Law Commission
Reforming the law

Contempt of Court

Consultation Paper

Consultation Paper 262

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9 July 2024

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Fraser, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Professor Alison Young. The Chief Executives are Joanna Otterburn and Stephanie Hack.

Topic of this consultation: We are conducting a review of the law on contempt of court and considering the need for reform to improve its effectiveness, consistency, and coherence. Our objective is to produce a law of contempt that is easier to understand, fairer, and that better protects the administration of justice.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 9 July 2024 to 8 November 2024.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/contempt-of-court. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:
By email to contempt-of-court@lawcommission.gov.uk
OR
By post to Contempt of Court Team, Law Commission, 1st Floor, Tower, 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 by email.

Availability of materials: The consultation paper is available on our website at https://lawcom.gov.uk/project/contempt-of-court-2/.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email contempt-of-court@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission: We aim to be transparent in our decision-making, and to explain the basis on which we have reached conclusions. We may publish or

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We list who responded to our consultations in our reports. If your response is anonymous we will not include your name in the list unless you have given us permission to do so. If you provide a confidential response your name will appear in that list.

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Glossary

This is not a comprehensive glossary of terms relating to contempt of court, nor is it a glossary of legal terms. It includes only terms related to contempt of court that have been used throughout this consultation paper and defines them as they are commonly understood in the contempt context.

Anti-Social Behaviour Injunction

An anti-social behaviour injunction is a type of court order provided for in the Anti-social Behaviour, Crime and Policing Act 2014 that seeks to prevent anti-social behaviour by restraining a party from doing a specified act or compelling a party to do a specified act. See also “Court order” and “Injunction”.

Applicant

An applicant is a person who has made an application to bring contempt proceedings.

Attorney General

The Attorney General is a government minister who acts as the principal legal adviser to the government. See also “Law Officers”.

Attorney General’s Office

The Attorney General’s Office is the government office that supports the Law Officers in the exercise of their duties. See also “Law Officers”, “Attorney General” and “Solicitor General”.

Autrefois convict

This is the principle in criminal law that a person cannot be tried for an offence of which they have already been convicted.

Breach

A breach is a failure to comply with an obligation, such as a term of a binding court order or undertaking.

Burden of proof

The burden of proof is the onus that is imposed on a party to establish (ie prove) a fact or facts. The party who bears the burden of proof will be required to prove those facts to a particular degree or “standard”. See also “Standard of proof”.

Civil contempt

Civil contempt is a form of contempt that principally involves disobedience of a court order and functions to enforce compliance. Civil contempt is explained further in Chapter 2.

Civil Procedure Rules

The Civil Procedure Rules are rules of court governing the practice and procedure in the Court of Appeal (Civil Division), the High Court and the County Court.

Committal

Committal refers to a sentence of imprisonment, either immediate or suspended.

Common law

The common law is a body of law formed and developed by judges through binding precedential decisions of the courts.

Consultee

Where we refer to consultees, we mean people who respond to a Law Commission consultation. In this consultation paper we usually use this term to refer to people who will respond to this consultation. Where we use it to describe people who responded to previous Law Commission consultations, that will be clear in the text. See also “Stakeholder”.

Contemnor

A contemnor is a person against whom a court has made a finding of contempt. See also “Defendant”.

Contempt proceedings

These are proceedings for contempt that are initiated either by a court or by application. Contempt proceedings are not a prosecution for a criminal offence.

Contra mundum order

A contra mundum order is a court order that binds “the world”, rather than just specifically named parties. See also “Court order”.

Court order

A court order is an enforceable direction of a court either to restrain a person from doing a specified act or to compel a person to do a specified act.

Court of Protection Rules

The Court of Protection Rules are rules about court procedure in Court of Protection proceedings.

Criminal contempt

Criminal contempt is a form of contempt that captures conduct that threatens the proper administration of justice and warrants punishment, such as assaulting a court officer or interfering with a witness. Criminal contempt is not a criminal offence. Criminal contempt is explained further in Chapter 2.

Criminal Practice Directions

The Criminal Practice Directions are issued by the Lady Chief Justice or Lord Chief Justice and act as a supplement to the Criminal Procedure Rules and govern the practice and procedure in all criminal courts.

Criminal Procedure Rules

The Criminal Procedure Rules, alongside the Criminal Practice Directions, are rules about court procedure in criminal proceedings and extradition proceedings. They apply in the magistrates' courts, the Crown Court, the High Court, and the Court of Appeal (Criminal Division).

Criminal record certificate

A criminal record certificate contains information about a person's criminal history such as criminal convictions, cautions, reprimands or warnings. It is generated by the Disclosure and Barring Service using information recorded on the Police National Computer database. See also "Police National Computer".

Crown Court Compendium

The Crown Court Compendium provides guidance to judges from the Judicial College on directing the jury and sentencing in Crown Court trials. It also contains some suggestions in relation to practical matters including jury management.

Crown Prosecution Service

The Crown Prosecution Service, often referred to as the CPS, is the independent body responsible for prosecuting criminal offences in England and Wales, after an investigation by the police or another investigative body.

Defendant

A defendant is a person against whom proceedings have been brought.

Devolved tribunals in Wales

A devolved tribunal in Wales is a tribunal whose functions are only exercisable in relation to Wales and do not relate to reserved matters (that is, matters which must be decided by the UK Parliament).

European Convention on Human Rights

The European Convention on Human Rights is an international treaty between the states of the Council of Europe which protects the human rights of people in these countries.

European Court of Human Rights

The European Court of Human Rights is an international court which rules on individual or state applications regarding possible violations of the rights set out in the European Convention on Human Rights.

Family Procedure Rules

The Family Procedure Rules are rules about court procedure in family proceedings in the High Court and family court.

Finding of contempt

At the end of contempt proceedings, the court makes a finding about whether the defendant has or has not committed contempt. A finding that a person has committed contempt may sometimes be expressed by saying that the person has "committed a contempt", been "found in contempt" or been "held in contempt". The phrase "guilty of contempt" is sometimes used, but we do not use that phrase in this consultation paper because "guilt" is associated with criminal proceedings.

Inherent jurisdiction

Inherent jurisdiction refers to powers of a court that arise from the court itself (rather than being conferred upon it by a particular statute) upon which a court can draw as necessary whenever it is just or equitable to do so in order to fulfil its role as a court of law, particularly to ensure the administration of justice.

Injunction

An injunction is a type of court order that is awarded as a remedy in civil proceedings either to restrain a party from doing a specified act or to compel a party to do a specified act. See also "Court order".

Judicial College

The Judicial College provides training for judges and produces the Crown Court Compendium.

Judicial review

Judicial review refers to a type of court proceeding in which a court reviews the lawfulness of a decision made by, or action of, a public body.

Jurisdiction

Jurisdiction refers to the extent of a court's legal authority or power to hear a case. It also refers to the geographical area in which a legal system operates and its laws are enforced.

Law Commission

The Law Commission is a statutory independent body that is required to keep the law in England and Wales under review and recommend reform where it is needed.

Law Officers

This term is used to refer collectively to the Attorney General and Solicitor General, who are the principal legal advisers to the government. See also "Attorney General" and "Solicitor General".

Legal aid

Legal aid is the provision of state funding for the costs of legal advice, assistance and representation. In England and Wales, legal aid is provided by the Legal Aid Agency.

Media advisory notice

A media advisory notice is a statement issued by the Attorney General's Office on behalf of the Law Officers that reminds publishers to keep contempt laws in mind when reporting on active proceedings. It warns publishers that if prejudicial information is published, the Law Officers may bring contempt proceedings.

Official Solicitor

The Official Solicitor is an individual appointed by the Lord Chancellor to ensure that those who are vulnerable due to their lack of mental capacity or young age are sufficiently protected in the justice system.

Parole Board

The Parole Board is an independent body that carries out risk assessments on prisoners to determine whether they can be released safely into the community.

Police National Computer

The Police National Computer is a computer system used by the police and other UK law enforcement organisations to record information relating to criminal offences, convictions and cautions.

Pre-sentence report

Before a court sentences a person, a pre-sentence report may be prepared by a probation officer to assist the court to determine the most appropriate sentence. A pre-sentence report provides an assessment of the nature and causes of the person's behaviour, and any risk they may pose to others.

Prosecution

A prosecution refers to the institution and conducting of legal proceedings, usually on behalf of the state, against the defendant in relation to a criminal charge. Contempt proceedings are not prosecutions.

Remedy

A remedy is awarded by a court to a party as a means of preventing, redressing or compensating a violation of a right.

Sanction

After making a finding of contempt, a court may impose a sanction. Sanctions are used to enforce the law, and possible sanctions for contempt include imprisonment (committal) or a fine.

Sentence

See “Sanction”.

Sentencing Council

The Sentencing Council of England and Wales is the body responsible for developing sentencing guidelines in England and Wales. See also “Sentencing guidelines”.

Sentencing guidelines

Guidelines are prepared by the Sentencing Council of England and Wales. They set out different levels of sentence based on the harm caused to the victim and the blameworthiness of the offender, as well as which factors courts should take into account when sentencing. Sentencing guidelines help to ensure that there is consistency in sentencing across courts in England and Wales. See also “Sentencing Council”.

Solicitor General

The Solicitor General is a government minister who supports the Attorney General across the range of their responsibilities. See also “Law Officers”.

Stakeholder

The Law Commission uses this as an umbrella term to refer to any person or entity affected by, or simply interested in, a project. This includes, for example, individuals, charities, campaigning groups, think-tanks, academics, lawyers, and professional associations. It also includes bodies and individuals that are associated with the state, such as government departments, independent statutory bodies or appointees, police, prosecutors, parliamentarians, as well as courts, tribunals and the judiciary. See also “Consultee”.

Standard of proof

The standard of proof is the degree to which a party must prove an allegation in order for the court to find in their favour on that issue. In civil proceedings, the standard of proof is normally “on the balance of probabilities” (ie more likely than not). In criminal proceedings, the prosecution must prove their case “beyond reasonable doubt”. Contempt applications must be proven to the criminal standard of proof, ie beyond reasonable doubt, so the court must be sure that the elements of contempt have been made out. See also “Burden of proof”.

Undertaking

An undertaking is a binding commitment given by a party to the court in the course of legal proceedings.

Chapter 1: Introduction

1.1 "Contempt of court" refers to a wide variety of conduct that may impede or interfere with the administration of justice. It may be something that happens in a court; taking photographs in a courtroom,[1] making an audio recording of proceedings, assaulting court staff or witnesses, and refusing to answer a court's questions if called as a witness are all examples. Contempt may also be committed by conduct that occurs elsewhere. Publishing material in contravention of reporting restrictions will be a contempt, as will any deliberate failure to comply with a court order. It will be a contempt to publish material that risks prejudicing a trial by, in particular, disclosing things that should not be known by the jury.

1.2 Contempt of court is not a criminal offence, but the sanctions that may follow include imprisonment for up to two years ("committal") and unlimited fines.

1.3 The law of contempt has developed over centuries, but has not done so systematically. As a result, the current contempt regime is often disordered and unclear. Problems arise from the confusing distinction between civil and criminal contempt of court, the multiple ways in which contempt can be committed, and the overlap between the law of contempt and criminal offences relating to the administration of justice, such as perverting the course of justice. There are also growing concerns about the impact of social media and technological advances including artificial intelligence ("AI") on the administration of justice; posts on social media may constitute contempt, especially when publishing material that could prejudice a criminal trial.[2]

1.4 There is no comprehensive data available in relation to contempt proceedings, but there is no doubt that contempt laws are used regularly throughout the courts in England and Wales and so these problems arise at scale. A snapshot of the available data on committal illustrates the extent to which contempt is a part of the legal landscape.

1.5 Ministry of Justice data on prison receptions records that over 100 people were imprisoned for contempt from 2020-2022.[3] Academic researchers have identified more than 250 cases where the breach of an Anti-Social Behaviour Injunction ("ASBI") or similar injunction resulted in an order of committal. Sentences ranged from 0.5 days to 730 days, with a mean average of 95 days, a median of 60 days, and around one

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1 This conduct may also amount to a criminal offence under the Criminal Justice Act 1925, s 41.

2 See Attorney General's Office ("AGO"), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019).

3 Ministry of Justice and HM Prison and Probation Service, *Offender Management Statistics quarterly: October to December 2022* (27 April 2023), Prison Receptions: 2022, Non-criminal admissions (A2-12).

third of cases had sentences of over 100 days. Around half of those sentences are suspended and in half, imprisonment was immediate.[4]

1.6 Some further indications of scale can be gleaned from published judgments. Where "a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings" by the Court of Appeal (Civil Division), High Court or county court the Civil Procedure Rules require the judgment to be published on the website of the judiciary of England and Wales.[5] The Family Procedure Rules and Court of Protection Rules likewise require that judgments in all contempt proceedings be transcribed and published, though they do not limit that requirement to cases where there has been an order of committal.[6] A search of the Judiciary website shows 427 published judgments during the four years from 1 January 2020 to 31 December 2023, comprised of 98 in 2020, 96 in 2021, 145 in 2022, and 88 in 2023.[7] This represents the immediate or suspended committal to prison of several hundred people for conduct that does not constitute a criminal offence.[8] However, because there are no procedural rules that require publication of judgments in contempt proceedings in the Crown Court or a magistrates' court, even where committal is ordered, it is highly likely that there are many more people who have been imprisoned for contempt, and many more again in both the civil and criminal courts who have been subject to contempt proceedings and have received non-custodial penalties.[9]

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4 R Epstein, C Hunter and J Meers, "Imprisonment for breach of injunctions: what is happening in the civil courts?" (2024) *Legal Studies* (First View, 2 July 2024). We are grateful to the authors for sharing with us in advance of publication the article and their data.

5 CPR, r 81.8(8).

6 FamPR, r 37.8(13); CoPPR, r 21.8(13). Where hearings are held in private then the order must be published: FamPR, r 37.8(6); CoPPR, r 21.8(6).

7 Courts and Tribunals Judiciary, Judgments. In Chapter 8 we discuss the publication of judgments and note stakeholder comments that suggest the published judgments do not represent all the committals that have occurred in the proceedings and courts to which those rules apply. We do not disaggregate the data any further because when judgments are published on the judiciary website the "subject element" tags vary; for example, some may be tagged as "family" and others "family court", or some may be tagged with more than one court.

8 The figures should not be interpreted as meaning that precisely 427 people were committed to prison in that period. Some defendants have been committed to prison more than once: eg *Chief Constable of Lancashire Constabulary v Foxcroft* (Blackpool Magistrates and Civil Court, Woosnam DJ, Case no J00PR324, 28 July 2023); *Chief Constable of Lancashire Constabulary v Foxcroft* (County Court at Preston, Woosnam DJ, Case no J00PR324, 7 November 2023). Some judgments involve the committal of multiple defendants: eg *North Warwickshire Borough Council v Shatford* [2022] EWHC 2569 (KB) and *North Warwickshire Borough Council v Litten* [2022] EWHC 2777 (KB).

9 It seems very few judgments of magistrates' courts and the Crown Court have been published. There appear to be two: *Committal for Contempt of Court: Wood* (Bristol Magistrates' Court, Wales DJ, Case H00BS007, 16 March 2022); *Committal for Contempt of Court: Singh* (Snaresbrook Crown Court, HHJ Lees, Case S20210518, 20 July 2021). These may not be the only ones. Disaggregation using the subject identifiers on the website shows ten Crown Court judgments and eleven magistrates' courts' judgments have been published but, on inspection, most are not judgments of those courts. Seven of the ten in the Crown Court are High Court judgments where the venue of the conduct concerned was a Crown Court. A further two were delivered in a Crown Court but the judge was (or appeared to be) sitting as a county court judge: *Committal for Contempt of Court: Phillips* (Crown Court at Newcastle, Judge Sendall, H01NE418, 1 March 2022); *Premier Marinas Limited v Looker* (Crown Court at Salisbury, HHJ Parkes QC, Case H00PO451, 25 March 2022). Ten of the eleven tagged with a magistrates' court identifier are for breaches of

1.7 A clearer set of laws and rules would help to ensure that this very significant area of law operates as a principled, comprehensible, and fair regime for all parties involved. To that end, the Ministry of Justice and the Attorney General's Office have asked the Law Commission to review the law on contempt of court.

1.8 This consultation paper sets out the law, presents provisional proposals for reform, and asks consultation questions to which we are seeking responses.

1.9 We begin in this chapter by stating the Terms of Reference that define the scope of the project, noting some issues that fall outside the scope of our review. We then explain our methods, some key terms, and our consultation process. Next, we lay out the structure of the consultation paper as a whole, chapter by chapter. We also include signposting for the material spread across different chapters that addresses the devolved tribunals in Wales, and that addresses contempt in inferior courts, tribunals and other bodies.

BACKGROUND AND TERMS OF REFERENCE

1.10 We have previously considered some specific aspects of the law relating to contempt of court. Following a consultation paper published in 2012,[10] we published reports on scandalising the court, juror misconduct and internet publications, and court reporting.[11] Whereas that earlier work focussed on specific aspects of contempt, this present project is directed towards a more holistic review that takes account of the various strands of the law and the way they interact.

