Law Commission
Reforming the law

Contempt of Court

Summary of the Consultation Paper

This summary

This summary is intended to provide an overview of the key issues that we discuss in our Contempt of Court consultation paper. It explains what the project is about and the issues that we address.

In the consultation paper, we set out a number of consultation questions to which we are seeking responses. We refer to these consultation questions throughout this summary. Some questions set out provisional proposals for law reform and ask whether or not you agree. Others are open questions in which we ask for your views. We will only reach our final conclusions and make recommendations for reform once we have received and considered all responses to the consultation paper.

Our aim is that anyone should be able to read this summary and engage with the key issues we address. This may be particularly useful for members of the public who may be less interested in engaging with the more detailed matters in the consultation paper.

Where individuals or organisations have particular interest or expertise in any or all of the areas we examine then we would encourage them to read the consultation paper. It has a more detailed discussion of the issues.

Responding to our consultation

Who we are 	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
What is it about? 	The Law Commission is conducting a review of the law of contempt of court and considering the need for reform with a view to improving its fairness, effectiveness, consistency, and coherence.
Why are we consulting? 	We are seeking views on whether and, if so, how the law needs to be reformed. Consultation is a crucial pillar of our work. We want any recommendations we ultimately make to have as strong an evidence base as possible.
Who do we want to hear from? 	We would like to hear from as many stakeholders as possible. This includes legal professionals working in any area of the law where contempt arises (be it criminal, civil, family, or any other area of law), judges, tribunal members, the media, law enforcement, prison staff, academics and researchers, court users, people with experience of contempt of court, and organisations that provide support to those who are or may be subject to contempt proceedings.
Where can I read the consultation paper? 	The full consultation paper is available at our website: **https://lawcom.gov.uk/project/contempt-of-court-2/**

What is the deadline? 	The deadline for responses is 8 November 2024.
How to respond 	We would appreciate responses to the consultation paper using the online response form available at: **https://consult.justice.gov.uk/law-commission/contempt-of-court** Otherwise, you can respond: by email to: **contempt-of-court@lawcommission.gov.uk** by post to: **Contempt of Court Team, Law Commission,** **1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG.** (If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.) It is up to you which consultation questions to answer - there is no need to answer every question.
What happens next? 	After analysing all the responses, we will make recommendations for reform, which we will publish in a report. It will be for Government to decide whether to implement the recommendations. For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees' responses, please see the consultation paper.

Introduction

"Contempt of court" refers to a wide variety of conduct that impedes or interferes with the administration of justice. It may be something that happens in a court: assaulting court staff or witnesses, for example, or refusing to answer a court's questions if called as a witness. Contempt may also be committed elsewhere, for example, by publishing material that breaches a reporting restriction or failing to comply with a court order.

The law of contempt is disorganised and, at times, incoherent. It has developed over centuries, but has done so piecemeal, and now comprises an unsystematic amalgam of statute and common law. Historic distinctions persist, such as the distinction between civil and criminal contempt, though with little utility. Indeed, whether classified as criminal or civil, contempt is not a criminal offence at all but is instead a wholly separate regime for safeguarding the administration of justice. The penalties for contempt are generally imprisonment or a fine. Alongside contempt of court are many overlapping criminal offences relating to the administration of justice (such as the offence of perverting the course of justice).

Nevertheless, the more fundamental problems with contempt are practical. Many courts and tribunals lack meaningful powers to deal with contempt when it arises. Even when courts do have such powers, the sanctions available to them – as tools either of coercion or punishment – are blunt. The procedures for contempt differ between different courts, and the law governing appeals can be unclear and complex.

There are also growing concerns about the impact of social media and other technological advances on the administration of justice.

All of these problems mean that it is difficult for laypeople and legal practitioners to identify and understand the relevant law, and for the courts to recognise and respond appropriately to interferences with the administration of justice.

A clearer and more coherent set of laws and rules governing contempt – addressing liability for contempt, the powers of courts, procedure, and the imposition of sanctions – would help to ensure that this very significant area of law operates in a principled, comprehensible, and effective way.

In 2012, we reviewed some aspects of contempt of court and published reports on three specific issues: scandalising the court; juror misconduct and internet publications; and court reporting. In this current project, we are undertaking a holistic review of the law of contempt of court. Following extensive discussions wth a broad range of stakeholders (including the media, the judiciary, academics, lawyers, regulators, and many others), we have made provisional proposals covering the whole landscape of contempt law. We are seeking the public's views on these proposals. Our objective in making these proposals is to produce a law of contempt that is easier to understand, fairer, and that better protects the administration of justice.

Freedom of expression and the right to a fair trial

In making provisional proposals for reform, we acknowledge that contempt laws, especially those relating to contempt committed by publication, affect professional and citizen journalists. The ability of the press to report on court proceedings – to ensure justice is, so far as possible, open – is a vital limb of the rule of law. The restrictions that contempt laws impose on freedom of expression must, to comply with article 10 of the European Convention on Human Rights ("ECHR"), be proportionate and pursue a legitimate aim.

That legitimate aim – the reason for restricting freedom of expression through the law of contempt – is the protection of another important right, namely the right to a fair trial (guaranteed by article 6 of the ECHR). Contempt laws should only interfere with freedom of expression to the extent that is necessary to protect the right to a fair trial. Our provisional proposals therefore aim to safeguard these two vital (albeit often competing) rights.

Article 10: freedom of expression

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 6: right to a fair trial

In the determination of civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The traditional framework: civil and criminal contempt

Contempt has traditionally been divided into categories of civil and criminal contempt. Civil contempt refers to a breach of a court order by a party in litigation, such as breaching a freezing order made to prevent a person taking assets out of the country. Criminal contempt is concerned with conduct which seriously interferes with the administration of justice, such as interfering with witnesses or disrupting proceedings by shouting in court.

