted signed. So they brought proceedings to compel her to do so. This extract is a bit long but it does set out the history and powers very well.

1. Of greatest concern, however, is the fact that, in circumstances where she should never have been committed at all, Mrs Kirk languished in prison for almost seven weeks before being released. And, as my Lord has pointedly observed, how much longer might she have remained there had Mr Challenger not intervened and been so tenacious in his pursuit of her release? A proper system should not permit this to happen. The fact that it did happen here suggests that the systems in place are not adequate.
1. I referred in *Justice for Families Ltd v Secretary of State for Justice* [\[2014\] EWCA Civ 1477](#), [2015] 2 FLR 321, paras 46-47, to the fact that the Official Solicitor no longer has any role to play in relation to committal orders which result from contempt of court. I

cannot help wondering whether Mrs Kirk might have achieved an earlier release if the Official Solicitor was still involved in such cases and still had responsibilities in relation to contemnors.

1. The problem of contemnors languishing in the Fleet prison, whether through poverty, ignorance, obstinacy, lack of resolve or choice<sup>[1]</sup> was addressed by Sir Edward Sugden, then Solicitor General, later, as Lord St Leonards, the Lord Chancellor, who took the initiative which led to the enactment of the Contempt of Court Act 1830. Section 2 required the Warden of the Fleet to make a report four times a year, on the 20<sup>th</sup> January, 20<sup>th</sup> April, 20<sup>th</sup> July and 20<sup>th</sup> October, to the Lord Chancellor of “the Names and Descriptions of [all Persons committed by the Courts of Equity for Contempts] in his Custody ... with the Causes and Dates of their respective Commitments.” Section 15 contained, as Rule 7, the requirement:

“That on the [30<sup>th</sup> January, 30<sup>th</sup> April, 30<sup>th</sup> July and 30<sup>th</sup> October] in every Year, or if any of those Days happen on a Sunday, then on the following Day, One of the Masters of the Court of Chancery, to be named by the Court, shall visit the Fleet Prison, and examine the Prisoners confined there for Contempt, and shall report their Opinion on their respective Cases to the Court.”

1. The arrangements in the 1830 Act seem to have broken down, and in any event could not survive the abolition of the Masters by the Court of Chancery Act 1852, and at some time in the 1840s were taken over by J J Johnson, who had been appointed the Solicitor to the Suitors Fund, the ancestor of the Official Solicitor, in 1842. Matters were put on a statutory basis by the Court of Chancery Act 1860, section 2 of which provided that:

“In the last Week in January, in the last Week in April, in the last Week in July and in the last Week in October in every Year, the present Solicitor to the Suitors Fund, or in case of his Illness or unavoidable Absence, some other Officer of the Court of Chancery to be appointed by the Lord Chancellor from Time to Time during such Illness or Absence, and after the Death or Retirement of the present Solicitor to the Suitors Fund, the Solicitor to the Suitors Fund for the Time being, or some other Officer of the Court of Chancery to be appointed by the Lord Chancellor from Time to Time, shall visit the Queen’s Prison, and examine the Prisoners confined there for Contempt, and shall report his Opinion on their respective Cases to the Lord Chancellor.”

Section 5 of the Act required the gaoler or keeper of every other prison to make a report to the Lord Chancellor, within 14 days after the committal of any Chancery prisoner, containing the name and description of the prisoner and “the cause and date of his commitment.”

1. Following the eventual repeal of the 1860 Act, the matter was regulated by a Direction to the Official Solicitor issued by Lord Dilhorne LC on 29 May 1963, requiring the Official Solicitor to:

*“review all cases of persons committed to prisons for contempt of Court, ... take such action as he may deem necessary thereon and ... report thereon quarterly on the 31<sup>st</sup> day of January, the 30<sup>th</sup> day of April, the 31<sup>st</sup> day of July and the 31<sup>st</sup> day of October in every year.”*

That Direction remained in force until revoked by Grayling LC on 1 November 2012.

1. The modern practice, as I recall, and I was involved on the instructions of the Official Solicitor in many such cases in the 1980s and 1990s, was that the Official Solicitor was notified by prison governors, very shortly

after the prisoner's arrival, of the reception in prison of every contemnor – which meant that the Official Solicitor could intervene, where appropriate, very quickly.