1.11 The scope of our current review is defined by our Terms of Reference, which have been agreed between the Ministry of Justice, the Attorney General's Office, and the Law Commission. They are as follows:

> To recommend reform of the law of contempt, with the aim of clarifying this area of law and improving its consistency, coherence, and effectiveness.
>
> The project will consider:
>
> (1) codification and simplification of the law of contempt, including consideration of the way contempts of court are labelled, categorised, and defined;

injunctions and the judges are contemplating sentences that would not be available in a magistrates' court; in several the judgment states that the court is the county court and it seems that all are county court judgments where the court sat in a magistrates' court. One reason for this may be that judgments are taken from transcriptions where the transcribers head the document with the venue in which the court was sitting, and the venue tag is then included as an identifier when a judgment is published on the website.

10 Contempt of Court (2012) Law Commission Consultation Paper No 209.

11 Contempt of Court: Scandalising the Court (2012) Law Com No 335; Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340; Contempt of Court (2): Court Reporting (2014) Law Com No 344. A further sub-project on contempt in the face of the court was not pursued but was retained for consideration for inclusion in our future programmes of law reform. This present project supersedes that strand of our earlier work.

(2) the extent to which certain contempts ought properly to be defined as criminal offences, including those areas where there is currently an overlap between the criminal law and the law of contempt;

(3) the responsibility for the adjudication, investigation and prosecution of contempts;

(4) courts' and tribunals' powers and protections relating to initiating and hearing contempt proceedings, committing defendants for contempt, and appeals;

(5) the effectiveness of the current provisions relating to contempt of court by publication (considered in its broadest sense) and breach of anonymity orders, including consideration of Article 10 rights under the European Convention on Human Rights, and the appropriateness of the penalties for breach;

(6) the appropriateness of penalties for contempt of court more generally, and whether there are alternative and more effective means of ensuring compliance with a court order;

(7) whether problems might arise from procedure in contempt proceedings, and whether there is scope for reform or synthesis of the relevant procedure rules; and

(8) the relationship between contempt and other offences against the administration of justice.

For the avoidance of doubt, this review will not be limited to contempt in the context of criminal proceedings or to criminal contempt.

The following topics are beyond the scope of this project:

(1) Substantive law relating to reporting restrictions and anonymity orders (rather than the law relating to their breach which is, for the avoidance of doubt, within scope).

1.12 In September 2023 the scope of the review expanded following a request from the Welsh Government that we consider the above matters as they apply to the devolved tribunals in Wales. These tribunals are: the Welsh Tribunals as defined by section 59 of the Wales Act 2017; the Valuation Tribunal for Wales; school admission appeal panels; and school exclusion appeal panels. We also address the likely future structure that would result from currently proposed changes to move these tribunals into a First-tier Tribunal for Wales and create an Appeal Tribunal for Wales.[12]

TERMINOLOGY, METHODS AND SCOPE

Terminology

1.13 We have included a separate glossary that explains some of the terms we use throughout the consultation paper. However, we also set out some of those terms

[12] Devolved Tribunals in Wales (2021) Law Com No 403; Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023).

here to put them in the context of contempt laws generally and our overarching approach to provisional proposals that rest on a different conceptualisation of, and legal structure for, the laws of contempt of court.

1.14 First, contempt of court has traditionally been divided into two categories: criminal contempt and civil contempt. Our review covers the law in relation to both of these areas. As we explain in Chapter 2, our provisional proposals for reform move away from this distinction. We generally use the terms "criminal contempt" or "civil contempt" only where they are used in the current law, and not as categories that should be used in a reformed system. However, in their current form these can be understood in the following ways:

- Criminal contempt captures conduct that threatens the proper administration of justice and warrants punishment; "[i]t is justice itself that is flouted"[13] by this form of contempt. This category is particularly wide-ranging, encompassing publication contempt for which liability is strict under sections 1 and 2 of the Contempt of Court Act ("CCA") 1981 ("strict liability publication contempt"), contempt committed "in the face of the court", and other types of interference with the administration of justice.

- Civil contempt principally consists of disobedience of a court order and functions to enforce compliance.[14]

1.15 The distinction between criminal and civil contempt is not related to the type of court or proceedings in which a contempt occurs. A criminal contempt may be committed in a civil court or a criminal court. Similarly, a civil contempt may be committed in a civil court or a criminal court.

1.16 Secondly, terminology has varied over time and across different areas of law with respect to a number of matters. We use the following terms in the ways described:

- "Contempt proceedings": with respect to proceedings, which are commenced by application or of the court's own motion, we generally refer to these simply as "contempt proceedings". We use this term irrespective of the type of contempt involved, and regardless of who institutes the proceedings. We do not refer to "prosecution" for contempt; we use "prosecution" only in reference to criminal offences.

- "Applicant": we generally use the term "applicant" to refer to a person who has made an application to bring contempt proceedings. On occasion we use the term "claimant", but generally only where an application is made under the Civil Procedure Rules (which use the term "claimant") and it is necessary or helpful to refer to a claimant rather than an applicant.[15]

- "Defendant": we use the term "defendant" (rather than "alleged contemnor") to refer to the person who is the subject of contempt proceedings. We use this term

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13 *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 449.

14 See paras 2.2 to 2.3 below.

15 CPR, r 81.2.

whether the proceedings arise from a contempt application made against the person or whether a court has instituted proceedings of its own motion.

- "Contemnor": we use the term "contemnor" only to refer to a person against whom a court has made a finding of contempt.

- "Finding of contempt": where a court is empowered to make a finding that a person has in fact committed contempt of court, or has made such a finding, then we will generally refer to a finding of contempt or say that a person has been found in contempt, has committed a contempt,[16] or has been held in contempt.[17] We do not use the term "guilty" of contempt.

- "Committal": we use the term "committal" to refer to a sentence of imprisonment, whether the committal is to be immediate or suspended.[18]

1.17 The term "contumacious" is often used to describe conduct that may amount to contempt, but we avoid using this term in the consultation paper. This is because "contumacious" refers to wilfully disobeying a court order, and thus its application is limited to a specific form of contempt (that is, contempt by breach of order). Further, its meaning imports a degree of fault and so risks being interpreted as adding to the fault element of contempt. It is also a term that is likely to be unfamiliar to readers without legal expertise. For these reasons, we do not use "contumacious". Instead, we refer to conduct that apparently constitutes contempt (or variations of this phrase), and when discussing fault we refer to intention where appropriate.

1.18 We generally refer to the powers of the Attorney General ("AG") rather than referring to the powers of the Law Officers, who are the AG and the Solicitor General ("SG"), and who both have powers to institute contempt proceedings.[19] We do so for convenience and consistency, referring only to the AG (rather than referring to "the Law Officers", or "the AG and the SG") unless the context requires the use of the collective or separate terms. In cases where the AG or the SG has been a party, there is much variation in the way that they are cited in case names in the law reports; for example, the AG might appear as "AG", "A-G", "Attorney-General" or "Attorney General". Where we cite such cases we avoid that variation. Instead, for consistency and clarity, we use the full title and so these parties will appear as "Attorney General" and "Solicitor General" in our citations.

Methods

1.19 In preparing this consultation paper we have been informed by the academic and professional literature, including comparative law where relevant. We have also had

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16 See, for example, CPR, rr 81.4, 81.5, 81.6.

17 See, for example, above, r 81.2.

18 See, for example, above. With respect to the term "sentence", we provide a detailed explanation of terminology at para 10.8 below.

19 As we explain in Chapter 7, under the Law Officers Act 1997, "any function of the Attorney General may be exercised by the Solicitor General" and "anything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General": ss 1(1) and 1(2). Accordingly, the SG has the power to bring contempt proceedings, exercising the functions of the AG in doing so.

the benefit of meetings and discussions with a wide range of stakeholders. These have included individuals and organisations representing the judiciary, the legal profession, government and the public sector, civil society, media, and academia. The views and experiences reported to us by stakeholders appear throughout the consultation paper. It should be noted that unless a comment is stated as indicating the views of an organisation, the views expressed are those of individuals and may not represent an organisational or institutional view. Where we refer to the views of a judge then this should not be taken to be a representative view but an individual view reflecting the experience of that judge.

1.20 In footnotes throughout the consultation paper we include links to sources available online. All links provided were current in June 2024.

Scope

1.21 Our Terms of Reference, above, include matters regarding the relationship between the law of contempt and criminal offences. This does not place a review of criminal offences within the scope of our project. We discuss criminal offences and the overlap with contempt on numerous occasions, but we make no provisional proposals in relation to the reform of criminal offences.[20] In addition, the second of our Terms of Reference invited us to consider whether any types of contempt should become criminal offences. It will be apparent from our provisional proposals regarding liability in Chapters 3, 4 and 5 that we provisionally conclude that contempt should not become a criminal offence.

CONSULTATION QUESTIONS AND PROVISIONAL PROPOSALS

1.22 The paper presents consultation questions on which we seek responses. Some questions include provisional proposals for reform. Provisional proposals are not recommendations; rather, they are provisional views we have reached based on our research and pre-consultation engagement with stakeholders. The purpose of this consultation is to test those provisional views. The responses we receive in the consultation process will inform the recommendations we make in the final report after the consultation. The making of a provisional proposal does not mean that the Commission will definitely adopt it as a recommendation in our final report.

STRUCTURE OF THE CONSULTATION PAPER

Overview of chapters

Chapter 2 – The contempt framework

1.23 In Chapter 2, we first set out the current framework of the law of contempt and explain some of the key problems that give rise to a case for reform. In particular, we note the uncertainty that has arisen in practice as a result of the disorganised, often unclear and occasionally incoherent legal landscape.

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[20] There is, however, one criminal offence in relation to which we seek consultees' views on whether Government might look at reform in future. This is the offence (in s 41 of the Criminal Justice Act 1925) of taking photographs in court. The issue of potential reform arises as a result of our provisional proposals in relation to contempt. See paras 3.90 to 3.97 below.

1.24 Secondly, we explain our provisional rejection of the traditional conceptual division of the law into criminal and civil contempt, and set out the general approach that underpins our provisional proposals for reform.

1.25 Thirdly, we introduce our provisionally proposed framework for contempt liability, under which there would be three forms of contempt:

(1) "general contempt";

(2) "contempt by breach of court orders or undertakings"; and

(3) "contempt by publication while proceedings are active".

Each form of contempt is considered in the following three chapters.

1.26 Fourthly, we consider "kindred offences". We provisionally propose that this term should no longer be used and that conduct currently captured by the term should be described as contempt.

Chapter 3 – General contempt

1.27 In this chapter we present our provisional proposals on what we have termed "general contempt". This form of contempt has two strands: general contempt committed by publication; and general contempt committed by conduct other than publication. Where general contempt is committed by conduct other than publication, a person would be liable if they engage in conduct that creates a substantial risk of a non-trivial interference with the administration of justice, or actually interferes with the administration of justice in a non-trivial way, with the intention to interfere with the administration of justice in a non-trivial way. We ask consultees for views about whether recklessness as to whether the conduct would so interfere should also be sufficient to establish fault where general contempt is committed by conduct other than publication.

1.28 However, where general contempt is committed by publication, we provisionally propose that it should be a requirement to prove intention: proof of recklessness should not be sufficient. This provides an important safeguard for freedom of expression.

Chapter 4 – Contempt by breach of court orders or undertakings

1.29 In Chapter 4 we introduce the first of two proposed alternatives to the general forms of contempt. Where proceedings for contempt are based on failure to comply with a court order or undertaking by those bound by that order or undertaking, liability will be established by proving this form of contempt (rather than general contempt or contempt by publication). In encompassing breach of any order or undertaking, the scope of this form of contempt is broader than the existing civil contempt.

1.30 Liability for this form of contempt, consistent with the existing law for proving civil contempt when an order has been breached, will be established by proving that, principally, the defendant had failed to comply with the order or undertaking and that they knew there was a court order or undertaking by which they were bound. There is no requirement to prove that the defendant intended to breach the order: it is enough

that they knew they were bound by an order and their deliberate conduct was in contravention of that order.

1.31 Next, we propose a regime of interim remedies in order to coerce compliance without having to proceed to a formal finding of contempt. We also consider that an interim procedure would go some way towards mitigating the disproportionate satellite litigation in the form of "weaponised" contempt proceedings, inasmuch as interim and coercive (rather than punitive) remedies should justify shorter proceedings and lower costs.

Chapter 5 – Contempt by publication when proceedings are active

1.32 In Chapter 5**,** we provisionally propose the second of the two alternatives to general contempt, which is a specific form of contempt called "contempt by publication when proceedings are active". The conduct element of this provisionally proposed form of contempt requires that the 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 (which is the same threshold that is used in the current law under the CCA 1981). The fault element does not require there to be an intention to interfere with the administration of justice but will be satisfied where there is proof that a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect proceedings were active. In setting out these provisional proposals the chapter considers a number of contentious issues, including: when proceedings are "active" for this form of contempt; the place of publication, including where the publication occurs outside England and Wales; and the protection for discussion of matters of public interest.

Chapter 6 – Contempt protection and powers

1.33 Having provisionally proposed the framework of contempt liability in Chapters 3 to 5, we then address a number of discrete issues in the remaining chapters.

1.34 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 conduct that apparently constitutes contempt. We make provisional proposals that would simplify and expand the contempt protection and powers of many inferior courts, tribunals and other bodies. These proposals would have the effect that all superior courts would have the same powers as each other, and also that all inferior courts, tribunals and other bodies would have the same powers as one another. The powers of the court to deal with conduct that apparently constitutes contempt or to refer such conduct to another court (or tribunal) could therefore be easily determined by reference to whether the court is superior or inferior. We propose a two-tier regime of powers accordingly.

Chapter 7 – The Attorney General's role in contempt proceedings

1.35 In Chapter 7 we look at the role of the AG and their powers and practice in bringing contempt proceedings in the public interest. We address criticisms of the AG's role in bringing proceedings for contempt by publication while proceedings are active, though we provisionally conclude that the AG should retain this function. We make a number of provisional proposals to mitigate the concerns raised with us, in particular in relation to the requirement for the consent of the AG and the susceptibility of the AG's decisions to judicial review. We also make provisional proposals to enhance the clarity

and predictability of decisions taken by the AG to initiate contempt proceedings. We further propose that the AGO should publish transparency data concerning contempt decisions.

1.36 Finally, we make a series of proposals to ensure that the AG has the necessary powers to obtain the information they require to exercise their contempt function.

Chapter 8 – Procedure

1.37 In Chapter 8 we provide a detailed examination of procedure. We present provisional proposals with a view to developing clear, comprehensive and, where possible, uniform procedures that enable courts, tribunals and other bodies to deal efficiently and consistently with conduct that may constitute contempt. We explain that contempt proceedings are classified as criminal proceedings for the purpose of the right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR") and make provisional proposals that would incorporate features into the procedure to ensure that this right is protected adequately.

Chapter 9 – Representation in contempt proceedings

1.38 In this chapter we consider three issues that arise in the context of legal representation in contempt proceedings, and make provisional proposals to clarify the rules relating to representation in contempt proceedings. First, we examine the operation of legal aid in contempt proceedings. We explain that contempt proceedings are classified as criminal proceedings for the purpose of the domestic legal aid framework. We then make proposals in relation to several issues concerning legal aid, including: the status of permission proceedings; legal aid for discharge of a committal order; means testing; and the law and practicalities for providing and accessing legally aided advice and representation. Secondly, we look at the operation of conditional fee agreements in contempt proceedings. Thirdly, we examine costs in contempt proceedings, considering whether and how the defendant's means should be considered, as well as an inconsistency in cost capping where defendants are legally aided.

Chapter 10 – Sanctions

1.39 We provisionally propose that there should be a greater range of sanctions options available to superior courts, including powers to order pre-sentence reports, remand in custody pending pre-sentence reports, and impose community sentences.

1.40 The chapter also includes provisional proposals that would simplify and clarify the powers of inferior courts, tribunals and other bodies to impose sanctions for contempt. We also consider the position of sanctions in the devolved tribunals in Wales.

1.41 Further, to ensure consistency in sentencing, we provisionally propose that sentencing guidelines for contempt should be developed by a judicial working group.

1.42 The chapter also considers the system of criminal records in relation to contempt, and makes provisional proposals on the recording and publishing of data on contempt findings.

Chapter 11 – Appeals

1.43 In Chapter 11 we explore the framework for appeals in contempt cases. We begin by explaining the current routes of appeal and by considering some of the inconsistencies, uncertainties and problems within the existing framework. We present provisional proposals and reform options with a view to establishing a clearer, more consistent and more coherent appeals framework. Then we turn to when permission to appeal is and should be required, and also consider the tests for permission. In the final part of the chapter we look at the position of the AG in relation to appeals, considering the circumstances in which the AG may appeal a decision, and whether in some circumstances the AG should be able to refer a point of law to the Court of Appeal.

Chapter 12 – Impacts

1.44 In this chapter, we summarise some of the potential economic and equality impacts that we have identified. We also invite views and evidence on economic and equality impacts, whether in relation to individual proposals, any combination of proposals, or the overall effect of our proposals.

Inferior courts, tribunals and other bodies

1.45 Readers who are interested in issues relating to the law of contempt in inferior courts, tribunals and other bodies will primarily find this material in Chapter 6, which concerns the contempt protection and powers of inferior courts, tribunals and other bodies. The procedure for contempt matters in these bodies is addressed in Chapter 8, and the sanctions which may be imposed by them is addressed in Chapter 10.