The categorisation of contempt as either civil or criminal causes confusion. Whether a contempt is civil or criminal does not depend on whether it is committed in a civil or criminal court, or in civil or criminal proceedings. For example, a person may commit criminal contempt by disrupting proceedings that take place in a civil court. Neither category of contempt is a criminal offence, though both may result in committal to prison.

More problematically, there has been inconsistency in the case law regarding what has to be proven in order to establish liability for contempt, particularly as to what a person needs to have known or intended.

In light of these problems, the current framework for liability for contempt is not fit for purpose. The distinction between civil and criminal contempt is unnecessary and unhelpful. We provisionally propose removing the distinction (see **Consultation Question 1**) and replacing it with a simplified and coherent contempt framework.

A new framework for liability for contempt

Under our proposed new framework for liability there would be three distinct forms of contempt.

- General contempt
- Contempt by breach of order or undertaking
- Contempt by publication when proceedings are active

These proposed forms of contempt are not designed to alter fundamentally the foundations of contempt liability (and nor do they). Rather, the purpose of the framework is twofold. First it is to clarify and codify the elements required to prove contempt.

Secondly, it is to ensure that an appropriate balance is struck between the protection of fair trial rights on the one hand and rights to freedom of expression on the other. What those various rights and protections require of contempt will be different depending on the context and nature of the conduct: the considerations that relate to publication of court proceedings are clearly different from those that relate to assault in court or breach of a court order.

In Chapters 3, 4 and 5 of the consultation paper we consider these three forms of contempt in detail and ask a range of consultation questions about liability for each of them. The three forms are summarised below.

The proposed forms of contempt of court

General contempt

There are two categories of general contempt

General contempt by publication

Proved by

Conduct: substantial risk of non-trivial interference with administration of justice or actual non-trivial interference

+

Fault: intention to interfere with administration of justice

General contempt by conduct other than publication

Proved by

Conduct: substantial risk of non-trivial interference with administration of justice or actual non-trivial interference

+

Fault: intention to interfere with administration of justice, **or potentially** (we seek views on this option) recklessness as to interference

Contempt by breach of court orders or undertakings

Proved by

Conduct: breach of order or undertaking (where order or undertaking made clear that breach would constitute contempt)

+

Fault: breach was deliberate, **and** person knew order existed and that they were bound by it, **and** person knew the facts that made the conduct unlawful

Contempt by publication while proceedings are active

Proved by

Conduct: publication creates substantial risk that the course of justice in active proceedings will be seriously impeded or prejudiced

+

Fault: (publisher) recklessness as to whether proceedings were active, **or** (distributor) recklessness as to whether distributed material created a substantial risk that course of justice in proceedings would be seriously impeded or prejudiced

1. General contempt

First, we provisionally propose a general form of contempt. This form of contempt would encompass any conduct that interfered with the administration of justice to a non-trivial degree, or that created a substantial risk of a non-trivial interference with the administration of justice. This conduct may be "in the face of the court", such as threatening a lawyer during proceedings, or it may be more remote from the court room, such as publishing confidential trial material online. Under our provisionally proposed framework, liability for general contempt would have two strands, depending on whether the conduct was by publication or not. The fault element for each could differ, reflecting the need to avoid a disproportionate interference in freedom of expression.

1. General contempt by publication. This would be committed where:
    a. a person's conduct creates a substantial risk of a non-trivial interference with the administration of justice or an actual non-trivial interference; and
    b. the person intends to interfere with the administration of justice. Recklessness would not be sufficient to establish liability.
2. General contempt by conduct other than publication. This would be committed where:
    a. a person's conduct creates a substantial risk of a non-trivial interference with the administration of justice or an actual non-trivial interference; and
    b. the person intends to interfere with the administration of justice. We also ask consultees whether, for this form of general contempt, it should be sufficient to prove recklessness as to the interference.

"Recklessness" here has the same meaning as in criminal law generally, namely that a person must be shown to have been aware of the risk of interfering in the administration of justice, and it must be shown that it was unreasonable to take that risk.

General contempt is discussed in detail in Chapter 3 of the consultation paper, where we ask a variety of consultation questions on the conduct and fault elements (see **Consultation Questions 3-17**).

2. Contempt by breach of order or undertaking

Secondly, we provisionally propose a form of contempt committed by breach of a court order or undertaking. This is a broader form of contempt than civil contempt (though it is very similar in form) in that it would bring breaches of any court order within its scope (not just those made for the benefit of a party in litigation). This is important in unifying and clarifying the approach to be taken where court orders are breached.

This form of contempt would be committed where:

a. a person breaches an order or undertaking (where the order or undertaking made clear that breach would constitute contempt);
b. the act or omission that constitutes the breach is deliberate;
c. the person has knowledge that the order existed and that they are bound by it; and
d. the person has knowledge of the facts that make the conduct unlawful.

As in the current law, the person in breach would not need to be shown to have known the terms of the order to be liable for contempt. It is enough that the person knows they are bound by an order; they should not then escape liability by having failed to acquaint themselves with its terms.

In Chapter 4, we also provisionally propose that an applicant may seek interim coercive remedies with a view to securing compliance with orders and undertakings that have been breached, but without the need to institute contempt proceedings or for a court to make a formal finding of contempt.

Our provisional proposals in relation to interim coercive remedies are summarised below (at page 15), and are addressed in **Consultation Questions 23-28**.

Contempt by breach of order or undertaking is explored in Chapter 4 of the consultation paper. We ask a range of consultation questions about liability (see **Consultation Questions 18-22**).

3. Contempt by publication when proceedings are active

Finally, we provisionally propose a form of contempt by publication when proceedings are active, reflecting in similar form the law that already exists in the Contempt of Court Act 1981.

Unlike the general form of contempt, the fault element of our provisionally proposed form of contempt by publication when proceedings are active does not require proof that the person intended to interfere with the administration of justice.