1. As can be seen, the process of quarterly review by an officer of the court, instituted in 1830, continued until 2012. It served contemnors, and more generally the system, well. Not the least of the merits of the involvement of the Official Solicitor was the fact that he was not dependent upon instructions from the contemnor and indeed could, and did, act even though the contemnor did not want him to. Thus the obdurate, those seeking martyrdom and, more generally, those who could not or would not act on their own behalf, could be freed at the earliest proper time: see, for example, *Churchman v Joint Shop Stewards' Committee* [1972] 1 WLR 1094, *In re Barrell Enterprises* [1973] 1 WLR 19, and *Enfield London Borough Council v Mahoney* [1983] 1 WLR 749.
1. My Lord has referred to the difficulties Mr Challenger seems to have had in gaining access to Mrs Kirk in prison. I share his great concern.

The Official Solicitor had no power to influence the Prison service about the placement or regime of a prisoner. He was very useful in assisting a contemnor with no solicitor to either meet one, or would arrange a hearing for the contemnor to Purge his Contempt, ie apologise to the court and promise to behave properly in future.

In those cases where a Contemnor was never going to apologise, the point of principle as in Tommy's situation being too important, the OS could bring an application for release to the court on the grounds of the public good. That no good would be served, but harm done by continuing to retain this person in prison any longer. A prisoner on hunger strike (as

sometimes happened) was given careful scrutiny.

I have not yet been able to trace in Hansard or documentation the reason the then Conservative Lord Chancellor Chris Grayling abolished the responsibility sometime in November 2012. It seems to have been an unceremonious edict. That said, I don't think that in 2012 he had foreknowledge of the events of this last year. The office had traditions but it didn't come with an in-house seer.

The office of Lord Chancellor is ancient; probably the oldest in the English and eventually British constitution. And yes, we do have a constitution, but it isn't written in one place, but many places. Until 2004 the office was a political appointment in that the government would appoint a LC from their 'party' but he would be a lawyer who was respected and above party politicking. He remained in office until the government changed, or until he retired in the fullness of time, or his health demanded.

In 2004 Tony Blair, rumoured to have used the back of a cigarette packet, suddenly abolished the Lord Chancellor's department and sacked the then LC his old pupil master Lord Irvine. He substituted his old flat mate Lord Falconer with orders to abolish himself and called the new department The Department for Constitutional Affairs. A team of lawyers searched for every duty of the Lord Chancellor. Over a period of 800 years they were too many, too varied: they concluded that the office could not be abolished as it was entwined too deeply into our multi-source constitution. Instead another new department, the Ministry of Justice was formed, which took in half of the Home office as well. The Home Office had been described as 'not fit for purpose'. Now the nation had two departments 'not fit for purpose.' Prominent Labour politician Jack Straw was the first Secretary of State for Justice (and Lord Chancellor) and now it is just another ministry, its Minister/Secretary being shuffled and reshuffled like the deck chairs on the Titanic.



The Liberty of the Subject responsibility was the reason the office of the Official Solicitor developed from the early 19<sup>th</sup> century. However it is only really known today for the children's work and the International Child Abduction and Contact Unit. Hence the appointment of Sarah Castle whose training and expertise is in local Government (Kent and Berkshire) Children's offices. She probably has little idea of the important responsibility for contemnors her predecessors carried. Over 100 years ago one of the Poplar councillors imprisoned during the famous Rates Rebellion was released due to his intervention. In 1972 it was members of the Dockers Union. All political cases which benefited from a cool outside scrutiny. In 1984 the [shipworkers of Cammell Laird](#) in Birkenhead. That intervention didn't result in release of the prisoners and the legal ramifications [continue 40 years on.](#)

I'd like to imagine the current Lord Chancellor, the first woman in the office, Shabana Mahmood, who wears a necklace inscribed 'Allah' and has the [shahada framed in her office](#), given a report every quarter saying, 'and Stephen Yaxley-Lennon continues to be defiant within HMP Woodhill . . .'

There is no longer anybody outside their own circle looking out for contemnors. A responsibility first codified 182 years ago, is, in this age of safeguards and support no longer extant. And I can't think of a case where it could be more helpful.