Devolved tribunals in Wales

1.46 Readers who are interested in issues relating to the law of contempt in the devolved tribunals in Wales will primarily find this material in Chapter 6, which concerns the contempt protection and powers of inferior courts, tribunals and other bodies. The procedure for contempt matters in the devolved tribunals in Wales is addressed in Chapter 8, and the sanctions which may be imposed by them is addressed in Chapter 10.

Equality and economic impacts of reform

1.47 Reforming the law of contempt will have impacts. We address possible specific impacts where they arise in the course of the above chapters, and provide some general questions in Chapter 12.

1.48 There are likely to be equality impacts, with change particularly affecting some groups of people. For instance, some of our proposals regarding pre-sentence reports and the availability of community sentences may have a beneficial effect on people who are subject to contempt proceedings for breaching ASBIs. Some of these people may also have disabilities, including mental health disabilities, or other protected characteristics.

1.49 There are also likely to be economic impacts. Reforms will have both costs and benefits. For example, streamlined procedures may mean that less court time is used in dealing with contempt matters, while our provisional proposals to limit the

circumstances in which an immediate inquiry procedure may be used could result in more court time being required. It seems likely that an expansion of contempt protection to tribunals would see more time and resources devoted to contempt. Yet, if a consequence is that there are fewer disruptions and greater compliance with orders then this may have economic benefits.

1.50 We provide those examples at this point merely as illustrations. Throughout the consultation paper there are questions that raise issues in relation to equality and economic impacts. In some instances, we invite consultees to provide data if they have any and on some occasions provisionally propose reforms that would ensure recording and publication of data in the future.

1.51 We welcome consultees' comments on impacts in response to specific questions where we have identified impact issues. However, we are aware that there may be potential impacts we have not identified or that some proposals may have unintended consequences in terms of economic or equality effects. In Chapter 11 we ask open questions that invite comments on impacts that consultees have not already addressed in earlier responses.

AN OVERVIEW OF OUR KEY PROVISIONAL PROPOSALS

1.52 The scope of our review is wide, and the issues are addressed chapter by chapter, as explained above. Here, we provide an overview of our key provisional proposals so that readers can gain a more holistic picture of what contempt of court law and procedure would look like under our proposed reforms.

1.53 Our provisional proposals are characterised by four broad lines of reform. The first of these is a move towards clarification and codification. Throughout, our provisional proposals aim to increase certainty in law and procedure. In some instances, this involves substantive reform of the law. In others, we do not provisionally propose changes to the substance of the law but rather codification of existing common law and measures that will enable judges, legal professionals, and the public to know with greater certainty what the law is and what procedures would be used. For example, although our proposed form of contempt by breach of order covers a broader range of conduct than the existing form of civil contempt, the elements that must be proven to be liable for that form of contempt essentially codify and clarify the existing common law position.

1.54 The second line of reform is a move towards transparency and accountability. Examples of provisional proposals in this regard are those related to the publication of judgments and data, and aspects of the role of the AG.

1.55 The third is directed towards greater consistency and ensuring fairness for defendants. Our procedural proposals are particularly directed toward these matters. Our provisional proposals in relation to sanctions also work toward those ends.

1.56 The fourth line of reform is directed towards enhancing some of the fundamental protections that the rule of law provides. In this regard, all of the first three lines of reform have a role to play but it will be particularly notable that our provisional proposals will appear to expand significantly the bodies that are protected by the law of contempt and will have powers to institute and determine contempt proceedings,

and to impose sanctions for contempt. This will be most apparent with respect to the First-tier Tribunal and the Employment Tribunals. Although our provisional proposals maintain the current test for whether a body is protected by the law of contempt, and so in that regard there would be greater certainty in the law rather than expansion, there is no question that, under our provisional proposals those bodies would have powers that they do not currently have. It will also be apparent in our provisional proposals for the availability of interim remedies, which would not require proof of contempt to the criminal standard, that there is some expansion in the operation of the law.

1.57 To the extent that our provisional proposals would expand contempt laws, they would do so in a way that we think is consistent with the rule of law. Consistency with the rule of law is an essential element of all of our provisional proposals. Lord Bingham, former Lord Chief Justice and Law Lord, has explained that at the core of the rule of law is the general principle that:

> all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[21]

1.58 As Lord Bingham has described, the rule of law demands that law is intelligible, clear and predictable.[22] It demands that procedures are fair.[23] It also demands efficient and effective dispute resolution.[24] Insofar as tribunals and other bodies do and would have contempt protection and powers, and insofar as interim remedies do not require proof to the criminal standard, it is because we are all both bound by and entitled to the benefits of the law when the judicial power of the state is exercised. Our provisional proposals are directed towards ensuring that those bodies can efficiently and effectively resolve disputes, with fairness to all parties.

1.59 The effect of our provisional proposals is that the traditional framework for liability for contempt would be replaced with a simplified and coherent framework. There would no longer be a distinction between civil contempt and criminal contempt. Instead, there would be three forms of contempt:

(1) General contempt. This would encompass any conduct that interferes with the administration of justice in a non-trivial way, or that creates a substantial risk of a non-trivial interference with the administration of justice. Liability for this form of contempt would have two strands, depending on whether the conduct was by publication or not. Where the conduct was by publication, contempt would be committed only where a person intends to interfere with the administration of justice. Where the conduct was not by publication, contempt would be committed where a person intends to interfere with the administration of justice. We seek consultees' views on whether, to establish fault, it should be sufficient that the person is reckless as to the interference.

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21 T Bingham, *The Rule of Law* (2010) p 8.

22 Above, ch 3.

23 Above, ch 9.

24 Above, ch 10.

(2) Contempt by breach of orders or undertakings. This would be committed where a person deliberately breaches an order or undertaking. They would also need to have knowledge that the order existed and that they are bound by it, and would need to have knowledge of the facts that make the conduct unlawful.

(3) Contempt by publication when proceedings are active. This would be committed where 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. Unlike the general form of contempt, this form of contempt does not require proof that the publisher intended to interfere with the administration of justice. Instead, it will be sufficient to establish that the publisher was reckless as to whether proceedings were active (that is, they knew or had reason to suspect proceedings were active).

1.60 Our provisional proposals would also have the effect of bringing clarity, consistency and coherence to the contempt protection and powers of courts, tribunals and other bodies. The current test for determining whether a body is a "court" for the purposes of contempt – that is, whether it exercises the judicial power of the state – would be set out in statute and accompanied by a non-exhaustive list of the courts, tribunals and other bodies that satisfy this definition, and are thus protected. All superior courts would have the same powers to deal with contempt and impose sanctions. All protected inferior courts, tribunals and other bodies would have the same powers as each other. These powers would be fewer than those that are available to the superior courts, but would allow them to address effectively conduct that apparently constitutes contempt in their proceedings either by dealing with contempt themselves, imposing limited sanctions, or referring a potential contempt upward to a superior court.

1.61 Our provisional proposals apply to devolved tribunals in Wales just as they apply to non-devolved tribunals. There would be no distinction. The effect of this is that all devolved tribunals in Wales which exercise the judicial power of the state would gain contempt protection. All protected devolved tribunals would be empowered to address conduct that may constitute contempt, and to impose sanctions for contempt.

1.62 We make provisional proposals for a new regime of interim coercive remedies that would be available to courts in respect of non-compliance with an order or undertaking. This would enable courts to award an interim remedy – such as payment by the defendant of a sum of money into court, or sequestration of the defendant's assets – for breach of an order or undertaking without needing to make a finding of contempt. The applicant would need to prove on the balance of probabilities the conduct and fault elements of contempt by breach of orders or undertakings.

1.63 Our provisional proposals would have the effect of broadening the powers of courts, tribunals and other bodies when sentencing for contempt. The range of sanctions would be expanded to include community sentences, and there would be powers to order a pre-sentence report and to remand a defendant in custody after a finding of contempt but before sentencing. We also provisionally propose that guidelines for sentencing in contempt cases should be developed by a judicial working group, and that it should be made clear that contempt should never be entered onto the Police National Computer or appear on a criminal record certificate.

1.64 Under our provisional proposals, the AG would retain their role in bringing and consenting to contempt proceedings. We make several proposals to ensure greater accountability and public confidence in their decision-making. A decision made by the AG not to bring, or consent to, contempt proceedings would be judicially reviewable. The AG would be required to publish a statement of practice setting out their decision-making processes, as well as data relating to the exercise of their contempt function.

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1.66 The Commissioners also acknowledge and thank Nicholas Paines KC who was Commissioner for Public Law and the Law in Wales prior to the appointment of Professor Alison Young. His insight and guidance during the pre-consultation stage and the drafting of the consultation paper has been invaluable. The provisional proposals, however, should not be taken to represent Nicholas Paines KC's views.

Chapter 2: The contempt framework

2.1 This chapter explains the existing framework for the law of contempt, and explores the concepts of – and distinction between – civil and criminal contempt that are the foundation of the framework. It identifies some problems with the way that distinction now functions and how those problems affect the current law and inform our reconsideration of contempt law. We provisionally agree with views that the distinction is no longer helpful and conclude by setting out our provisional proposal that the distinction between civil and criminal contempt should be dispensed with in any reform of the law.

THE TRADITIONAL FRAMEWORK OF CONTEMPT LIABILITY

Civil and criminal contempt

2.2 Contempt has traditionally been divided into categories of civil and criminal contempt. In *Attorney General v Crosland*, the Supreme Court explained the difference between the two. Civil contempt involves "a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party".[1] Criminal contempt, however, is concerned with "conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice".[2]

2.3 The scope of both types of contempt is wide. Criminal contempt includes, for example, contempt committed "in the face of the court" – which can take many forms – and contempt by publication under sections 1 and 2 of the Contempt of Court Act ("CCA") 1981. With regard to civil contempt, the definition in *Crosland* is perhaps best seen as an archetype because civil contempt may be committed by breaching a wide range of orders and statutory requirements. For instance, it will be civil contempt to breach a production order made under the Police and Criminal Evidence Act ("PACE") 1984, or to breach an order made under the Criminal Justice and Police Act 2001 to return property that has been seized in a criminal investigation.[3] It will also be a civil contempt when a defendant in a criminal case passes to another person confidential information they receive from the prosecution as part of the disclosure process.[4]

2.4 Neither civil contempt nor criminal contempt are criminal offences. Both may be punished by a fine or imprisonment.[5] It is sometimes said that civil contempt is not a

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1 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23].

2 Above, citing *Director of the Serious Fraud Office v O'Brien* [2014] AC 1246 at [39] (Lord Toulson). The judgment is also published as *R v O'Brien* [2014] UKSC 23.

3 See CrimPR, r 48.9. The rule sets out the procedure to be used when these and other breaches occur and notes to the rule state that "the conduct to which this rule applies is sometimes described as 'civil' contempt of court".

4 Criminal Investigation and Procedure Act 1996, s 18; s 17 permits disclosure in certain circumstances or with the court's permission. See also CrimPR, r 48.9 (notes) and generally on the civil and criminal contempt distinction *Home Office v Harman* [1983] 1 AC 280 at 310.

5 See Chapter 10.

crime,[6] but that does not mean that criminal contempt is "a crime" in the ordinary sense of the word. Rather, in making observations about whether a contempt is or is not a crime, the courts are concerned with the nature of the defendant's conduct, which is what makes the contempt "criminal". *Arlidge, Eady & Smith* has said that a criminal contempt has been regarded as "an act which so threatens the administration of justice that it requires punishment".[7]

2.5 As a consequence of the focus being on the nature of the conduct, 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.[8] For example, when a witness makes a false witness statement then this will be criminal contempt whether it occurs in a civil or criminal court, and whether in civil or criminal proceedings. Conversely, as is evident from paragraph 2.3 above, a civil contempt may arise in a criminal court. A further example is that it will be a civil contempt to breach a restraint order made under the Proceeds of Crime Act 2002 that prevents a person dealing with their assets. At the same time, there can be practical consequences that follow from whether a contempt is a civil contempt or a criminal contempt. For example, in Chapter 10, we note that the categorisation is relevant when sanctions are imposed. In *Lovett v Wigan Borough Council,* the Court of Appeal (Civil Division) pointed out that different objectives underly the penalties for criminal and civil contempt respectively, in particular "the relative significance of punishment as compared to ensuring future compliance with [a court] order".[9]

2.6 There is a wide range of problems with the law of contempt which are the focus of in-depth analysis in the chapters that follow. Not all of these are linked to or arise from the existence or operation of civil and criminal contempt, and the distinction between them. However, there are some problems that are directly referable to these. We outline five.

Disorganisation, inconsistency and uncertainty

Criminal contempt: a disorganised legal landscape

2.7 The law governing criminal contempt has developed in a piecemeal way. It is spread across various pieces of legislation and common law, resulting in a disorganised and incoherent legal landscape. This can make it 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. Moreover, statutory provisions and the common law deal with similar and overlapping behaviour, with inconsistent approaches to structure and terminology, and thus it is not always clear which law applies to the circumstances.

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6 See, for example, *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23, [2014] AC 1246 at [42] (Lord Toulson).

7 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") para 3-1.

8 See, for example, *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23, [2014] AC 1246 at [42] (Lord Toulson).

9 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [33].

2.8 At common law, conduct generally is treated as constituting criminal contempt where it creates a "real"[10] or "serious risk"[11] of interference with the administration of justice. It is a criminal contempt at common law, for example, to disrupt proceedings, publish prejudicial material, intimidate witnesses or jurors, or frustrate the purpose of a court order. It is not necessary to prove that conduct in fact interfered with the administration of justice.[12] The courts tend to avoid being more prescriptive than this, so as not to limit unnecessarily or inappropriately the type of conduct that may be treated as contempt.[13] The law of contempt has thus developed incrementally as new challenges to the administration of justice arise. It was said in *Attorney General v Newspaper Publishing* that:

> the law of contempt is based upon the broadest of principles, namely, that the courts cannot and will not permit interference with the due administration of justice. Its application is universal. The fact that it is applied in novel circumstances… is not a case of widening its application. It is merely a new example of its application.[14]

2.9 Alongside the common law of criminal contempt, some behaviour has been defined as a contempt in statute. For example, section 12(1) of the CCA 1981 and section 118(1) of the County Courts Act 1984 provide that the magistrates' courts and the county court can deal with as contempt an insult towards particular participants in proceedings, conduct that interrupts proceedings, and other misbehaviour in court. Section 14(1) of the County Courts Act 1984 provides that the county court can treat an assault on an officer of the county court while in the execution of his duty as contempt.[15]

2.10 In other instances, statutory provisions allow the courts to deal with particular behaviour as a criminal offence that may be punished as a summary offence or "as if it were" a criminal contempt.[16] This approach is taken in, for example, the Juries Act 1974 where the offence of failing to attend court in compliance with a jury summons or, having attended, being unavailable when called or unfit to serve by reason of drink or drugs can also be punished "as if it were criminal contempt committed in the face of the court".[17] A similar approach applies to the offence of absconding while released on bail under section 6(1) or (2) of the Bail Act 1976; this is punishable "as if it were a

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10 *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1208; *Attorney General v Hislop* [1991] 1 QB 514 at 525.

11 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [27].

12 *Solicitor General v Holmes* [2019] EWHC 1483 (Admin), [2019] 1 WLR 5253; *Re B* [1965] Ch 1112; *Liverpool Victoria Insurance Company v Khan* [2016] EWHC 2590 (QB).

13 See, for example, *Attorney General v Times Newspapers* [1974] AC 273 at 302.

14 *Attorney General v Newspaper Publishing* [1988] Ch 333 at 368 (Sir John Donaldson MR).

15 See also County Courts Act 1984, s 92 (rescuing or attempting to rescue any goods seized in execution under process of the county court).

16 There are several examples of legislation that makes conduct punishable as if it were contempt. There exist slight variations in the drafting of such provisions, as the Crown Prosecution Service ("CPS") points out in their response to the Criminal Procedure Rule Committee Consultation (2010), though there is nothing to suggest that there is any difference in the meaning ascribed to the formulation: Criminal Procedure Rule Committee, "Analysis of responses received to the Invitation to Comment on rules about contempt" (2010) CrimPRC (10)49, para 69.

17 Juries Act 1974, s 20(1)-(2).

criminal contempt of court".[18] However, the Court of Appeal (Criminal Division) has explained that this provision does not mean the offence *was* contempt of court: "the effect of section 6(5) is not to convert an offence under the Bail Act into a contempt of court, but simply to provide a speedy and effective alternative method of dealing with such an offence".[19]

2.11 Behaviour that amounts to criminal contempt can also amount to a criminal offence in its own right. Examples include taking photos or making recordings, or assaulting a person in court, which may also constitute summary offences.[20]

2.12 The overlap in the common law and statutory regimes relating to criminal contempt, as well as the criminal law, makes for a confusing legal landscape. Not only does this make it difficult for members of the public to know and understand the law, which is essential if they wish to be able to predict their potential contempt liability, but we have also been told in our pre-consultation engagement that it creates difficulties for advocates and members of the judiciary. It was emphasised to us that the current framework is not straightforward and, consequently, may not be utilised by the courts as much or as effectively as it might be.[21]

Criminal contempt: uncertainty around contempt "in the face of the court"

2.13 Contempt "in the face of the court" will constitute criminal contempt. However, the term contempt in the face of the court has not been defined comprehensively or consistently.[22] Consequently, it cannot be said with certainty in all circumstances whether a contempt falls within this category. This matters because whether or not a contempt is committed in the face of the court can affect the procedure used by the court in response – in particular, whether the court may deal immediately with an alleged contempt – and the requisite fault that must be proved. Under the existing contempt framework, it is thus important to be able to identify this type of contempt.