This is consistent with the fault element of the existing form of "strict liability" contempt, which we think reflects appropriately the paramount importance of protecting a litigant's right to a fair trial when proceedings are active (most notably the rights of a defendant in a criminal trial) and the corresponding need to prohibit the publication of material that might seriously impede or prejudice those proceedings.

This form of contempt would be committed where:

a. a publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced when court proceedings are active; and
b. the publisher was reckless as to whether proceedings were active (that is, they knew or had reason to suspect proceedings were active). Where the defendant is a distributor, rather than publisher, it will be necessary to prove that they were reckless as to whether the distributed material created a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced.

Contempt by publication when proceedings are active is addressed in Chapter 5, where we also explore the relationship between freedom of expression and the need to protect the administration of justice (see **Consultation Questions 29-40**).

Protection and powers

The law relating to whether a court, tribunal or other body is protected by the law of contempt and has the power to deal with a person for contemptuous conduct is complex.

"Protection" refers to whether the law of contempt applies in a particular court, tribunal or other body (whether or not the court is able to deal with that contempt through some means). If there is no contempt protection then it is not possible to be in contempt of that court, tribunal or other body.

"Powers" refer to the powers of a protected court, tribunal or other body to address conduct that may constitute contempt.

A court, tribunal or other body may have contempt protection but not have the power to deal with contempt itself. In those circumstances a higher court would make a finding as to whether there has been a contempt and, if so, impose a sanction.

In Chapter 6, we examine which courts, tribunals and other bodies are protected by the law of contempt, and what powers they have to address contemptuous conduct. The protection and powers are inconsistent and unclear, and often vary depending on the nature of the conduct and the specific court in which that conduct takes place. We make provisional proposals to achieve clarity, consistency, and coherence across these bodies. Our proposals would mean that all protected courts, tribunals and other bodies would have some powers to deal with contempt, the nature of those powers depending only on whether or not they are a superior court of record.

Protection

Superior courts of record are inherently protected by the law of contempt. Examples of superior courts of record include the High Court, the Court of Appeal, the Upper Tribunal ("UT") and the Employment Appeal Tribunal ("EAT").

For bodies other than superior courts of record, the position is more difficult. A body will have contempt protection if it is an inferior court. The protection extends to those that "exercise the judicial power of the state", which is to say bodies that "discharge judicial functions" and "form part of the judicial system of the country".[1] Examples of inferior courts include the county court, the family court and the magistrates' courts.

[1] *Attorney General v BBC* [1981] AC 303 at 339-340 (Viscount Dilhorne).

Though the courts have stated there is "no sure guide, no unmistakable hall-mark by which a 'court' … may unerringly be identified",[2] there are factors that will indicate whether a body is exercising the judicial power of the state and is thus a "court" for these purposes. Factors which the courts have found to indicate a body exercises the judicial power of the state include the fact the body was established by Parliament, it sits in public, and it can award costs.

In the consultation paper we consider whether this test is appropriate. Our provisional view is that it accurately reflects the way judicial power is exercised in England and Wales today. There are many bodies that are rightly understood as courts and the existing test, with the factors that indicate whether it has been met, provides an appropriate basis on which to make determinations about what bodies are and are not "courts". Therefore, in the consultation paper, we provisionally conclude that the current test for determining whether a body is a "court" for the purposes of contempt should be retained (see **Consultation Question 41**).

However, we are concerned that the current regime lacks certainty and predictability. Unless it has been said in a judgment that a particular body is or is not a court for the purposes of contempt, then litigants, their representatives, and those who sit on those panels cannot be sure whether the court has contempt protection. The test of whether a body exercises the judicial power of the state has been employed on an ad hoc basis, which has left an inconsistent and unclear landscape of contempt protection in tribunals and other bodies.

For example, judgments have suggested that the Employment Tribunals ("ETs") and certain chambers of the First-tier Tribunal ("FtT"), such as the FtT (Tax), exercise the judicial power of the state and thus are protected by the law of contempt. Further, the predecessors of certain chambers, namely the FtT (Property) and the FtT (Health, Education and Social Care), were declared to be "courts" for the purposes of contempt, so these chambers of the FtT may be protected. The status of contempt protection in the other chambers of the FtT rests on the question of whether they exercise the judicial power of the state, which falls to be determined by case law.

Our provisional view is that this uncertainty is unsatisfactory. For this reason, we provisionally propose that the statutory definition of what constitutes a court for the purposes of contempt should be accompanied by a non-exhaustive list of the superior courts, inferior courts, tribunals and other bodies that are considered "courts" for the purposes of contempt, and are thus protected (see **Consultation Question 42**). We also make a provisional proposal as to which bodies should be on this list, which includes expanding contempt protection to all chambers of the FtT (see **Consultation Question 43**).

[2] *Attorney General v BBC* [1981] AC 303 at 351 (Lord Edmund-Davies).

Powers to address apparently contemptuous conduct

The powers of a protected court, tribunal or other body to address conduct that may constitute contempt include:

- The power of a court, tribunal or other body to deal with such conduct itself. That is, the power of a court or tribunal to initiate or entertain proceedings for contempt, whether in relation to contempt of itself or of another judicial body, and whether proceedings must be instituted on application or of a court's own motion, or both.
- The power of a court, tribunal or other body to refer such conduct to be dealt with by another court or tribunal, with a view to that body making a finding about whether there has been a contempt.

We consider these powers here and in Chapter 6. We consider the power to impose a sanction for contempt below in the discussion of the sanctions regime (from page 16) and in Chapter 10.

At common law, the powers of a court, tribunal or other body to address apparently contemptuous conduct depend on whether it is:

- a superior court of record, which means it has the power to deal with any contempt affecting its own proceedings;
- an inferior court that is also a court of record, which means it has the power to deal with contempt committed in its face; or
- an inferior court that is not a court of record, which means it has no power to deal with contempt itself, but may refer the contempt to the High Court.

There are two significant problems with the existing contempt powers of protected inferior courts, tribunals and other bodies.

First, it is often difficult to identify what powers a body has to address apprarently contemptuous conduct. A court, tribunal or other body may have statutory powers in addition to their common law powers. For example, a magistrates' court is not a court of record and thus cannot deal with contempt at common law, but it can (by virtue of its statutory powers under section 12 of the Contempt of Court Act 1981) deal with contempt in its face. Therefore, whether or not an inferior court is also a court of record is not necessarily an accurate indicator of its powers to deal with contempt itself.

Secondly, the powers of inferior courts, tribunals and other bodies do not allow apparently contemptuous conduct to be effectively addressed. We have heard significant concerns from members of the tribunals judiciary that the power of protected tribunals to refer contempts to the High Court is not sufficient to assist them in managing proceedings. We were told that "the power to take immediate action on the basis of contempt of court, or (more pragmatically) to threaten to do so, would be a valuable tool for tribunals faced with a challenging situation during a hearing."

To address the lack of clarity about the powers of protected bodies and concerns that some bodies are ill-equipped to ensure the administration of justice, we propose a simpler and more uniform framework of powers for all protected inferior courts, tribunals and other bodies. This framework would not distinguish between inferior courts that are courts of record and those that are not, thus it would be clearer to all those involved in the proceedings what the powers of the court are.

Our provisional view is that the powers of protected inferior courts, tribunals and other bodies should be broadened to allow them to effectively address apparently contemptuous conduct in their proceedings. This means that all protected bodies will also have some form of power to deal with contempt.

We provisionally propose that any protected body that is not a superior court of record should have the following powers (see **Consultation Question 48**):

- the power to the deal with general contempt by conduct other than publication and contempt by breach of order, but not to deal with general contempt by publication or contempt by publication when proceedings are active; and
- the power to refer any type of contempt to the High Court, or, in the case of the FtT and ETs, to the UT and EAT respectively.

We have provisionally proposed that the powers of protected inferior courts, tribunals and other bodies to deal with contempt themselves should not be extended to include general contempt by publication or contempt by publication when proceedings are active; they should have the power only to refer such contempts to the High Court. This is because these forms of contempt particularly engage the right to freedom of expression under article 10 of the ECHR, and so it is more appropriate for the matter to be adjudicated by the High Court, which has particular expertise in dealing with ECHR rights.

How would these proposals affect Wales?

Our provisional proposals would apply to devolved tribunals in Wales just as they apply to other tribunals. There would be no distinction.

As the structure of the Welsh tribunals system is likely to change following the Law Commission's report on Devolved Tribunals in Wales and the Welsh Government's subsequent White Paper, our consultation questions are directed towards what the position should be under a new system. This means that our consultation questions are based on the existence of a First-tier Tribunal for Wales ("FtTW") and an Appeal Tribunal for Wales.

Our provisional proposals would have a significant impact for the devolved tribunals in Wales. Under the current law, the devolved tribunals have no contempt protection and thus have no powers to deal with apparently contemptuous conduct.

We provisionally propose that all the chambers of the FtTW should have contempt protection (see **Consultation Questions 44 and 45**), and should have the same powers to deal with contempt as all other protected inferior courts, tribunals and other bodies (see **Consultation Question 49**).

Interim coercive remedies

Contempt applications for breaches of orders are an increasingly common and expensive form of satellite litigation. Further, we have been told by stakeholders that it is not uncommon for those who are bound by an order or undertaking to refuse to comply with their obligations until a contempt application is made. The coercion exists only in the threat of sanction; there is no coercive remedy for ongoing non-compliance.

In Chapter 4 (contempt by breach of order or undertaking) we propose a regime that would provide the court with a suite of interim remedies to compel compliance with court orders and undertakings, and require less judicial time and resource than full contempt proceedings.

Under the current law, courts do not have any powers to order remedies to ensure compliance with an order or undertaking, or sanction non-compliance, without first engaging in full contempt proceedings. Sanctions are only available once a contempt has been proven to the criminal standard (beyond reasonable doubt). Outside of the costs regime, there are few if any remedies available to the court short of full contempt proceedings. This means judicial time and resources are drained. Even when a sanction is imposed, such as a fine or committal to prison, these are not effective tools for securing compliance with an order or undertaking because they aim to punish the person who has committed contempt (the contemnor) after the fact.

In the consultation paper we provisionally propose that a new regime of interim coercive remedies should be available to the courts in respect of non-compliance with an order or undertaking (see **Consultation Question 23**). Under our proposed regime, the courts would be able to award an interim remedy for breach of an order or undertaking without needing to make a finding of contempt (although the interim remedies would not preclude a subsequent application for contempt proceedings). This would require the applicant to prove on the balance of probabilities the conduct and fault elements of contempt by breach of order or undertaking (see **Consultation Questions 24 and 25**). This is a lower standard of proof than is required for a contempt application (which requires proof beyond reasonable doubt). We consider this is appropriate on the basis that the interim remedy regime should be less expensive and take less court time than a contempt application.

We provisionally conclude that the standard of proof that normally applies to interim remedies (a "good arguable case") would be too low a threshold bearing in mind the seriousness of the interim remedies. They need to be serious enough to compel compliance where a party has already failed to comply. The context of interim remedies for contempt is therefore different from interim remedies generally.

Interim remedies may include, for example: payment by the defendant of a sum of money into court, either by way of deposit or periodic payment; sequestration of the defendant's assets; or impounding a passport or other documents. In the consultation paper we ask various questions on the proposed reform (see **Consultation Questions 23-28**).

The sanctions regime for contempt of court

After a court makes a finding of contempt, it may impose a sanction. Currently, sanctions for contempt are imprisonment, which may be immediate or suspended, and fines. Sequestration of assets is also an option but, on the occasions this is imposed, it is largely used only where there has been a breach of order.

Powers to impose sanctions for contempt

Under the current law, the powers of the courts to impose a sanction for contempt vary. Section 14 of the Contempt of Court Act 1981 provides for these maximum sanctions:

- A superior court may imprison a contemnor for a maximum of two years or impose an unlimited fine.
- An inferior court may impose a maximum of one month's committal to prison and the maximum fine is £2,500.
- Tribunals and other bodies may not impose sanctions.