2.14 The core of the problem lies in the following unresolved issue: is any contempt that may be dealt with immediately by the court correctly called a contempt in the face of the court, or is contempt in the face of the court a freestanding category (to which a particular procedure may then apply)?

2.15 On the first view, contempt in the face of the court may be conceptualised as those contempts that require prompt and effective resolution by the court and thus necessitate the immediate use of a summary procedure. This position was advocated by Lord Denning MR, who considered that this subcategory of contempt "covered all

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18 Bail Act 1976, s 6(5). See also Juries Act 1974, s 20(2) (dealing with an offence of failing to attend court in compliance with a jury summons, or failing to be available or fit when called to serve as a juror under s 20(1) as if it were a criminal contempt in the face of the court).

19 *R v Thomas Lubega* [1999] EWCA Crim 215.

20 Criminal Justice Act 1925, s 41; Criminal Justice Act 1988, s 39.

21 There are also aspects of procedure that give rise to uncertainty; see Chapter 8.

22 See, for example, the comments of Lord Denning MR in *Balogh v St Albans Crown Court* [1975] QB 73 at 84.

contempts for which a judge of his own motion could punish a man on the spot".[23] He held that a judge was so empowered:

> whenever there was a gross interference with the course of justice in a case that was being tried, or about to be tried, or just over – no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others – whenever it was urgent and imperative to act at once.[24]

2.16 This view does not confine this type of contempt to those that are committed *literally* in the face of the court. Instead, it is the procedure that dictates the substance of what amounts to a contempt in the face of the court. An alleged contempt may be dealt with immediately where it was committed in court and witnessed by the judge, such as in *Morris v Crown Office* where a group of students "flocked into the public gallery" during proceedings in the High Court and "shouted slogans… scattered pamphlets… sang songs… [and] broke up the hearing".[25] An alleged contempt may also be dealt with immediately where it was committed in court but was not witnessed by the judge, such as in *Lecointe v Court's Administrator of the Central Criminal Court* where a person distributed pamphlets in the public gallery inciting people to picket the court and their behaviour was reported to a police officer and then to the judge.[26]

2.17 The procedure for dealing with an alleged contempt immediately has also been exercised in cases where the contempt occurred "[a]t some distance from the court",[27] which Lord Denning MR nevertheless categorised as a contempt in the face of the court. For example, this procedure was used in *Moore v Clerk of Assize, Bristol* where a person threatened a witness in a café just after she had given evidence in a trial; [28] and also in respect of an employer who had threatened to dismiss his employee for obeying a jury summons.[29] Recently, the procedure was used in *R v Jordan*, and a person was found in contempt in the face of the court, having played music through a megaphone pointed at the court from the park next to it.[30] It is thus clear that there are no geographical, temporal or principled restrictions on the types of contempt that are labelled as having been committed in the face of the court; the rationale is solely procedural. As a result, the label is unhelpful: it does not indicate accurately what type of contempt falls into this category, and laypeople cannot be expected to understand in which circumstances a court may act immediately and thus identify the relevant forms of contempt on that basis.

2.18 On the second view, exemplified in the approach of the Divisional Court in *Solicitor General v Cox*, "the concept of the face of the court is interpreted broadly", but

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23 *Balogh v St Albans Crown Court* [1975] QB 73 at 84 (Lord Denning MR).

24 Above.

25 *Morris v Crown Office* [1970] 2 QB 114 at 121.

26 *Lecointe v Court's Administrator of the Central Criminal Court*, February 8, 1973 (unreported). See *Balogh v St Albans Crown Court* [1975] QB 73 at 84.

27 *Balogh v St Albans Crown Court* [1975] QB 73 at 84 (Lord Denning MR).

28 *Moore v Clerk of Assize, Bristol* [1971] 1 WLR 1669.

29 See "The Rule of Law and Jury Service" (1966) 130 JP 622, cited in *Balogh v St Albans Crown Court* [1975] QB 73.

30 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30.

"concerns 'some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court'".[31] In contrast with Lord Denning MR, and though noting that contempt in the face of the court "may require speedy action", this approach does not define such contempts according to the type of procedure used by the court but by the conduct itself. There is, nevertheless, a lack of clarity in this approach just as there was with the first: it is not clear when behaviour will amount to contempt in the face of the court.[32]

2.19 The Divisional Court has held that "the concept of the face of the court is interpreted broadly".[33] It has said that it "concerns 'some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court'".[34] Conduct that constitutes contempt in the face of the court includes, but is not necessarily limited to, contempts that occur "in the precincts of the court".[35] The conduct need not occur in the presence or sight of a judge.[36] It is enough, for example, that it was heard by the judge, such as a threat made by one party against another in a different room after the hearing.[37]

2.20 The case law relating to section 12(1) of the CCA 1981 and section 118(1) of the County Courts Act 1984 is similarly at odds with the first approach, though it does not resolve uncertainty and arguably contributes to it.

2.21 Section 12(1) of the CCA 1981 provides that the magistrates' courts may make a finding of contempt against any person who:

(a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

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31 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [67], citing *Arlidge, Eady and Smith on Contempt* (4th ed) para 10-2, which was also cited in Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.2. See also *Robertson and Gough v HM Advocate* [2007] HCJAC 63 at [34]: contempt is categorised as having been committed in the face of the court where it occurs "during the proceedings and in front of the judge" or "where the… conduct is so closely related to the proceedings in time and place as to be considered part of them".

32 In some instances there is clarity in statutory provisions. For example, the courts can deal with certain conduct as contempt of court (eg a failure to appear in court, in disobedience to a witness summons), and can do so summarily "as if [the] contempt had been committed in the face of the court": Criminal Procedure (Attendance of Witnesses) Act 1965, s 3(1)-(1A). These types of contempt are known as "constructive" contempts in the face of the court: White Book 2023, 81CC.5.

33 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [67].

34 Above, citing *Arlidge, Eady and Smith on Contempt* (4th ed) para 10-2, which was also cited in Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.2.

35 *Robertson and Gough v HM Advocate* [2007] HCJAC 63 at [34].

36 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [67].

37 *Bokhari v Blessed* [1994] Lexis Citation 2112 (Court of Appeal (Civil Division)).

2.22 Similarly, section 118(1) of the County Courts Act 1984 provides that the county court has jurisdiction to deal with any person who:

(a) wilfully insults a judge of the county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the county court or otherwise misbehaves in court.

2.23 These sections make provision for the types of conduct that will constitute contempt, with which the magistrates' courts and the county court can then deal immediately. Given that section 12(1) of the CCA 1981 is almost identical to section 118(1) of the County Courts Act 1984, they are likely to be interpreted similarly. The Court of Appeal (Civil Division) has concluded repeatedly that "section 118 is not limited to contempts in the face of the court"[38] and has noted in particular that "its reference to going to, or returning from, the court, would appear to make it quite plain that the language is not so confined".[39] The problem in terms of clarity and certainty is that the view expressed in *Cox* is that contempt in the face of the court extends beyond conduct in the courtroom, whereas section 118 suggests statutory provisions are required to capture such conduct.

2.24 On either approach, there is uncertainty in the law. Neither limits contempt in the face of the court to conduct that occurs in a courtroom, but neither has clearly defined limits about where or when conduct will fall outside the scope of contempt in the face of the court. On the first approach, that uncertainty is exacerbated because the scope is driven by the procedure the court elects. The uncertainty is especially unsatisfactory where the court may deal with the contempt immediately, because such a procedure lacks some important safeguards to protect a defendant's fair trial rights.[40]

2.25 Over time, the tendency has been to take the second approach. This reduces the uncertainty by setting out the types of conduct where the courts may elect to deal with the conduct immediately, but without relying on contempt in the face of the court as a category of contempt. Notably, rule 48.5 of the Criminal Procedure Rules sets out the procedure to be used when there is "obstructive, disruptive, insulting or intimidating conduct, in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings". It does not classify this as contempt in the face of the court but instead the notes to the rules observe that "the conduct to which this rule applies is sometimes described as 'criminal' contempt of court".[41]

2.26 Nevertheless, and although the courts must be cautious where they elect to deal with an alleged contempt immediately, there is considerable latitude available depending on the circumstances. In *R v Jordan* the Court of Appeal (Criminal Division) held that

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38 *Manchester City Council v McCann* [1999] QB 1214 at 1219.

39 *Bokhari v Blessed* [1994] Lexis Citation 2112 (Court of Appeal (Civil Division)).

40 We discuss these concerns in detail in Chapter 8.

41 CrimPR, r 48.5 (notes).

"the jurisdiction is not strictly circumscribed", for example to situations where it is "imperative for the court to act immediately", and that:

> it remains a guiding principle that the summary process should be used with restraint, but [recent cases show that] … [t]he court is called upon to form a multi-factorial judgment which takes account of the underlying purpose of the jurisdiction, the available alternative courses of action, proportionality, and the essential requirements of fairness.[42]

2.27 In Chapter 8 we return to these issues and present provisional proposals regarding the procedure that should be followed by the courts when an alleged contempt arises, relying neither on the category of contempt in the face of the court nor the category of criminal contempt.

Civil contempt, criminal contempt and court orders

2.28 There is a lack of clarity and consistency as to when a breach of a court order will constitute civil contempt and when it will constitute criminal contempt. While breach of an order is generally treated as civil contempt, there are some circumstances in which such conduct goes beyond mere disobedience and constitutes a serious interference with the administration of justice. However, the distinction between these two situations is not always obvious.

2.29 As explained above, liability for civil contempt arises where a party to proceedings breaches the terms of an order made by the court, but liability for criminal contempt – a serious interference with the administration of justice – may also arise in the breach context where a person subverts the court's purpose in making an order. There may be liability for criminal contempt where, for example:

(1) The court makes an order against a party to litigation and a non-party knowingly subverts the court's purpose in making the order; for instance, person A is granted a freezing order against person B's assets, but person C helps B to hide the assets.[43]

(2) The court makes an order against the world, known as a *contra mundum* order, and that order is breached. Such an order is intended to be served on and to bind those who are not parties to proceedings in respect of which the order is made.[44]

(3) The court orders reporting restrictions under, for example, section 4(2) of the CCA 1981, to avoid a substantial risk of prejudice to the administration of justice

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42 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [29], referring to *R v Griffin* (1989) 88 Cr App R 63, *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254, and *R v Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

43 See, for example, *Z v A-Z and AA-LL* [1982] QB 558; *Attorney General v Newspaper Publishing Plc* [1988] Ch 333.

44 See *Re Z (A Minor)* [1997] Fam 1.

in the proceedings at hand or in any other imminent or pending proceedings, and that order is breached.[45]

(4) The court makes an order "regulating its own procedure and the purpose of the order is plainly to protect the administration of justice"[46] and a person subject to that order breaches it.

2.30 Criminal contempt is committed in the first of these scenarios because a person (C) knowingly subverts the court's purpose and thereby interferes with the administration of justice.[47] In the second, where the person is not a party to the order, liability can arise whether, in doing the act, they were assisting or encouraging a party bound by the order in committing a breach, or were acting independently: "In both cases the third party has, with knowledge, interfered with the course of justice, and in both cases he should … be subject to the same liability".[48] In the third, a person is breaching an order made to the public at large but is not required to have knowledge of the order and, though not a party to the case, "someone reporting on a trial is not in any relevant sense a 'third party' to a s 4(2) order".[49]

2.31 In the fourth scenario, however, it is not clear which types of orders are within scope of this form of liability and so whether a breach will constitute criminal contempt. Confusion arises because the order is made against, and breached by, a named party, thus bearing the hallmarks of civil contempt. Indeed, the High Court has previously held that a breach of a general civil restraint order ("GCRO"), which restrains a party who persists in issuing claims or making applications which are totally without merit from issuing any claim or making any application in specified courts,[50] should be treated as typical disobedience to a court order (that is, as a civil contempt) in the absence of any authority suggesting otherwise.[51] However, the Supreme Court later held in *Crosland* that a party who had breached an embargo on the publication of a draft judgment issued by the court – which may, arguably, constitute civil contempt – had "interfered with the court's control of its own proceedings" and should thus be liable for criminal contempt:

> The present case is not a case involving a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party. Rather the order was made in order to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded ….[52]

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45 See, for example, *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB), [2020] 3 All ER 477.

46 *Attorney General v Newspaper Publishing* [1988] Ch 333 at 380.

47 *Z v A-Z and AA-LL* [1982] QB 558 at 578: such conduct "interferes with the administration of justice by causing the order of the court to be thwarted".

48 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 230. See also *Z v A-Z and AA-LL* [1982] QB 558 at 578.

49 *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB), [2020] 3 All ER 477 at [54].

50 CPR, r 2.3(1).

51 *Solicitor General v Ellis* [2020] EWHC 3505 (QB) at [8].

52 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23].

2.32 When the issue of breach of a GCRO came before the High Court again, after *Crosland*, it held that breaches of GCROs "bear the character of a criminal contempt rather than a civil contempt because they consist of alleged breaches of civil restraint orders, which are made to protect the administration of justice generally".[53] This illustrates a distinction made by the courts between orders that serve to protect parties' private rights and orders that seek to protect the administration of justice more broadly.

2.33 However, this approach has not been applied consistently by the courts. For example, in *Attorney General v Branch*[54] the High Court dealt with a breach of a "Noueiri order",[55] which restrains a person "from representing others or entering the Royal Courts of Justice to litigate on behalf of others where there is necessity to protect the proper processes of the administration of justice".[56] Despite the judgment in *Crosland*,[57] and the similarities between the purposes of a Noueiri order and a GCRO, the court in *Branch* treated the breach as a civil contempt. The justification for that approach is unclear. Given these different approaches, there is uncertainty as to when the courts will consider an order to be made for the purpose of protecting the administration of justice, and thus when a breach will amount to a civil or criminal contempt. As discussed below, this may have implications for the fault required to prove the contempt.[58]

Fault in civil and criminal contempt

2.34 In *Cox* the Divisional Court stated that "[t]he circumstances in which contempts of court arise are too varied, in our judgment, for one *mens rea* to be applicable to all forms of contempt".[59] The Court added, "Nor is that the law".[60] The absence of a single fault requirement is not of itself problematic. However, what is problematic is that the variations in the requisite fault for different types of contempt are not dependent on whether the contempt is civil or criminal. That is, the fault element is not directly related to the foundational distinction and categories of contempt. That can make it difficult for people to understand and predict whether their behaviour will give rise to contempt liability, and for the courts to identify contempt when it occurs.

2.35 With respect to "acts which fall into the broad category of contempt in the face of the court or contempts closely related to such contempt",[61] the general rule is that "the acts must be deliberate and in breach of the criminal law or a court order of which the person knows".[62] For example, it is a contempt to take photographs in court in breach

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53 *Solicitor General v Ellis* [2023] EWHC 604 (KB) at [27].

54 *Attorney General v Branch* [2021] EWHC 1735 (Admin).

55 *Paragon Finance Plc v Noueiri* [2001] EWCA Civ 1402, [2001] 1 WLR 2357.

56 *Attorney General v Branch* [2021] EWHC 1735 (Admin) at [27].

57 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103.

58 See para 3.150 below.

59 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [66].

60 Above.

61 Above.

62 Above at [66] and [69].

of signs displayed prohibiting such conduct where it was done deliberately and the defendant had notice of those signs;[63] or deliberately to fail to attend court in breach of a witness summons where the witness had notice of that order.[64] There is no separate requirement for a specific intent to interfere with the administration of justice; this is "proven in reality by the deliberate and knowing breach itself".[65] This is the same standard of fault that is required for civil contempt committed by breaching a court order.[66]

2.36 However, a different standard of fault applies in cases of contempt that fall within the scope of section 12(1) of the CCA 1981 and section 118(1) of the County Courts Act 1984, which, as discussed above, includes some contempts in the face of the court. Here, it will be sufficient that the defendant acted recklessly as to the risk that their conduct would interfere with the administration of justice.[67] For example, a person will have "wilfully interrupt[ed] the proceedings of the court", contrary to section 12(1)(b) of the CCA 1981, if they "knew that there was a risk that [their] acts would interrupt the proceedings of the court but nevertheless went on deliberately to do those acts".[68] This is a lower bar than required for contempt in the face of the court at common law.

2.37 Other forms of criminal contempt – those that are not committed in the face of the court – traditionally have required a specific intent to interfere with the administration of justice. This applies to, for example, common law contempt by publication,[69] interfering with witnesses or jurors,[70] or encouraging a person to lie on oath.[71]

2.38 There is no clear correspondence between the civil and criminal contempt categories, and the fault elements that must be proved for different contempts. The result is an unnecessary and unsatisfactory lack of coherence, clarity and certainty in the fault element.[72] The distinction between civil and criminal contempt is not helpful.

Civil contempt, criminal contempt and interference with the administration of justice

2.39 The mischief that contempt law is seeking to address is the risk of interference with the administration of justice or, where the risk has come to pass, addressing actual

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63 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [66] and [69]; *Solicitor General v Holmes* [2019] EWHC 3765 (QB), [2019] 1 WLR 5253.

64 Criminal Procedure (Attendance of Witnesses) Act 1965, s 3. See, for example, *R v Kenny* [2011] EWCA Crim 1232; *R v Wang* [2005] EWCA Crim 476; *R v Abbott* [2004] EWCA Crim 91; *R v Popat* [2008] EWCA Crim 1921.