For superior courts, we have not heard evidence that the two year limit of committal or the unlimited fine is inappropriate or ineffective. Therefore, we provisionally propose retaining the current maximums (see **Consultation Questions 100 and 111**).

In the consultation paper we also discuss the status of the county court. Under the Contempt of Court Act 1981, the county court is treated as a superior court. We provisionally propose that it should retain that status, and that if a wider range of sanctions is made available for superior courts, those sanctions would also be available to the county court (see **Consultation Question 117**).

In respect of inferior courts, tribunals and other bodies, our provisional view is that there should be consistency in the sanctions regime, and that inferior courts, tribunals and other bodies should all have the same sanctions powers as each other, which we propose should be (see **Consultation Question 118**):

1. the power to order committal for up to one month (immediate or suspended); and
2. the power to impose a fine of up to £2,500.

However, we are interested in whether there should be exceptions to this. Where a more severe sanction may be warranted, we provisionally propose a referral mechanism so those cases can be passed to a superior court (see **Consultation Question 48**).

Sanctions options

Sanctions for contempt of court can be severe, so it is important that the law is clear and consistent. In the consultation paper we consider various aspects of the existing sanctions options: for example, suspension of sentences, early release and discharge, sanctions for contempt by publication, and sanctions for contempt by breach of an Anti-Social Behaviour Injunction ("ASBI"). We ask consultees about how the law should be clarified and codified.

We also ask whether the sanctions options are fair and proportionate, and whether courts have sufficient powers to ensure the appropriateness of any sanctions for vulnerable individuals, including those with mental health conditions, and children and young people.

The main concern raised by stakeholders in relation to sanctions for contempt was that courts do not have a sufficient range of sanctions options. We have heard that a wider range of options should be available, such as community sentences and the power to obtain pre-sentence reports. We make four core provisional proposals which would significantly reform the sanctions regime.

1. Community sentences

Currently, community sentences, which are alternatives to custodial sentences, are not available as a sanction for contempt of court. By contrast, when sentencing a criminal offender, courts may order a community sentence. Community sentences include conditions, for example to carry out unpaid work, adhere to a curfew or residence requirement, undergo mental health or drug and alcohol treatment, or comply with restrictions and monitoring of whereabouts.

There is a lot of support for introducing community sentences for contempt because, first, custodial sentences are a blunt option and, as the courts have few alternatives, can result in very harsh sanctions. Secondly, evidence suggests that community sentences are effective and less costly than custodial sentences. Thirdly, there is no good reason why community sentences should be available for criminal offences but not contempt. Therefore, we provisionally propose that community sentences should be available as a sanction for contempt of court (see **Consultation Question 114**).

2. Pre-sentence reports

Courts do not currently have the power to order a pre-sentence report ("PSR") when sentencing for contempt, though they can do so when sentencing an offender for a criminal offence. A PSR assists the court in determining the most suitable sentence, including whether to order a custodial or community sentence. The absence of PSRs from contempt proceedings is a shortcoming and means that vulnerable individuals, sometimes unrepresented, appear before the court for sentencing without their vulnerabilities being sufficiently taken into account.

Although preparing a PSR requires resources, our provisional view is that courts should have the power to order a PSR when sentencing for contempt as the benefits outweigh the burden (see **Consultation Questions 104 and 105**). This is especially so when the contempt is a breach of an ASBI, as we have heard that the incidence of mental health vulnerabilities is higher amongst those who breach ASBIs than those who commit other forms of contempt.

If courts have powers to obtain PSRs, they may need a power to remand a contemnor in custody while the report is being prepared. In most instances, when a report is being prepared to inform sentencing, the person should be entitled to bail, as in the ordinary criminal context. However, where a custodial sentence is highly likely, the court may need to remand the contemnor in custody. They do not currently have that power. We provisionally propose a power to remand in custody after a finding of contempt, but before sentencing (see **Consultation Question 106**).

3. Guidelines for sentencing for contempt

When offenders are sentenced in criminal cases, courts refer to sentencing guidelines produced by the Sentencing Council for England and Wales. Sentencing guidelines ensure consistency and transparency in the sentencing of offenders.

There are no guidelines for sentencing for contempt, and preparing such guidelines does not fall within the statutory remit of the Sentencing Council. Over time, courts have developed general principles to apply when sentencing for different types of contempts. However, the lack of specific guidelines means that in contempt cases there are inconsistencies in sentencing, and a lack of transparency overall.

We provisionally propose that guidelines should be developed by a judicial working group which draws together a range of expertise on sentencing contempt in different contexts (see **Consultation Question 121**).

4. Criminal records

There is some confusion as to when contempt is entered into the central criminal records database and appears on a criminal record certificate. Information including criminal convictions and cautions is recorded on the Police National Computer ("PNC") and is used by the Disclosure and Barring Service ("DBS") to generate criminal record certificates. Sometimes contempt is recorded on the PNC and does appear on a DBS certificate. This may happen where, for example, contempt accompanies a recordable criminal offence.

However, it seems that the practice of recording contempt is not consistent or well understood, with the result that it sometimes, but not always, appears on a certificate.

Contempt is not a criminal offence and does not result in a conviction. It is clear from the legislation that contempt should not be entered into the PNC and should not appear on a criminal record. Criminal records have serious impacts on people's lives and we provisionally conclude that it should be made clear that contempt should never be entered into the PNC and should never appear on a criminal record certificate (see **Consultation Questions 122 and 123**).

Recording and publishing of sanctions data

Contempt findings and sanctions are not recorded systematically in the justice system. We do not know, for example, against how many people a finding of contempt has been made, what sanctions have been imposed (and when no sanction has been imposed), in what courts, and in what circumstances. This represents a significant data gap.

There are many reasons why it would be valuable to have such data, including to enhance consistency and fairness in sanctions and to ensure transparency surrounding the number of committals for contempt and length of sentences. We provisionally propose that there should be annual publication of data in relation to committals for contempt (see **Consultation Question 124**).

Proposed sanctions options

Inferior Courts

Including the Coroners' Courts and Magistrates' Courts

We provisionally propose that tribunals and bodies that exercise the judicial power of the state should have the same sanctions powers as inferior courts

Sanctions options

- Committal (immediate or suspended) for a maximum of one month
- Fine to a maximum of £2,500

Superior Courts

Including the Crown Court, High Court, Court of Appeal and Supreme Court

We provisionally propose that the County Court should have the same sanctions powers as superior courts

Sanctions options

- Pre-sentence reports
- Committal (immediate or suspended) for a maximum of two years
- Unlimited fine
- Sequestration of assets
- Community sentences

Where an inferior court encounters a matter that it considers may require sanctions available only to the superior courts then it may refer the matter upwards so that it is decided by a superior court

The role and powers of the Attorney General

The Attorney General ("AG") is a government minister and the principal legal adviser to the government. The AG also serves a constitutional function in bringing proceedings for contempt to safeguard the public interest in the administration of justice. The AG plays a significant role in relation to contempt by publication, for example by cautioning publishers to avoid reporting where it may prejudice an ongoing case[3] and by consenting to bringing such proceedings.[4]

As a member of the government and a parliamentarian, the AG has an inherently political character. This has resulted in criticisms that the AG's role in relation to the law of contempt may involve a conflict of interest on the basis that the AG is not sufficiently independent. For example, where a publication that may amount to contempt is made by a politician or a partisan media organisation, decisions by the AG on whether to bring contempt proceedings may be perceived to be politically motivated.

In the consultation paper we consider these concerns, though we provisionally conclude that the AG should retain the role, particularly because there are other ways to mitigate the concerns (see **Consultation Question 50**).

[3] For example, a media advisory notice cautioning against the publishing of material that might jeopardise a fair trial in relation to the disappearance of Sarah Everard (12 March 2021): **www.gov.uk/government/news/media-advisory-notice-disappearance-of-sarah-everard**

[4] Under the Contempt of Court Act 1981, proceedings for strict liability contempt must have the consent of the AG unless the court itself institutes proceedings.

Consent requirement

Currently, the AG must always give consent to proceedings for contempt by publication when proceedings are active. It is an important requirement in preventing large numbers of inappropriate contempt applications being brought. However, we ask consultees whether, and how, it could be modified (see **Consultation Questions 51 and 52**). For example, a court could grant permission where the AG refuses to give consent, or, where the potential defendant is a politician, the consent requirement could be entirely removed and replaced with a judicial permission requirement.

We also make provisional proposals as to whether decisions of the AG not to bring, or consent to, contempt proceedings should be judicially reviewable (see **Consultation Questions 53 and 54**). Currently, such decisions are immune from judicial review. This proposed reform would mean that, in the event of illegality, irrationality or procedural unfairness, courts could review and set aside decisions of the AG. This would mean greater accountability and public confidence in their decision-making.

Enhancing consistency, predictability and transparency in decision-making

Different AGs have taken different approaches to their contempt role. For example, some AGs are very active in exercising their powers to bring proceedings for contempt. Others do not focus so much on contempt cases. This variation results in inconsistencies when proceedings are brought in the public interest. Uniformity is unrealistic, but some consistency and predictability in the exercise of discretion between different individuals is desirable so that people may know whether their conduct will result in proceedings.

In 2022, the Law Officers published a Contempt Public Interest Framework which sets out the factors the AG takes into account when making contempt decisions. However, it is still not clear how a decision is made against the criteria. In the consultation paper we consider how transparency might best be achieved.

To improve transparency, consistency and predictability, we provisionally propose that the AG should publish a statement of practice setting out their decision-making processes (see **Consultation Question 55**). We also provisionally propose that the AG should publish data relating to their contempt function because currently no such data is published (see **Consultation Questions 63-64**). This could include publishing the number of contempt referrals or requests to give consent received by the AG, the decisions made by the AG, or the outcomes of any proceedings.

Clarifying powers to obtain and share information for decision-making

The AG requires information before they can bring proceedings for contempt. Some information is essential, such as the identity and address of the defendant as well as proof of the alleged conduct (for example, a screenshot of a social media post which declares that a defendant in active criminal proceedings is guilty). Other information may simply be helpful in determining whether it would be in the public interest to bring proceedings. This may include whether the defendant has been found in contempt previously or has any criminal convictions.

The Attorney General's Office ("AGO") plays an important role in obtaining information to assist the AG. However, it can sometimes be difficult for the AGO to obtain information.

For example, online publications may be made anonymously, so it is not always easy for the AGO to determine against whom the AG should bring proceedings. Without access to information on past criminal convictions or contempts, the AG may not be able to determine whether it would be in the interests of justice to bring proceedings.

The AG exercises an important constitutional function in safeguarding the public interest in the administration of justice, so it is important that the AGO can obtain the information the AG needs to discharge these duties. It is also important that the legal framework governing the powers of the AGO to obtain information is sufficiently clear and accessible to the public.

In the consultation paper, we consider the legal framework governing the sharing and obtaining of personal data. We ask consultees about the powers of the AGO to obtain publicly available information as well as communications data from social media platforms. We also consider the powers of the police to share with the AGO information that they already hold. Under the legal framework, the police may share essential information, but not information that is merely helpful. It also provides a power for the police to obtain information on behalf of the AGO, but only under very limited circumstances. We conclude that the law is satisfactory but needs to be clarified in statute (see **Consultation Questions 57-59**).