65 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [78].

66 On contempt by breach of court orders, see Chapter 4.

67 See also paras 3.77 to 3.117 below on recklessness.

68 *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397 at 405.

69 *Attorney General v News Group Newspapers* [1988] 2 All ER 906.

70 *Connolly v Dale* [1996] QB 120; *Attorney General v Judd* [1994] Lexis Citation 4369, *The Times*, 15 August 1994.

71 *Liverpool Victoria Insurance Co v Khan* [2016] EWHC 2590 (QB).

72 We set out our provisional proposals in relation to fault in paras 3.65 to 3.117 below (for general contempt) and paras 4.24 to 4.55 below (for contempt by breach of court orders or undertakings).

interferences. It is not clear that the distinction between civil and criminal contempt is necessary, or indeed helpful, in that endeavour.

2.40 In many if not all instances of civil contempt, the breach of an order or undertaking as between parties will carry with it a threat to the administration of justice by virtue of the court having been defied. In some circumstances such a breach could constitute a serious threat to the administration of justice and be an act that so threatens the administration of justice as to require punishment. In this light, the two categories of contempt are not different or, at least, will not always be different; rather, civil contempt may on occasion be better characterised as a subset of criminal contempt. This has long been observed in the literature:

> It will be seen at once that any example of [civil contempt] is also an example of [criminal contempt]: if the court has made a peremptory order, its breach is necessarily an interference with the way in which the court has expressly determined to administer the course of justice.[73]

2.41 Conversely, however, it is not clear that every criminal contempt constitutes a serious threat to the administration of justice that is greater than the threat that may arise from breach of an order. For example, if a person spits at the judge, this is a paradigmatic case of criminal contempt (in this instance, contempt in the face of the court). However, it seems difficult to maintain that this poses any greater threat to the administration of justice (generally or in the specific proceedings) than the party in commercial litigation who deliberately removes all of their assets from the jurisdiction to prevent the court order (and, by extension, the court) having any practical effect.

2.42 The absence of bright lines with regard to when a breach of order may be a criminal contempt and when it may be a civil contempt does not suggest that there is significant logic to or value in the distinction.

The doubtful utility of the distinction

2.43 While the distinction between civil and criminal contempt is foundational in understanding how the existing law of contempt is expressed, the problems with the law are reflective of a deeper, underlying concern. The classification into civil and criminal contempt owes more to history than it does to principle and practicality. Any conceptual or practical benefits that may once have been derived from the distinction have increasingly become of limited assistance, so much so that the courts have described the classification of contempt as civil or criminal as "unhelpful" and "largely meaningless".[74]

2.44 In our pre-consultation engagement, a number of legal practitioners and judges identified many of the problematic inconsistencies and uncertainties that are outlined above. Some of them expressly raised the possibility of reforming the law to dispose of the distinction. For example, a judge told us:

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[73] J Laws, "Current Problems in the Law of Contempt" (1990) 43 *Current Legal Problems* 99, 101.

[74] *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 at 217. See also *Jennison v Baker* [1972] 2 QB 52 at 61.

> I have been wondering whether it would be worth trying to get rid of the distinction between civil and criminal contempt ... or merging civil and criminal contempt. My instinct … is that the benefits of merging the two would probably outweigh the disbenefits.

A senior barrister posed the question: "Should you clear up or get rid of the distinction between civil and criminal contempt?"

2.45 In our provisional view, the utility of the distinction between civil and criminal contempt has rightly been called into question, and fundamental change is needed. It is not clear that the categorisation of contempt as criminal or civil assists in identifying or addressing contempts of court.

2.46 Given the foundational problems in the traditional classification, our starting point in considering the contempt framework is that a consistent, coherent and effective law of contempt will be better served by a framework that does not rely on a distinction between civil and criminal contempt. Instead, a contempt framework can and should be constructed without those underlying concepts. To that end, in the next three chapters we set out in detail our provisional proposals for a new framework for liability for contempt.

Our overarching provisional proposal: a new framework for liability for contempt

2.47 Our proposed new framework would discard the civil and criminal contempt classification. It would comprise three forms of contempt.

(1) A general form of contempt, provisionally called "general contempt". This has two strands: general contempt by publication, and general contempt committed by conduct other than publication. The conduct element for both strands would be the same. It would require proof of a substantial risk of a non-trivial interference with the administration of justice or an actual non-trivial interference. Where general contempt is committed by publication, the fault element would require proof of intent to interfere with the administration of justice. Where general contempt is committed by conduct other than publication, we seek consultees' views on whether the fault element should be satisfied only by proof of intention, or whether it should be satisfied either by intention or recklessness as to the interference.

(2) A specific form of contempt, provisionally called "contempt by breach of court order or undertaking", in which the conduct element would require proof of the breach of order or undertaking and the fault element would require proof of a deliberate act or omission that constitutes the breach, accompanied by the knowledge that the order existed and the defendant was bound by it, and the knowledge of facts that made the conduct unlawful.

(3) A specific form of contempt, provisionally called "contempt by publication when proceedings are active", in which the conduct element would require proof that the 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. There would be no requirement of an intention to interfere with the administration of justice. The fault element would require proof

that, regardless of whether there was an intent to interfere with the administration of justice, a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect that proceedings were active. Where the defendant is a distributor rather than publisher, fault would be established by proving that the distributor was reckless as to whether the distributed material creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

2.48 Our proposals for these forms of contempt are set out in detail in Chapters 3, 4 and 5. A restructured framework for liability for contempt will then have knock-on effects, including requiring consideration of procedure and sanctions (whether designed to achieve compliance or punishment). These are the subject of Chapters 8 and 10. Consultation questions throughout those chapters welcome responses on our proposals.

2.49 At this point, however, we seek views on our provisional proposals in relation to discarding the distinction between civil and criminal contempt.

Consultation Question 1.

2.50 We provisionally propose that a reformed framework for liability for contempt of court should discard the traditional distinction between civil and criminal contempt.

Do consultees agree?

CONTEMPT AND KINDRED OFFENCES

2.51 There are several legislative provisions that refer to "contempt and kindred offences".[75] Our provisional view is that the phrase "kindred offences" is not helpful.

2.52 First, where statutes refer to "kindred offences", they do not state what falls within that category. In our 2000 report on the Powers of Criminal Courts (Sentencing) Bill we explained what the term meant:

> The phrase "kindred offence" is considered to refer to conduct punishable under a statutory provision – such as section 12 of the Contempt of Court Act 1981 or section 14 of the County Courts Act 1984 – which would be a contempt of court if performed in relation to a superior court. It has also been held to include the offence of failing to comply with an order under section 115(3) of the Magistrates' Courts Act 1980 to enter into a recognizance to keep the peace.
>
> However, some enactments use the term "contempt" to describe offences which might, using the above definition, be described as merely "kindred to" contempt. For example, section 12 of the Contempt of Court Act 1981, which enables magistrates' courts to punish conduct that would certainly be contempt of court if performed in relation to a superior court, is entitled "Offences of contempt of magistrates' courts". Similarly, section 14(5) of that Act describes as "offences of contempt" various

[75] Eg CCA 1981, s 14(2A); Sentencing Code, ss 222(2), 226(5), 305(5).

> statutory offences relating to inferior courts. In short, it appears that a clear distinction has not always been drawn between offences of contempt and offences kindred to contempt.[76]

2.53 In the context of the Bill, we concluded that:

> there does not seem any good reason for requiring the courts to make this distinction: the feature of the "kindred offences" is that they are similar in nature to contempt, and it is therefore logical for committals for them to be treated in a similar way to the way committals for contempt are treated.[77]

2.54 The relationship between contempt and "kindred offences" is unchanged. The powers referred to above under the County Courts Act 1984 and the CCA 1981 remain unchanged; the wording of the provisions does not state that the conduct being punished is contempt.

2.55 Second, the lack of clarity and certainty is exacerbated by the use of the term "offences" to refer to power to punish, in effect, for contempt; though the word "offences" is used, kindred offences are not criminal offences.

2.56 The current position is neither helpful nor necessary. Our provisional view is that where conduct constitutes contempt and is dealt with as contempt then it should be labelled as contempt. There would then be no need for the use of the term "kindred offences" and no uncertainty about whether the conduct in question was to be punished as contempt. The effect would be that where a section of a statute empowers a court to punish a contempt, then the content of that section would refer to the relevant power as one relating to contempt, and there would be no reference to "offences" at all. As a consequence, for example, where the title of section 12 of the CCA 1981 is "Offences of contempt of magistrates' courts", the wording of the section would refer to that conduct as contempt and, reflecting the fact that contempt is not a criminal offence, the title of the section would not refer to "offences".[78]

Consultation Question 2.

2.57 We provisionally propose that the term "kindred offences" should no longer be used. Instead, conduct currently captured by the term "kindred offences" should be described as contempt.

Do consultees agree?

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76 Powers of Criminal Courts (Sentencing) Bill (2000) Law Com No 264; Scot Law Com No 175, p 6.

77 Above, p 7.

78 We discuss the substance of these provisions at para 3.140 below.

Chapter 3: General contempt

INTRODUCTION

3.1 In the preliminary chapters, we set out in broad terms our proposed framework for a new contempt regime. This chapter explores the first of three forms of liability that make up this framework. We refer to this form of liability as “general contempt". This form of liability encompasses interferences with the administration of justice without reliance on the categorisation of contempt as either criminal contempt or civil contempt.[1] Given that a wide range of conduct may interfere with the administration of justice, we consider that the conduct element for general contempt should be broad, that certainty should be afforded by a clearly defined fault element, and that risk of disproportionate infringement of freedom of expression should be mitigated by a higher threshold for fault where the defendant’s conduct constituted publication. General contempt may be committed in two ways, and so has two strands: “general contempt by publication” and “general contempt by conduct other than publication”.

3.2 This chapter comprises three parts. First, it considers our provisionally proposed conduct element. This will be satisfied where a person’s conduct either creates a substantial risk of non-trivial interference with the administration of justice, or actually interferes in a non-trivial way with the administration of justice. Secondly, it addresses our provisionally proposed fault element. Where the contempt is committed by conduct other than publication, this will be satisfied where the conduct element is accompanied by an intent to interfere with the administration of justice in a non-trivial way. Where the contempt is committed by publication then the fault element will only be satisfied by intention; proof of recklessness will not be sufficient to establish fault where contempt is committed by publication. Where contempt is committed by conduct other than publication, we seek consultees’ views on whether the fault element should be satisfied only by proof of intention or whether it should be satisfied either by intention or recklessness as to the interference Thirdly, the chapter looks at some examples of conduct that may fall within the scope of general contempt and asks whether a statutory definition should be accompanied by a non-exhaustive list of examples.

THE CONDUCT ELEMENT

3.3 This part of the chapter considers the type of conduct that should be capable of amounting to general contempt. We provisionally propose that the conduct element should be satisfied where a person’s conduct interferes with the administration of justice in a non-trivial way or creates a substantial risk of non-trivial interference with the administration of justice. This requires consideration of the risk that a consequence will follow from the conduct (where the conduct involves a risk of interference), and of the consequence itself (whether the conduct involves a risk of causing that consequence or actually causes it). This structure mirrors the conduct

[1] In Chapter 2 we discuss this distinction and set out our provisional proposals for dispensing with it.

elements of existing forms of contempt (though the thresholds for liability in those differ from our provisionally proposed general contempt).

3.4 In the next section we focus on the consequence that must be caused or risked.

The consequence

3.5 We provisionally propose that the requisite consequence caused or risked by a person's conduct should be a non-trivial interference with the administration of justice. This consequence requirement can be broken down into two parts: the nature of the consequence, and the gravity of the consequence. Each of these will be taken in turn below.

The nature of the consequence

3.6 We provisionally consider that the consequence risked by the conduct should be an interference with the administration of justice. This concept is sufficiently broad to capture the variety of existing challenges to the administration of justice, and to allow the law to respond and adapt to technological developments that may pose a threat in the future. This approach is consistent with the current test for criminal contempt at common law.[2]

3.7 We note that the term "interference" has been criticised for being "too imprecise"[3] because it does not make it clear "that the interference has to be undesirable".[4] This raises the concern that using interference with the administration of justice as the consequence related to the conduct element for general contempt may capture conduct that interferes with the administration of justice but not in an adverse way. Arguably, only a narrower category of conduct ought to be proscribed, by adopting a conduct element that:

(1) Makes it clear that only undesirable interferences are subject to liability. Such a test could be satisfied where a person, for example, perverts,[5] impedes or prejudices[6] the administration of justice.

(2) Exhaustively lists all types of conduct that would constitute general contempt. For example, such a test could provide that the conduct element is satisfied where a person insults, assaults, intimidates, or threatens, a judge, witness, or juror.[7]

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2 *Attorney General v Martin*, *The Times* 23 April 1986 DC (Lexis); *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1208; *Attorney General v Hislop* [1991] 1 QB 514 at 525; *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [27]; *AXA Insurance UK Plc v Rossiter* [2013] EWHC 3805 (QB).

3 *Report of the Committee on Contempt of Court*, Cmnd 5794 (1974) para 113.

4 Above.

5 See, for example, the common law offence of perverting the course of justice: *R v Vreones* [1891] 1 QB 360. See also *R v Andrews* [1973] QB 422; *Sharpe and Stringer* (1938) 26 Cr App R 122; *Panayiotou and Antoniades* (1973) 57 Cr App R 762; *R v Murray* [1982] 1 WLR 475.

6 Impede or prejudice is used for the strict liability rule: CCA 1981, s 2(2).

7 See, for example, CCA 1981, s 12(1); County Courts Act 1984, s 118(1).

3.8 In our provisional view, neither of these options is suitable for the purposes of general contempt liability. Given that it is not possible to contemplate every example of conduct that may interfere with the administration of justice, limiting liability in either way might unintentionally cause some sufficiently harmful and serious conduct to be excluded from scope.

3.9 A narrower test – seriously impeding or prejudicing the course of justice – is in place to delineate the nature of the consequence with which the "strict liability rule" for contempt by publication is concerned. For example, to "impede" the administration of justice is understood as "slowing down the stream of justice, or… diverting its flow even temporarily".[8] This identifies the nature of the consequence with which the strict liability rule is concerned,[9] but it is appropriate in that context. This is because the rule limits freedom of expression, and so the rule needs to have a narrow scope. Moreover, the courts have interpreted the common law offence of "perverting" the course of justice as meaning that "there must be a possibility that what [the defendant] has done 'without more' might lead to injustice".[10] This is a high threshold which is unlikely to be met where, for example, a person shouts at a judge. While a test of "perverting" may be appropriate for an offence triable only on indictment with a maximum penalty of life imprisonment, it is inappropriate for contempt. A narrow test would also potentially limit the scope of contempt so that it did not capture some conduct, such as insults or even threats.

3.10 Even where legislation has sought to identify specific types of conduct that constitute contempt, the law is not necessarily clear. For example, the courts have given different interpretations to the word "insult" in section 12(1)(a) of the Contempt of Court Act ("CCA") 1981 and section 118(1)(a) of the County Courts Act 1984; the former is said to exclude threats,[11] whereas the latter encompasses them.[12] This approach creates a risk of inconsistently exposing people to liability or affording unequal protection based on arbitrary definitions and distinctions, and may thus result in gaps in the law.

3.11 For these reasons, the conduct element should be defined broadly. Our provisional conclusion is that this is achieved most effectively if the requisite nature of the consequence is an interference with the administration of justice. Our provisional view is that it is not necessary to add any gloss that the interference must be undesirable; the term "interference" inherently connotes undesirability. We recognise that there will remain a lack of certainty as to the type of conduct that would be caught by this test, but we consider it more appropriate to restrict liability and bring greater certainty to the law via the fault element. This will be discussed from paragraph 3.65 below.

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8 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*"), para 4-116.

9 CCA 1981, s 2(2).

10 *R v Murray* [1982] 1 WLR 475 at 479.

11 *R v Havant Justices ex parte Palmer* (1985) 149 JP 609.

12 *Manchester City Council v McCann* [1999] QB 1214.

Consultation Question 3.

3.12 We provisionally propose that to establish the conduct element of general contempt, there should be a requirement to prove that the actual or risked consequence of the defendant's conduct was an interference with the administration of justice.

Do consultees agree?

The gravity of the consequence

3.13 The requisite gravity of the consequence in question must reflect the fact that general contempt is concerned with serious behaviour, which we provisionally consider to be conveyed by a test that excludes from liability any trivial interferences. Our provisional conclusion has been informed by the existing common law test for contempt and the strict liability rule in the CCA 1981.

3.14 At common law, the courts do not always specify how grave the interference must be.[13] In other cases they require that the conduct caused or risked a "serious"[14] interference. Generally, however, whether or not specified, the term seems in practice to have the effect of excluding from liability conduct that constitutes or risks only a trivial interference with the administration of justice.

3.15 The strict liability rule requires that a publication risks "seriously"[15] impeding or prejudicing the course of justice in the relevant proceedings. The case law provides little clarity on the meaning of "serious" for these purposes. In *Attorney General v English*, the House of Lords defined it as "an ordinary English word that is not intrinsically inapt when used to describe the extent of an impediment or prejudice to the cause of justice in particular legal proceedings",[16] though that is not of great assistance. However, the explicit requirement of seriousness is appropriate given that liability is strict. In our provisionally proposed general contempt, liability is not strict and so the seriousness qualifier is less justifiable or needed.