Procedure in contempt proceedings

The procedure for contempt proceedings should be sufficiently simple and prescriptive to ensure it can be utilised where necessary, while also adequately protecting a defendant's right to a fair trial under article 6 of the ECHR. To that end, we make provisional proposals for a clear, comprehensive and, where possible, uniform procedure that enables courts, tribunals and other bodies to deal fairly, efficiently, effectively, and consistently with conduct that may constitute contempt of court.

Harmonisation and clarification

The existing procedures followed in contempt proceedings are varied and often lack specificity and clarity. We heard from stakeholders that this can make it difficult for judges to understand when the contempt procedure should be invoked and what it should look like, leading to reluctance among judges to utilise their contempt powers. In the consultation paper, we address problems relating to:

- Varying and inconsistent procedures across courts, jurisdictions, and types of contempt. For example, in the criminal courts there is one procedure for contempt involving obstruction or disruption and another for contempt involving breach of an order. By contrast, in the civil and family courts there is only one procedure that applies in most contempt proceedings.
- Inconsistent and unclear language in contempt proceedings. For example, the alleged contemnor is referred to as the "respondent" in the magistrates' courts, Crown Court, and Court of Appeal (Criminal Division), but as the "defendant" in the county court, High Court, Court of Appeal (Civil Division), and Court of Protection.
- A lack of detail, specificity and completeness in the procedure rules and accompanying guidance for contempt proceedings. For example, the Civil Procedure Rules are silent on how the courts should address certain types of contempt, such as where the court is faced with a contempt by breach of an embargo on a draft judgment.
- The imprecision of the concept of a summary procedure. There is no question that courts have a common law power to deal with contempt "summarily". However, though often used to refer to dealing with a matter immediately, there is no clear or consistent statement of law about what it means to deal with a matter summarily in contempt proceedings. Neither of the terms "summary" or "summarily" nor anything similar is used to describe procedure in any of the rules.

To overcome these issues, harmonisation and clarification of the procedures to be followed in contempt proceedings is necessary. We provisionally propose that there should be a uniform, general procedure in contempt proceedings in all courts, tribunals and other bodies (see **Consultation Question 65**).

We are aware that in certain circumstances there will need to be some variation in this procedure based on the facilities and needs of particular courts, tribunals and other bodies. For example, alternative procedures may be warranted to preserve the necessarily informal nature of proceedings in tribunals.

Fair trial protections

Contempt is considered a "criminal offence" for the purposes of article 6 of the ECHR. This means that all contempt proceedings must comply with all the requirements of the right to a fair trial. However, in many ways the existing contempt procedures do not go far enough to secure a defendant's fair trial rights.

These rights are particularly at risk in the initial procedure for dealing with contempt by obstruction or disruption in the criminal courts under rule 48.5 of the Criminal Procedure Rules. This procedure allows the court to address the conduct "there and then", and for the same judge who witnesses the contempt to hear the contempt proceedings. This risks interference with the person's right to a fair hearing by an independent and impartial tribunal under article 6(1). This is because "the court is the victim; the court is the witness; the court is the prosecutor, and the court is the judge."[5]

In the consultation paper, we consider various issues relating to the compliance of contempt procedures with article 6, and make provisional proposals for a procedure that strengthens fair trial protections. In our provisional view, it is almost always necessary for the court to defer proceedings to ensure the defendant's article 6 rights are upheld.

Therefore, we provisionally propose that, where a court, tribunal or other body institutes contempt proceedings, in all cases the hearing should be set for a time and date that allows the defendant a reasonable opportunity to obtain legal advice and prepare their defence (see **Consultation Question 75**).

This would be a change from the current law; whereas the court may currently choose between instituting contempt proceedings "there and then" or postponing the enquiry, under our provisional proposal the enquiry should almost always be postponed. It is within the court's discretion to determine what constitutes a "reasonable opportunity" for the defendant to obtain legal advice and prepare their defence. For example, the court may decide to hear the matter later that same day where the defendant has immediate access to legal advice, or it may hear the matter the following week if they do not.

To avoid the risk of partiality, we provisionally propose that, where the allegation is contested by the defendant, the court, tribunal or other body that conducts the hearing should not comprise the same members who observed the conduct in question. In these circumstances, the matter should be heard by another member of the court, tribunal or other body in accordance with a prescribed procedure (see **Consultation Question 86**).

[5] *R v Powell* (1994) 98 Cr App R 224 at 226.

Publication of contempt judgments

The Civil Procedure Rules require that where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings, the judgment must be published on the website of the judiciary of England and Wales. Similarly, in family proceedings and proceedings in the Court of Protection, rules require that contempt judgments must be published on the judiciary website, and not only where they result in committal. There is no corresponding provision in the Criminal Procedure Rules.

The absence of published contempt judgments from criminal courts means there is a lack of transparency. We are of the provisional view that where there is a committal then there is a strong case for publication, even if the judgment is short (see **Consultation Question 87**).

Representation

As a defendant's liberty is at stake in contempt proceedings, fair trial rights may require that they receive legal assistance. In addition to the legal aid and costs issues discussed below, in the consultation paper we also consider: applications to discharge a committal order so a defendant can be released from prison; conditional fee agreements; the capping of costs; and the practicalities of accessing legally aided advice and representation.

Means testing for legal aid

When a defendant receives legal aid in contempt proceedings, they receive "criminal legal aid" (as opposed to "civil legal aid"), regardless of the court in which proceedings occur and regardless of whether proceedings are for civil contempt or criminal contempt. However, criminal legal aid is means tested if proceedings are in the criminal courts, but not if proceedings are in a civil venue.

This means that whether a defendant in the criminal courts receives legal aid will depend on their financial resources but, in civil courts, a defendant will receive legal aid regardless of their financial resources. For example, a potentially vulnerable defendant on a low income who has breached an ASBI and is facing a committal order in the county court will receive legal aid, and a wealthy person who lied on a witness statement as part of an insurance claim, with the insurer commencing a contempt application in the High Court and legal costs running to tens of thousands of pounds, will also receive legal aid.