3.16 In our provisional view, the conduct element should be satisfied where a person's conduct actually interferes with the administration of justice in a non-trivial way or creates a risk of an interference with the administration of justice that is more than trivial.

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13 See, for example, *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [25], where the court simply refers to the "real risk"; *Attorney General v English* [1983] 1 AC 116 at 142.

14 See, for example, *Director of the Serious Fraud Office v B* [2014] UKSC 23, [2014] AC 1246 at [39]. See also Crown Prosecution Service ("CPS"), *Contempt of Court, Reporting Restrictions and Restrictions on Public Access to Hearings* (4 May 2022).

15 CCA 1981, s 2(2).

16 *Attorney General v English* [1983] 1 AC 116 at 141-142. See also *Report of the Committee on Contempt of Court*, Cmnd 5794 (1974) para 113: "the law should aim at preventing serious prejudice, not serious risks".

Consultation Question 4.

3.17 We provisionally propose that to establish the conduct element of general contempt it should be sufficient to prove that the defendant's conduct actually interfered with the administration of justice in a non-trivial way.

Do consultees agree?

The risk

3.18 This section will first consider the difference between a risk of interference and actual interference, explaining why a risk is sufficiently serious that it should be captured by the conduct element of general contempt. The discussion then turns to the degree of risk that should be required to satisfy the conduct element. Finally, this section considers the position where a person's conduct does not create the requisite degree of risk of a non-trivial interference with the administration of justice but nevertheless results in an actual non-trivial interference.

The distinction between a risk of interference and actual interference

3.19 In our provisional view, the conduct element of general contempt should be satisfied where a person's conduct creates a *risk* of non-trivial interference with the administration of justice; it should not be necessary to prove that their conduct *actually* so interfered. Where for instance a person (C) has threatened a juror with a view to affecting deliberations, it will in most cases be impossible to know whether that act did in fact affect deliberations. Similarly, where a person has threatened a witness then it may be impossible to know if that threat affected the witness's evidence. It is possible to view the act itself as constituting an actual, non-trivial interference with the administration of justice but our preferred approach is that actual interference lies only in the actual effect of the conduct (which would be an effect on deliberations or an effect on the witness).

3.20 If the conduct element of general contempt required an actual interference with the administration of justice in this sense, it would be necessary to prove that the interference was caused by the threat. While it might be argued that liability should only be imposed where conduct actually interferes with the administration of justice, such a requirement would set too high a threshold for establishing general contempt and may impose too onerous a burden on the party bringing proceedings. Such conduct is sufficiently serious that it should be prohibited and punished; it should not be excluded from the scope of the conduct element by requiring proof of actual, non-trivial interference.[17] It will be sufficient to prove the risk of a non-trivial interference.

3.21 Our provisional view, then, is that conduct that creates a sufficiently high risk of interference should constitute contempt. The importance of ensuring the proper administration of justice warrants an approach that protects it from such risks and thus

[17] We expressed similar concerns in a different context in our report on Modernising Communications Offences (2021) Law Com No 399, para 2.110.

proof of actual interference should not be required. In some circumstances,[18] the courts have held that this is too low a bar and that "some significant and adverse effect on the administration of justice" should be required.[19] However, we consider that an appropriately high level of culpability can be secured before imposing liability by adopting a test that (as we discuss in the following sections) requires the conduct to create a substantial degree of risk, combined with fault elements of intention or (where contempt is committed by conduct other publication) recklessness. Taken together, these conduct and fault elements will ensure that only serious and culpable behaviour attracts contempt liability. Therefore, it is unnecessary to narrow the scope of liability by requiring proof of actual interference.

Consultation Question 5.

3.22 We provisionally propose that to establish the conduct element of general contempt it should be sufficient to prove that the conduct created a risk of interfering with the administration of justice in a non-trivial way.

Do consultees agree?

The degree of risk

3.23 Given that general contempt seeks to capture serious behaviour, where proof of the conduct element relies on proof that a person's conduct created a risk of a non-trivial interference with the administration of justice (as opposed to relying on proof of an actual interference), the conduct element should only be satisfied where the conduct creates a sufficiently high degree of risk that a non-trivial interference with the administration of justice will follow. To determine the appropriate threshold for the requisite degree of risk, we have considered the different thresholds imposed currently at common law and in statute.

3.24 On the one hand, at common law the courts tend to treat the conduct element of contempt as satisfied where a person's conduct creates "a real risk of interference"[20] with the administration of justice. The courts have not defined the meaning of "real" for these purposes. On the other hand, the strict liability rule requires that a publication creates "a substantial risk".[21] The courts have interpreted this to mean a risk which is,

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18 For example, where a party seeks to impose indirect liability on a non-party to proceedings for interference with a court order: *Attorney General v Newspaper Publishing* [1997] 1 WLR 926; *Neil and Hall v Henderson* [2018] EWHC 90 (Ch).

19 *Attorney General v Newspaper Publishing* [1997] 1 WLR 926 at 936.

20 See, for example, *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [25].

21 CCA 1981, s 2(2).

for example, "practical"[22] (as opposed to theoretical), "not remote",[23] "not insubstantial",[24] or "not minimal".[25]

3.25 In our provisional view, liability for general contempt should arise only where the degree of risk of non-trivial interference with the administration of justice is not remote. Conduct that creates only a remote risk is insufficiently serious to be subject to liability for general contempt.

3.26 It would also be inappropriate to impose a threshold higher than substantial risk as this may narrow excessively the scope of the conduct element, thus restricting the ability of the courts to maintain order and administer justice effectively. A higher threshold is not needed in order to restrict the range of conduct that is captured because fault is also required; liability would only arise under our provisional proposal where it is proved that the defendant intended to interfere or was reckless as to the interference. In this way, the requisite fault elements serve to limit the scope of liability to behaviour that is particularly culpable.

3.27 A question arises as to whether the degree of risk should be described as, for example, a risk that is "not remote" or, alternatively, a "substantial" risk. Given that describing the requisite degree of risk as "substantial" in the context of the strict liability rule generally serves to exclude from scope a remote or trivial risk,[26] we provisionally propose that the same language should be used for the conduct element in general contempt. This would enable the courts to draw on decades of case law concerned with the meaning of that threshold when dealing with a case of general contempt. Furthermore, adopting similar terminology across the contempt regime will promote consistency and clarity in the law.

Consultation Question 6.

3.28 We provisionally propose that to establish the conduct element of general contempt on the basis that the defendant's conduct created a risk of interfering with the administration of justice in a non-trivial way, it should be a requirement to prove that the conduct created a substantial risk of such an interference. By "substantial risk" we mean *a risk that is not remote* (which is the meaning the courts have given to the term in section 2(2) of the Contempt of Court Act 1981).

Do consultees agree?

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22 *Attorney General v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874 at 881.

23 *Attorney General v British Broadcasting Corporation* [1997] EMLR 76 at 80.

24 *Attorney General v News Group Newspapers* [1987] QB 1 at 15.

25 Above. See also *Attorney General v British Broadcasting Corporation* [1997] EMLR 76 at 80.

26 See para 3.24 above.

Where conduct does not create a substantial risk of interference but nevertheless actually interferes

3.29 In most cases where a person's conduct actually interfered with the administration of justice in a non-trivial way, the conduct also would have created a substantial risk of such interference. However, it is conceivable that circumstances may arise in which the conduct created a less than substantial risk of a non-trivial interference but ultimately did actually interfere in a non-trivial way.

3.30 Under our provisional proposals, actual interference in these circumstances would be within the scope of liability where the defendant had an intention to interfere with the administration of justice in a non-trivial way. Proof of intention would establish the fault element, as we explain at paragraphs 3.67 to 3.76 below. However, were recklessness to be sufficient to establish fault for general contempt then the defendant would not be liable on the basis of recklessness in these circumstances. This is because (as we explain at paragraph 3.87 below) establishing recklessness would require proof that the defendant had a subjective awareness that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice. If there was in fact no substantial risk, then such subjective awareness could not be established.

Liability where proceedings have not commenced

3.31 It is well established that the law of contempt will apply when proceedings have not yet commenced, but when they are "imminent". However, the law was expanded appreciably by the 1989 decision of the Divisional Court in *Attorney General v News Group Newspapers*, which was followed two years later by Bingham LJ in the same court in *Attorney General v Sport Newspapers*.[27] Those cases decided that "contempt may be committed even though proceedings are neither in existence nor imminent".[28] That is, the law of contempt will apply not only when proceedings have not yet commenced but are to commence imminently, but also prior to that point, when proceedings are not yet imminent.

3.32 In *News Group Newspapers*, the newspaper had offered to cover the costs for a woman to commence a private prosecution against a doctor who she alleged had raped her child and against whom the Director of Public Prosecutions ("DPP") had declined to proceed on the grounds there was insufficient evidence. In the following days, the newspaper published in several articles, including on the front pages, the allegations against the doctor. The Attorney General ("AG") instituted contempt proceedings on the basis that:

> the publications were calculated to interfere with the course of justice in criminal proceedings which were intended to be launched with the [newspaper's] money and were so launched about seven weeks later … [creating a real risk that] the minds of

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27 *Attorney General v News Group Newspapers* [1989] QB 110 at 133; *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1207 (Bingham LJ).

28 *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1207 (Bingham LJ); *Attorney General v News Group Newspapers* [1989] QB 110 at 133 (Watkins LJ, Mann J agreeing at 135).

potential jurors would be affected by what they read so that their view of the case would not be founded purely upon the evidence.[29]

3.33 It was held that there had been a contempt:

> The common law surely does not tolerate conduct which involves the giving of encouragement and practical assistance to a person to bring about a private prosecution accompanied by an intention to interfere with the course of justice by publishing material about the person to be prosecuted which could only serve to and was so intended to prejudice the fair trial of that person. This is especially so where the publisher of them makes it plain that he believes the person referred to in the articles is guilty of serious crime, is deserving of punishment for that and that he has committed some other similar crime.[30]

3.34 In *Sport Newspapers*, police were searching for a man who was suspected of abducting a 15-year-old girl. The suspect had previous convictions for sexual offences, including a conviction for raping a 17-year-old girl. On 11 November, three days after the disappearance, police sought the media's assistance in publicising the search but warned journalists not to publish information about the suspect's background. On 13 November the newspaper published the suspect's criminal history on its front and second pages. On 18 November an arrest warrant for the suspect was issued.[31]

3.35 It was held that that had not been a contempt as the intention to cause a real risk of prejudice to the due administration of justice had not been proven. The judges were divided on whether common law contempt by publication could apply when proceedings were imminent or prior to that point. Nonetheless, Bingham LJ went on to state the basis on which imminence was to be judged, which was that whether proceedings were imminent was to be judged by "what appeared to the alleged contemnor as being likely to happen" and, although it turned out that a warrant was issued, on the facts, proceedings were not imminent because the issue of a warrant was not apparently likely at the date of publication on 13 November.[32]

Uncertainty and reach

3.36 The meaning of "imminent" has long been the subject of controversy. There has been particular concern that, as the Phillimore Committee noted, "there is no way of knowing what period the word 'imminent' is intended to cover".[33] It has been said to be "an imprecise word by which to mark out a period of time".[34] The lack of clarity about what imminent means may interfere with freedom of expression because a publisher

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29 *Attorney General v News Group Newspapers* [1989] QB 110 at 117. The doctor was ultimately acquitted at the criminal trial nine months later.

30 Above at 133.

31 *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1197-1199 (Bingham LJ).

32 Above at 1210 (Bingham LJ).

33 *Report of the Committee on Contempt of Court* (1974) Cmnd 5794 ("Phillimore Report") para 117.

34 *James v Robinson* (1963) 109 CLR 593 at 619 (Windeyer J), cited in *Attorney General v News Group Newspapers* [1989] QB 110 at 133; *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1206 (Bingham LJ), 1229 (Hodgson J).

cannot know when the law will apply and so this can have a chilling effect.[35] In 2012, we observed that such an interference "may not be an interference with freedom of expression 'prescribed by law' for the purposes of article 10" of the European Convention on Human Rights (ECHR), which is given effect in England and Wales by the Human Rights Act 1998.[36] That said, there seems to be little disagreement that proceedings can be said to be imminent "if it must be obvious that a suspect is about to be arrested".[37] So, for example, where a person is holding police at bay in a siege then there would be a strong argument that proceedings are (objectively) imminent.[38] Beyond such immediate circumstances, the search for certainty and clarity has been challenging, though in *News Group Newspapers*, Watkins LJ expressed the view that "where a prosecution is virtually certain to be commenced and particularly where it is to be commenced in the near future, it is proper to describe such proceedings as imminent".[39]

3.37 However, the uncertainty about what imminence means and the uncertain scope of the law beyond imminent proceedings have attracted considerable criticism. In *Arlidge, Eady & Smith* it is argued that there is a chilling effect, especially in relation to investigative journalism,[40] suggesting that exposure to liability for contempt when proceedings "may never materialise" is not easy to reconcile with the protection of freedom of expression provided by article 10 of the ECHR.[41]

3.38 There have also been judicial criticisms. In the Divisional Court in *Sport Newspapers*, Hodgson J (taking a different view from Bingham LJ) thought the decision in *News Group Newspapers* was wrong in extending the law beyond imminent proceedings. He expressed concern about publication contempt reaching into circumstances prior to proceedings being commenced:

> It is … a decision which has implications for the media …. It is almost a daily occurrence that investigative journalism … will target some wrongdoer, publish damning material about [them] and seek, expressly or impliedly, to have instigated criminal proceedings or to urge those who have suffered to seek compensation by civil litigation; such proceedings would clearly be contemplated. … [The Attorney General's consent] is not required for common law contempt proceedings. … Many

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35 See Contempt of Court (2012) Law Commission Consultation Paper No 209, Appendix B: Contempt of Court and the European Convention on Human Rights, para B.44.

36 Above. See also paras 3.100 to 3.105 below.

37 *R v Horsham Justice ex parte Farquharson* [1982] QB 762 at 773 (Forbes J), citing *R v Beaverbrook Newspapers* [1962] NI 15; see also at 807 (Ackner LJ, with reference to submissions at 782).

38 In *R v Beaverbrook Newspapers* [1962] NI 15 (cited in *R v Horsham Justice ex parte Farquharson* [1982] QB 762 at 773 (Forbes J)) the defendant published a prejudicial article about a person who was at the time "under close police surveillance" and was charged with murder two days later. As explained above at para 3.35 while proceedings may be objectively imminent, liability will depend on a subjective assessment of the likelihood of proceedings as it appeared to the defendant at the time: *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1210 (Bingham LJ).

39 *Attorney General v News Group Newspapers* [1989] QB 110 at 135.

40 *Arlidge, Eady & Smith* (2019) para 5-93.

41 Above, para 5-76.

> of the "targets" of investigative journalism are rich and powerful and who is to say that they, when attacked, will not respond by seeking leave to move for contempt?
>
> I do not think that the ambit of … [common law] publication contempt should be widened. The criminal law should be left to deal with offences of perverting the course of justice. [Contempt should not be applicable] unless it is necessary for the effective control of active proceedings.[42]

3.39 The concerns about uncertainty and reach should be seen in light of the requirement that there must also be an intention to interfere with the administration of justice. *Arlidge, Eady & Smith* notes that such cases "are likely to be relatively rare" but argue that "the shadow which common law contempt continues to cast may very well have an inhibiting or 'chilling' effect".[43] We will address the fault element in the next part of this chapter but note that if the fault threshold were to drop below intention then the concerns raised by *Arlidge, Eady & Smith* would be exacerbated.[44]

3.40 We note also that the discussion above is particularly concerned with contempt by publication. This is because that is where the concept of "imminence" has been relevant in the case law. It is, however, conceivable that contempt could be committed other than by way of publication where proceedings are not active; for instance, some conduct might be intended to discourage a witness from giving evidence at proceedings that are not yet imminent. Accordingly, and for the avoidance of doubt, our provisional proposals on these issues apply to general contempt, whether committed by publication or by conduct other than publication.

Contempt and conduct that may affect criminal investigations

3.41 One notable point at which specific proceedings are not yet imminent is during a criminal investigation.

3.42 The possibility of common law contempt applying at the investigatory stage is a live one. For example, the AG's media advisories have drawn journalists' attention to it in the following terms:

> The Attorney General … wishes to amplify the importance of not publishing any material where there is a risk that it could prejudice any potential criminal investigation or prosecutions. Publishing this material could amount to contempt of court. Editors, publishers, and social media users should take legal advice to ensure they are in a position to fully comply with the obligations to which they are subject under the common law and Contempt of Court Act 1981.[45]

3.43 The AG's advice is non-specific and that in itself is a problem. As a media lawyer told us, lawyers need to be specific when advising so that journalists can understand the risk they are taking, but when a risk is vague it is very hard for a journalist to

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42 *Attorney General v Sport Newspapers* [1991] 1 WLR 1194 at 1229-1230 (Hodgson J), see also at 1225 (Hodgson J).

43 *Arlidge, Eady & Smith* (2019) para 5-93.

44 See paras 3.65 to 3.117 below.

45 Attorney General's Office ("AGO"), *Media Advisory Notice: Russell Brand* (22 September 2023).

understand what the risk is. Another media lawyer told us that although the requirement to prove an intention to interfere with the administration of justice sets a high bar, common law contempt nevertheless "seems to hang a bit like the sword of Damocles so that you worry about it". The lawyer told us that although journalists can take advice, if there is a risk of contempt at a point prior to arrest then "you could see how people could start self-censoring".