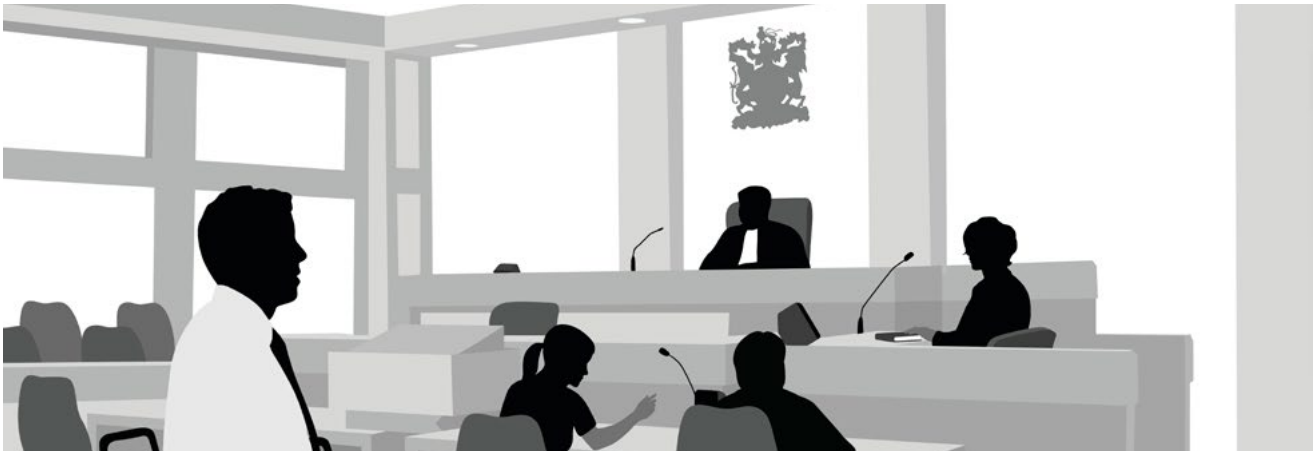
There are arguments both for and against having means testing in all contempt proceedings. On the one hand, there is an appeal in an approach that is not dependent on whether the venue is a criminal or civil court, and means testing would reduce legal aid exposure to bills in the High Court scenario above. On the other hand, introducing means testing for legal aid in all contempt proceedings may have adverse consequences for defendants who fail the means test but are faced with a contempt application made by a well-resourced applicant.

Our provisional view is that means testing for legal aid should apply in all contempt proceedings, and we seek consultees' views on whether there are any categories of cases that should be carved out as exceptions where means testing should not apply (see **Consultation Question 95**).

Costs: the relevance of the defendant's means

The courts have made clear that costs in contempt cases "are not in some special category"[6] and general principles apply. This means that costs against defendants in criminal courts are limited to the amount that the defendant has the "means and ability to pay",[7] but there is no requirement that civil courts take into account the defendant's means when making costs orders. This inconsistency may be seen as undesirable, particularly where the orders for costs in civil courts may be made against an impecunious defendant for the breach of an ASBI, or against a protester for the breach of an injunction whilst exercising their rights to freedom of expression and freedom of association.

We seek consultees' views on whether a civil court in contempt proceedings should be required to consider the defendant's financial resources when making decisions about costs awards in contempt proceedings (see **Consultation Question 98**).



6 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [68].

7 Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 consolidated with amendment no 1 [2016] EWCA Crim 98, para 3.4. The Practice Direction also applies to proceedings in the High Court for contempt in the face of the court: para 1.1.3 and Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 14(g).

Appeals

The framework for appeals from an order or decision made in contempt proceedings is complex.

In particular, the existing routes of appeal are difficult for court users to understand and not always well understood by those who advise them (including non-legal professionals, such as advisers from Citizens Advice). This is because there are numerous different appeal routes that vary depending on the precise context. For example, there is considerable variation in ways that contempt decisions of magistrates' courts can be appealed. In the senior courts, an appeal from an order or decision of the High Court will lie to the Court of Appeal (Civil Division) if the contempt proceedings were heard by a single judge, but will lie direct to the Supreme Court if the contempt proceedings were heard by a Divisional Court.

In Chapter 11 of the consultation paper we consider two alternative options for reform of the routes of appeal in contempt cases, with a view to making the structure clearer and more coherent.

1. The first option is a simple, vertical structure, with all contempt appeals following the same route. In this option:

    - Appeals from first instance contempt decisions in all lower courts (including magistrates' courts in all circumstances), tribunals (including tribunals that are superior courts of record), other bodies and the Crown Court would lie to the High Court. Appeals from High Court appeal decisions would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.
    - Appeals from first instance decisions of the High Court (including the Divisional Court) would lie to the Court of Appeal (Civil Division), and from there would lie to the Supreme Court.

2. The second option would see contempt appeals follow the same routes of appeal that ordinarily apply in criminal and civil courts. For example, appeals from first instance decisions of lower criminal courts (specifically, magistrates' courts exercising their criminal jurisdiction) would lie to the Crown Court by way of rehearing, and from there to the Court of Appeal (Criminal Division), and then to the Supreme Court.

We invite consultees' views on which of these options (or variations on them) is preferable at **Consultation Question 129**.

Impacts

Recommendations for law reform must be informed by economic and equality impacts that the changes would have. For example, it is important to consider what transitional costs (associated with moving to a new scheme) as well as ongoing costs (associated with the operation of any new scheme once it is implemented) may be incurred. In relation to equality impacts, we consider how our proposals for law reform might affect groups or individuals with characteristics protected under the Equality Act 2010 such as race, age or disability.

Throughout the consultation paper, and in particular in Chapter 12, we consider the economic and equality impacts of our provisional proposals. In addition to providing questions relating to specific issues, such as the impact of sanctions on those who lack capacity, or children and young people (see **Consultation Questions 105, 110 and 115**), we ask for evidence on impacts in relation to any combination of proposals, or the overall effect of our proposals (see **Consultation Questions 136 and 137**).