3.44 A particularly significant and challenging situation is where the conduct of, for instance, a journalist or campaigner may deter witnesses (including victims) from coming forward when police are investigating a crime; that deterring conduct may create a risk of an interference with the administration of justice. One text has argued that the effect of the law is that journalists need to be careful because liability could arise on the basis that conduct "could deter people from coming forward as witnesses in years to come in cases yet to exist".[46]

Criminal offences before proceedings are commenced

3.45 The law of contempt is not the only way of dealing with conduct that occurs before proceedings are active and which may interfere with the administration of justice. There are also criminal offences that will apply prior to commencement of proceedings. They will be especially relevant where conduct may deter a witness from coming forward.

3.46 Under section 51(1) of the Criminal Justice and Public Order Act 1994 it is an offence if a person:

> (a) does an act which intimidates, and is intended to intimidate, another person ("the victim"),
>
> (b) does the act knowing or believing that the victim is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and
>
> (c) does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with.[47]

3.47 Where the intimidation relates to a person who is or is believed to be assisting in an investigation then the offence will apply for a year from the time of any act that assisted or is believed to have assisted in an investigation, and if the person was also a witness then will run until one year after the conclusion of the trial or appeal.[48] The offence is punishable on indictment by a maximum of five years' imprisonment and/or a fine, and on summary conviction by a maximum of six months' imprisonment and/or a fine.[49]

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46 S Harrison and M Hanna, *McNae's Essential Law for Journalists* (26th ed 2022) ("*McNae's*") para 19.3.2.

47 Criminal Justice and Public Order Act 1994, s 51(1). The section also makes further provisions regarding the elements of the offence and proof.

48 Above, s 51(9).

49 Above, s 51(6).

3.48 The common law offence of perverting the course of justice will also be available, taking effect even before an investigation has begun; it will apply from the point where an allegation is made that may be taken seriously by police and give rise to an investigation.[50] The prosecution must prove that the accused has done an act or embarked on a course of conduct that has a tendency to, and is intended to, pervert the course of public justice.[51]

3.49 On the whole, the justice system is not without criminal offences with which to combat threats to the administration of justice that occur before the point of arrest. Section 51, which has been enacted since the decision in *News Group Newspapers*, may be particularly significant. However, criminal offences regularly sit alongside the law of contempt, rather than operating as a substitute. The existence of the offences discussed here does not of itself mean that contempt law should not operate before proceedings are active.

When should the law of contempt apply?

3.50 Should the law of contempt apply before proceedings have commenced? Both the uncertainty and reach of the existing law are undesirable, in particular in relation to publication, due to the potential chilling effect that inhibits speech prior to the commencement of proceedings and the exposure to punishment for speech on the grounds that it may affect proceedings that are yet to materialise. Nevertheless, our provisional view is that the law of contempt should continue to apply before proceedings have commenced.

3.51 We acknowledge that it would be possible to reduce the reach of the law by limiting the pre-commencement circumstances to those of imminence, though that would not resolve the problem that there may be a risk to the administration of justice (including to fair trial rights) from conduct prior to the point where proceedings are imminent. It would also be possible to give some clarity to imminence – for example, to define it as meaning that proceedings are virtually certain to commence within a specified time period (whether one hour, 24 hours, or any other period). However, any specified period would inevitably be arbitrary.

3.52 Significantly, for general contempt committed by publication, we provisionally propose that there must continue to be proof of an intention to interfere with the administration of justice; recklessness will not suffice to establish the fault element for general contempt by publication. In our 2012 consultation paper we noted that common law contempt by publication may be compliant with article 10 because it requires proof of intention.[52]

3.53 We acknowledge that our provisional proposal to have intention only as the fault element in the case of contempt by publication does not fully address the problems of uncertainty and reach of the law where proceedings have not yet commenced and, especially, where they are not yet even imminent. However, in our view, the

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50 *R v Cotter* [2002] EWCA Crim 1033, [2003] 2 WLR 115 at [33].

51 *R v Kenny* [2013] EWCA Crim 1, [2013] QB 896 at [27]; see also CPS Legal Guidance, *Public justice offences incorporating the charging standard* (revised 2 August 2022).

52 Contempt of Court (2012) Law Commission Consultation Paper No 209, Appendix B: Contempt of Court and the European Convention on Human Rights, para B.111. See also paras 3.100 to 3.105 below.

requirement to prove intention to interfere with the administration of justice constrains the scope of contempt law in such cases substantially and appropriately.

Consultation Question 7.

3.54 We provisionally propose that the law of contempt should continue to apply before proceedings have commenced, including when proceedings are imminent and also before proceedings are imminent.

Do consultees agree?

Liability where proceedings have concluded

3.55 It is doubtful that contempt can be committed after the disposal of a matter, or at least not on the basis that there is an actual or risked interference with the concluded proceedings.

3.56 In *Attorney General v Butterworth*, proceedings were brought against ten trade unionists who victimised a union member and office holder after he had given evidence in a case involving the union.[53] Lord Denning MR rejected the finding of the court below that contempt did not apply "after the case is over and all have gone home", in spite of "centuries" of case law:[54]

> It may be that there is no authority to be found in the books, but if this be so, all I can say is that the sooner we make one the better. … How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given? Let us accept that he has honestly given his evidence. Is he to be liable to be dismissed from his employment, or to be expelled from his trade union, or to be deprived of his office, or to be sent to Coventry, simply because of that evidence which he has given? I decline to believe that the law of England permits him to be so treated. If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences. … I have no hesitation in declaring that the victimisation of a witness is a contempt of court, whether done whilst the proceedings are still pending or after they have finished.[55]

3.57 There does not appear to be any other authority for the approach taken in *Butterworth*. However, the logic of extending the application of contempt in time is that the administration of justice may be interfered with more broadly "as a continuing

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53 *Attorney General v Butterworth* [1963] 1 QB 696.

54 Above at 718 (Lord Denning MR).

55 Above at 719 (Lord Denning MR); see also at 723 (Donovan LJ), 728 (Pearson LJ).

process",[56] rather than in any particular proceedings at hand. In *Attorney General v Times Newspapers* it was said by Lord Simon that:

> once the proceedings are concluded, … the pan holding the administration of justice is not entirely cleared. … Further juries must be empanelled, so the departing jurors must not be threatened. Witnesses in future cases must be able to give honest and fearless testimony, so witnesses in past cases must not be victimised.[57]

3.58 Although the conduct is associated with the specific proceedings that have concluded, the rationale lies in the effect that the conduct would have on unspecified future proceedings.

Criminal offences after proceedings are concluded

3.59 Where proceedings have concluded then it is a criminal offence to make threats against or to intimidate a witness or juror who participated (or the defendant believed participated) in the trial. These offences did not exist when *Butterworth* was decided.

3.60 Under section 51(2) of the Criminal Justice and Public Order Act 1994 it will be an offence if a person:

(a) does an act which harms, and is intended to harm, another person or, intending to cause another person to fear harm, he threatens to do an act which would harm that other person,

(b) does or threatens to do the act knowing or believing that the person harmed or threatened to be harmed ("the victim"), or some other person, has assisted in an investigation into an offence or has given evidence or particular evidence in proceedings for an offence, or has acted as a juror or concurred in a particular verdict in proceedings for an offence, and

(c) does or threatens to do it because of that knowledge or belief.[58]

3.61 The actual or threatened harm "may be financial as well as physical (whether to the person or a person's property)".[59] The offence will apply where the act was done from the time proceedings were commenced until one year after the conclusion of the trial or appeal.[60] The offence is punishable on indictment by a maximum of five years' imprisonment and/or a fine, and on summary conviction by a maximum of six months' imprisonment and/or a fine.[61]

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56 *Attorney General v Butterworth* [1963] 1 QB 696, 728 (Pearson LJ). See also *Moore v Clerk of Assize, Bristol* [1971] 1 WLR 1669.

57 *Attorney General v Times Newspapers* [1974] AC 273 at 320.

58 Criminal Justice and Public Order Act 1994, s 51(2). The section also makes further provisions regarding the elements of the offence and proof.

59 Above, s 51(4).

60 Above, s 51(9). The subsection also sets out the relevant period in relation to an investigation.

61 Above, s 51(6).

3.62 The Criminal Justice and Police Act 2001 provides for a similar offence where the proceedings are not criminal proceedings.[62]

3.63 In our pre-consultation engagement we have not heard views about the applicability of contempt laws after proceedings have concluded. However, our provisional view is that if contempt is deployed after particular proceedings have concluded then it will inevitably be concerned with the risk of interference with future proceedings, and that would be consistent with the statements in the cases. The criminal offences now available are both appropriate and adequate to punish the actual or threatened harm to a participant in concluded proceedings and to deter the risk of such harm and interference with the administration of justice that may occur in future.

Consultation Question 8.

3.64 Our provisional view is that where potentially contemptuous conduct occurs following the conclusion of particular proceedings, then any application of the law of contempt will inevitably be concerned with the risk of interference with future proceedings.

Do consultees agree?

THE FAULT ELEMENT

3.65 This part of the chapter considers the fault element that should be required to establish liability for general contempt. First, it addresses proof of intention to carry out the relevant conduct and to interfere with the administration of justice in a non-trivial way. Secondly, it considers whether proof of recklessness as to the interference should be an alternative to proof of intention. Lastly, it considers whether any additional or alternative requirements might be set down for some types of conduct.

3.66 The effect of our provisional proposals regarding fault is that the scope of liability for contempt would continue to require proof of intention to interfere with the administration of justice. However, we also look at whether proof of recklessness should suffice where general contempt is committed by conduct other than publication. We seek consultees' views on whether, for that strand of general of contempt, the fault element should be satisfied only by proof of intention or whether it should be satisfied either by intention or recklessness as to the interference. However, we do not consider whether proof of recklessness should suffice where general contempt is committed by publication; we provisionally propose that only proof of intention should be sufficient to establish fault for that strand of general contempt.

Intention

3.67 In Chapter 2 we explain our provisional proposal to dispense with the distinction between civil and criminal contempt. However, given that contempt liability may give rise to criminal sanctions such as imprisonment, we draw on general criminal law principles in approaching the fault element.

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62 Criminal Justice and Police Act 2001, ss 39-41.

3.68 The criminal law distinguishes between a basic intent, which relates to the act itself, and a specific intent, which relates to the purpose or consequences of that act. Applied to the contempt context, where, for example, a person had glued themselves to a courtroom fixture such as the dock, basic intent would be established by proof the defendant intended to glue themselves to the dock, while specific intent would be established by proof that they intended to interfere with the administration of justice.

3.69 As the law stands, some forms of contempt can be committed with a basic intent only – for example, in a magistrates' court, under section 12(1)(b) of the CCA 1981, a contempt may be committed where a person does an act that interrupts proceedings with an intent to do such an act.[63] This chapter is concerned with a form of contempt that is particularly serious and may expose a defendant to sanctions that include terms of imprisonment up to two years, and thus should require more than a mere basic intent to carry out the relevant conduct. Some conduct in the contempt sphere may also involve expression or association with others, which respectively engage rights of freedom of expression and freedom of association, which are protected by articles 10 and 11 of the ECHR. The protection of those rights also dictates the need for more than just basic intent. Otherwise, liability for general contempt may be imposed at too low a threshold.

3.70 One option may be to require proof of a specific intent as to the consequence of the conduct. Here, that consequence is a non-trivial interference with the administration of justice. Consequently, such a fault element would be satisfied where the defendant intended to interfere with the administration of justice in a non-trivial way. This would be the case whether the defendant's conduct created a substantial risk of such an interference or actually interfered.

3.71 We have explored the meaning of intention in detail on previous occasions,[64] but for the purposes of this chapter it is necessary to reiterate briefly that intention may be either direct or indirect. A person is taken to have direct intention where they "acted in order to bring about"[65] a particular result. Indirect intention arises where they "did not act in order to bring about that [result], but [they were] aware that it was a virtually certain consequence"[66] of their conduct. In the context of our provisionally proposed form of general contempt, the relevant result is a non-trivial interference with the administration of justice. This test sets a high bar: absent proving direct intention, for a person's foresight of consequences to suffice to establish intention, "the probability of the consequence taken to have been foreseen must be little short of overwhelming".[67]

3.72 In *Attorney General v Newspaper Publishing*, the court made an order prohibiting the publication of certain material to preserve confidentiality but a non-party to those

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63 *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397.

64 See, for example, Reform of Offences Against the Person (2014) Law Commission Consultation Paper No 217, paras 2.23-2.24; Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 3.9-3.15; Modernising Communications Offences (2021) Law Com No 399, paras 2.184-2.203.

65 Reform of Offences Against the Person (2014) Law Commission Consultation Paper No 217, para 2.23.

66 Above.

67 *R v Moloney* [1983] AC 905 at 929 (Lord Bridge). See also *R v Hancock* [1985] UKHL 9, [1986] 1 AC 455 at 472 (Lord Scarman).

proceedings nevertheless published it.[68] Such conduct frustrates the court's purpose in making the order and thus interferes with the administration of justice.[69] It was concluded by Morritt J that it was "clear beyond doubt" that the editor "both appreciated and accepted" that "one of the inevitable consequences" of publishing the prohibited material "would be to damage or destroy [the purpose of the order]" – that is, to damage or destroy the confidentiality of the material – "and thereby interfere in the administration of justice in the proceedings" to which the order related.[70] Where the defendant was aware that an interference with the administration of justice was a virtually certain consequence of their conduct, that would be sufficient to establish intention.[71]

3.73 Similarly, in *News Group Newspapers*, discussed above,[72] Watkins LJ concluded that the editor's intent to interfere with the administration of justice could be inferred, given the high likelihood that the publication would risk interfering and that the editor could foresee that result:

> I simply cannot accept that an experienced editor such as [the editor in question] could have failed to have foreseen that the material which he published in the articles complained of and the steps he announced he was taking to assist the mother to prosecute would incur a real risk of prejudicing the fairness of a trial of [the doctor].[73]

3.74 As the judgment of Watkins LJ indicates, in the context of a publication contempt committed by the media, the court may consider the experience of the defendant when assessing their foresight of the consequences. This approach enables the courts to take into account the fact that an inexperienced publisher with fewer resources and limited access to legal advice, such as a citizen journalist, may not have appreciated the potential consequences of their conduct, whereas a journalist for a major media organisation is more likely to have been adequately informed of the risks.[74]

3.75 For the above reasons, it is our provisional view that a defendant who acts with specific intent should be culpable. This intent will be established upon proof that a defendant acted in order to bring about a non-trivial interference with the administration of justice. We note that, as the case law shows, proof the defendant knew that such an interference was a virtually certain consequence of their conduct will be sufficient to infer intention.

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68 *Attorney General v Newspaper Publishing* [1989] 1 FSR 457. This case concerned the publication of *Spycatcher*, a memoir by a former employee of the Security Service.

69 See also paras 3.157 to 3.160 below.

70 *Attorney General v Newspaper Publishing* [1989] 1 FSR 457 at 486.

71 Above at 474, citing *R v Nedrick* [1986] 1 WLR 1025 at 1028.

72 See paras 3.32 to 3.33 above.

73 *Attorney General v News Group Newspapers* [1989] QB 110 at 127.

74 See also *Attorney General v Newspaper Publishing* [1988] Ch 333 at 374-375; *Attorney General v Sports Newspapers* [1992] 1 All ER 503 at 516.

Consultation Question 9.

3.76 We provisionally propose that the fault element of general contempt should be satisfied by *intention*, which will be established where it is proved that the defendant intended to interfere with the administration of justice in a non-trivial way.

Do consultees agree?

Recklessness

3.77 In some circumstances, a person may not have intended the contempt (in the manner described above) but may still have had a level of awareness that indicates culpability. The concept of recklessness may provide an alternative basis for liability in these circumstances. We do not provisionally propose that proof of recklessness should be sufficient to establish fault. Rather, we have not reached a provisional conclusion on this issue and seek consultees' views on whether recklessness should be sufficient and, if so, on the test for recklessness that we explain in the following paragraphs.

3.78 Allowing fault to be proved by establishing recklessness would represent a change in the existing common law of contempt, which requires that intention must be established. In 1988, the Court of Appeal (Civil Division) in *Newspaper Publishing* stated clearly that recklessness would not be a sufficient basis for liability.[75] The court was addressing a case involving publication. It found that while the CCA 1981 preserved common law contempt, the purpose of the statute "was to effect a permanent shift in the balance of public interest away from the administration of justice and in favour of freedom of speech".[76] The court rejected the proposition that recklessness should be sufficient to establish fault for contempt at common law, noting that to accept such arguments "would certainly not be furthering the statutory purpose" of the CCA 1981.[77] The statement of law was not limited to publication contempts but was made with respect to a "general category of contempt, namely, interfering with the due administration of justice".[78]

3.79 It is noteworthy, however, that just six years earlier the House of Lords had addressed the meaning of recklessness. In *R v Caldwell* it was held that the awareness of the risk was to be judged by objective standards: if in the circumstances an "ordinary prudent individual" would have been aware of "the possibility of [the relevant] kind of harmful consequence".[79] Thus, when the Court of Appeal rejected the proposition that recklessness should be sufficient to establish fault, it was rejecting an objective test.

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75 *Attorney General v Newspaper Publishing* [1988] Ch 333 at 374-375 (Donaldson MR), 381-382 (Lloyd LJ), 387 (Balcombe LJ).

76 Above at 382 (Donaldson MR).

77 Above.

78 Above at 372 (Donaldson MR). The report of the case indicates that argument was put to the court that publication is just one type of conduct in the general category (for example, at 354: "other conduct, including publication").

79 *R v Caldwell* [1982] AC 341 at 354 (Lord Diplock).

3.80 In 2003, *Caldwell* was overturned by the unanimous decision of the House of Lords in *R v G* that held proof of recklessness required actual awareness of the risk.[80] The now-familiar test stated in *R v G* is that a person will be reckless:

> with respect to –
>
> (i) a circumstance when he is aware of a risk that it exists or will exist;
>
> (ii) a result when he is aware of a risk that it will occur;
>
> and it is in the circumstances known to him, unreasonable to take the risk.[81]

3.81 This change in the law makes it appropriate to consider whether proof of recklessness (in the *R v G* sense) should now be sufficient to establish fault in contempt.

3.82 In the discussion below we consider whether proof of recklessness should be sufficient to establish fault in the general form of contempt, except where contempt is committed by publication. That is:

(1) For general contempt by publication, our provisional view is that intention must be proved.

(2) For general contempt by conduct other than publication, we seek consultees' views on whether the fault element should be satisfied only by proof of intention or whether it should be satisfied either by intention or recklessness as to the interference. However, were recklessness to be sufficient, we provisionally propose a test for recklessness so that liability on this basis would be carefully circumscribed.

3.83 We deal first with the awareness of the risk and then turn to the reasonableness of taking the risk.

Recklessness as to the risk

3.84 We have provisionally proposed that the conduct element of contempt may be established by proving that the defendant's conduct either: (a) created a substantial risk of a non-trivial interference with the administration of justice; or (b) resulted in an actual non-trivial interference with the administration of justice.

3.85 As proof of recklessness first requires that the defendant was aware of a risk, this suggests two possible ways in which this component of recklessness may be proved:

(1) Proof that the defendant was aware there was a risk that their conduct would create a substantial risk of a non-trivial interference with the administration of justice.

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80 *R v G* [2003] UKHL 50, [2004] 1 AC 1034; see also *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

81 *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41] (Lord Bingham).

(2) Proof that the defendant was aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice.

3.86 Our provisional view is that the first of these should not be sufficient to establish recklessness. The first threshold relies on awareness of a risk of a risk. In effect, there are too many uncertainties as to the risk that the conduct will result in an interference. This sets the bar too low for culpability and its complexity makes it difficult to explain and apply.

3.87 The second, however, involves a higher degree of culpability. We welcome consultees' views as to whether a person who engages in the requisite conduct while aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice may be sufficiently culpable and, where it was unreasonable to take the risk (discussed below) should be subject to liability for general contempt.

Where the risk is not considered

3.88 As the awareness component of the test for recklessness is subjective, requiring proof of the defendant's awareness of the risk, a person is not treated as reckless where they did not turn their mind to the risk at all. In the context of contempt liability, this may act as a safeguard against the over-criminalisation of people unfamiliar with the law and legal process.

3.89 Therefore, although the introduction of recklessness as an alternative way to establish fault would broaden the scope of liability, it would still only capture behaviour which the defendant was aware posed a substantial risk of non-trivial interference with the administration of justice.[82] As we have indicated in paragraphs 3.87 above, we welcome consultees' views as to whether that threshold would ensure sufficient culpability for the imposition of liability for contempt.

Taking photographs in court

3.90 Taking photographs in court will ordinarily be a clear contempt and an instance of what has been called contempt in the face of the court. It will also be a criminal offence under section 41 of the Criminal Justice Act 1925. In *Solicitor General v Cox*, where the defendant had taken photographs in the Crown Court during a sentencing hearing, the Divisional Court noted that in the "overwhelming majority of cases, it will no doubt be readily inferred that the person deliberately taking photographs intended to interfere with the due administration of justice".[83] However, there may be circumstances where intention cannot be inferred and the court considered what the law required in those circumstances.

3.91 The court held that where there is no intention to interfere with the administration of justice, "the acts must be deliberate and in breach of the criminal law or a court order

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82 See also Chapter 5, where this issue arises in relation to contempt by publication; media lawyers and academics expressed concern about the difference in culpability of, on the one hand, social media users and citizen journalists who lack the legal expertise to avoid committing contempt and, on the other hand, professional journalists who have the benefit of legal advice from teams of lawyers.

83 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [68].

of which the person knows".[84] A defendant, said the court, "is taken to know of the existence of the criminal law".[85] While referring specifically to the taking of photographs, the court was also speaking generally of the requisite fault for "acts which fall into the broad category of contempt in the face of the court or contempts closely related to such contempt".[86]

3.92 Our general contempt test clearly accommodates most conduct of this kind. Proof of intention to interfere with the administration of justice will establish fault under general contempt just as it does under the *Cox* test, with intention readily inferred in most circumstances. Where intention is not proved and the conduct constitutes a breach of a court order of which the defendant knows then, if recklessness is to be sufficient to establish fault, recklessness would be satisfied.

3.93 Where intention is not proved, and the conduct constitutes a breach of the criminal law then the position may be less clear. The Divisional Court in *Cox* explained the rationale for the fault requirements it laid down:

> Contempt in the face of the court may require speedy action, whether by removing or detaining a person or lawful warning that that may happen if an act is repeated. If a person is seen taking photographs, the court has to have the power to seize his phone, for the images to be checked and if necessary deleted, for any onward transmission to be prevented, and for the person to be removed from court to the cells for inquiries to be made, followed by any punishment later that day. In the overwhelming majority of cases, it will no doubt be readily inferred that the person deliberately taking photographs intended to interfere with the due administration of justice.
>
> However, there may be rare cases where that is not the inference; in such cases it should be no bar to those steps for the person taking the photographs deliberately to say that he was unaware of the [statutory prohibition on photography], or that he had not read or understood the prohibitory notices, for example if he were illiterate or foreign, or that he had no intention of interfering with the administration of justice, but had tried to take his photographs unobtrusively, just wanting a personal souvenir. …
>
> The substance of this part of the common law is to enable courts to prevent and punish interference with the administration of justice by acts done in the face of the court. The intent required cannot depend on the foresight, knowledge or understanding which the ignorant or foolish might have of the ways in which his acts risk or actually do interfere with the administration of justice. The ignorant and foolish, who are unaware of the law or who read prohibitory notices but do not understand their purpose, and do not realise the risks which their acts may create for the trial or other court process, and who may be right when they say that the risk or the actual harm was not what they ever intended, could not be dealt with at all for contempt in the face of the court. Yet they may cause the most serious harm. A defence that the contemnor is not guilty because he did not realise what could

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84 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [69].

85 Above at [76].

86 Above at [66], also [68] and [70].

> happen, and intended no interference, would put the court proceedings at greater risk the more ill-informed the contemnor was prepared to say he was, or actually was. The power of the court to react swiftly to acts of this sort, which risk interference with the administration of justice, cannot be dependent on any further specific intent to interfere with the course of justice, without creating a serious risk of neutering the court in the exercise of its powers when it may need them the most.[87]

3.94 If there were a recklessness requirement in our provisionally proposed general contempt test, it would require subjective awareness of the risk. The test in *Cox* that relies on the defendant being "taken to know" of the criminal law is premised on an objective test. This presents a challenge because there is a persuasive rationale for bringing within the realm of contempt conduct that is committed with such a state of mind.

3.95 Our provisional conclusion is that a defendant who does not have intention or (if recklessness is to be sufficient for fault) subjective awareness should not be liable to a finding of contempt on the basis that they are "taken to know" of the criminal law. This would not deny the court the power to deal immediately with a person who is taking photographs and address the risk; under the Courts Act 2003 a person may be excluded or removed from the courtroom, people may be searched, and articles seized "where they may be evidence of, or in relation to, an offence".[88] The court would also be able to deal with it as a potential contempt, consistent with procedural rules, and only after an initial enquiry indicated that the defendant did not have the requisite intention (or subjective awareness) would the court be faced with a decision about next steps.[89] It may be sufficient to make the person aware of the relevant laws, after which there could be no doubt about subjective awareness and, almost certainly, no doubt about intention. There is also the option of referring the matter to police with a view to prosecution as a criminal offence under section 41 of the Criminal Justice Act 1925.

3.96 We note that the maximum penalty for a breach of section 41 is a £1,000 fine.[90] The penalty is substantially less than the maximum two year sentence that the superior courts may impose for contempt, and the offence is one of strict liability.[91] As the effect of our provisional proposals regarding fault is that taking photographs would not constitute contempt in circumstances where there was neither intention nor (if recklessness is to be sufficient) awareness of the risk of interference with the administration of justice, the result would be that the courts have fewer powers in relation to taking photographs in court. It is outside our Terms of Reference to make provisional proposals or, ultimately in the final report, recommendations about the

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87 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [68]-[70].

88 Courts Act 2003, ss 52-54 and 55. The offence would be taking photographs in court, which is an offence under the Criminal Justice Act 1925, s 41(1). If the photographs are published prior to seizure then it may well be that strict liability contempt by publication will apply.

89 See Chapter 8 on procedure.

90 Criminal Justice Act 1925, s 41(1).

91 CCA 1981, s 14(1). We discuss sanctions in detail in Chapter 10.

criminal offence. However, we are able to take consultees' views on whether the government might in due course consider a review of section 41.

Consultation Question 10.

3.97 We provisionally propose that, in the event that taking photographs in court were not to constitute contempt unless intention (or recklessness, if recklessness is to be sufficient for establishing fault) could be proved, the government should consider reviewing section 41 of the Criminal Justice Act 1925.

Do consultees agree?

The reasonableness of taking the risk

3.98 Having proved that the defendant was aware of the risk, it would then need to be proved that, in the circumstances as they were known to the defendant, it was unreasonable to take that risk.

3.99 An assessment of whether it was reasonable to take a risk will at times engage issues of rights. This will be particularly relevant where the conduct involves expression, which is protected under article 10 of the ECHR. It may also be relevant where the conduct involves association with others, such as protest, as freedom of association is protected by article 11. These, however, must be balanced against the right to a fair trial, which will be compromised should there be an interference with the administration of justice.

Articles 10 and 11

3.100 Article 10 of the ECHR states:

> 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. ….[92]

3.101 This right is subject to limits, which must be narrowly construed:[93]

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others … or for maintaining the authority and impartiality of the judiciary.[94]

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92 ECHR, article 10(1).

93 *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [65].

94 ECHR, article 10(2).

3.102 Article 11 states:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.[95]

3.103 Like those in article 10, the rights in article 11 are subject to qualifications. Relevantly to contempt, those qualifications are:

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others.[96]

3.104 The law of contempt is clearly intended to protect the rights of others – in particular, the right to a fair trial – and the authority and impartiality of the judiciary.[97] As such, though contempt laws will in some circumstances constitute an interference with the freedom of expression, that interference falls within the exceptions in article 10(2). Any interference must be necessary and proportionate to the protection of one of the legitimate aims.[98] Expression that is political and relates to a matter of legitimate public interest will attract the greatest weight and interference will be more closely circumscribed.[99] With respect to freedom of assembly, which will typically also engage expression in protest cases and articles 10 and 11 will be invoked on the bases of the same facts, the Supreme Court has noted that ECtHR case law requires "a certain degree of tolerance towards peaceful gatherings".[100] However, fair trial rights take precedence where article 6 is engaged.[101]

Assessing reasonableness

3.105 In assessing whether it was reasonable for a defendant to take a risk that there would be an interference with the administration of justice, the court must ensure that any limits placed on the defendant's rights to expression or assembly are proportionate to the legitimate aims that are being protected. As the Supreme Court has noted, "determination of the proportionality of an interference with ECHR rights is a fact-

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95 ECHR, article 11(1).

96 Above, article 11(2).

97 See further the detailed appendix in Contempt of Court (2012) Law Commission Consultation Paper No 209, Appendix B: Contempt of Court and the European Convention on Human Rights, para B.56; *News Verlags v Austria* (2001) 31 EHRR 8 (App No 31457/96); *Worm v Austria* (1998) 25 EHRR 454 (App No 22714/93) at [40].

98 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [35].

99 *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 at [82]; Contempt of Court (2012) Law Commission Consultation Paper No 209, Appendix B: Contempt of Court and the European Convention on Human Rights, para B.72 citing: *Wingrove v UK* (1997) 24 EHRR 1 (App No 17419/90) at [58]; *Bowman v UK* (1998) 26 EHRR 1 (App No 24839/94) (Grand Chamber decision).

100 *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 at [61] and [80], citing *Primov v Russia* (2014) App No 17391/06.

101 See the discussion in *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [35] and [72].

specific enquiry which requires the evaluation of the circumstances in the individual case".[102]

3.106 Whether it will be reasonable to take the risk will thus depend on a consideration of all the circumstances. This will include, for example, the likelihood of the risk coming to pass, the seriousness of the consequences of the potential interference; the practical and reasonable measures that might be available to the court or the wider justice system that could mitigate the consequences of any interference or minimise the risk; and whether taking the risk would serve a public interest.

3.107 It should be noted, however, that the assessment of reasonableness will only be required where recklessness is being relied on to prove fault. It will not be relevant to intention.

Contempt committed by publication

3.108 Earlier in this chapter we discuss liability for contempt where proceedings have not commenced and note that the existing requirement to prove intention in the case of contempt committed by publication is an important safeguard for freedom of expression. In our provisional view, this requirement should be retained and proof of recklessness should not be sufficient to establish liability. Although the recklessness test would require an assessment of reasonableness that took account of the right to freedom of expression protected by article 10, there is a clear risk that there would be a chilling effect on publication, to the detriment of public discussion of matters of public interest. Our provisional view is that the better approach is to retain the intention requirement.

3.109 If the defendant's conduct constitutes "publication" then it would fall within the contempt by publication strand of general contempt. Our provisional view is section 2(1) of the CCA 1981 provides an appropriate definition of publication. The definition is broad and in non-exhaustive terms:

> "publication" includes any speech, writing, programme included in a programme service, or other communication in whatever form, which is addressed to the public at large or any section of the public.[103]

3.110 This definition has been considered in our previous work on liability under the CCA 1981 – and it will be relevant to the form of contempt that we provisionally propose should replace it, being contempt by publication where proceedings are active[104] – but it can be applied with equal relevance in the general contempt context. We draw attention to two points here.

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102 *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 at [59].

103 Under s 2(5), a "programme service" has the same meaning as in the Broadcasting Act 1990, which is in effect that a programme service is a programme delivered either by broadcast or cable. Some publications of the legislation (eg on legislation.gov.uk and Westlaw) presently state the s 2(2) definition incorrectly as "programme included in a cable programme service". We have stated the amended section in the way it was amended by the Broadcasting Act 1990, s 203 and sch 20 para 31(1) (which followed previous amendments by the Cable and Broadcasting Act 1984, s 57 and sch 5 para 39).

104 See Chapter 5.

3.111 First, the definition requires that a communication is addressed to "the public at large or any section of the public". This means that not every communication will fall within the contempt by publication strand of general contempt. In Chapter 5 we consider when it can be said that there has been a publication to "a section of the public" and consultees with an interest in this area may wish to also respond to the consultation questions there.[105]

3.112 Secondly, the definition does not make reference to online communications. In our 2012 review we recommended that there be no change to the definition, noting in particular that the "other communication in whatever form" wording was sufficient to capture online publications.[106] We did, however, receive a comment from the Criminal Bar Association that "the illustrative examples currently included in section 2(1) (speech, writing, programme included in a programme service), could be added to with words such as 'online communication of any kind'".[107] Another consultee commented that the section "should be much more clearly defined to cover electronic and internet publications".[108]

3.113 In our pre-consultation engagement on this occasion, no doubts have been expressed to us as to whether the current definition of publication adequately captures publication online. Nevertheless, we consider it appropriate over a decade after our previous consultation to reconsider the illustrative examples because the absence of online communications now appears anomalous. Our provisional view is that a technical definition is not required, though we note that there are complex definitions of communication in other statutes.[109] Rather, our provisional view is that if the law is to be clear and comprehensible to a lay person then the definition of publication should continue to be non-exhaustive, but the examples should include online and electronic communications.[110]

Consultation Question 11.

3.114 We provisionally propose that where general contempt is committed by publication, the fault element for general contempt should be satisfied only by intention.

Do consultees agree?

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105 See paras 5.71 to 5.82 below.

106 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 3.18-3.22; Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, paras 2.24-2.29.

107 Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, para 2.27 (emphasis in original).

108 Above, para 2.28.

109 See in particular Communications Act 2003, s 32, which gives definitions of "electronic communications network" and an "electronic communications service". See also Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 3.13-3.17.

110 In Intimate Image Abuse (2022) Law Com No 407, paras 10.142-10.147, we considered the difficulty in defining "public" sharing of images online, as against "private" sharing online. We concluded that there were no determinative factors and that the better option was flexibility on a case by case basis, with the courts best placed to determine whether a place where an image was shared was or was not private.

Consultation Question 12.

3.115 We invite consultees' views on whether, where general contempt is committed by conduct other than publication, the fault element for general contempt should be satisfied:

(1) only by intention, or

(2) either by intention or recklessness.

Consultation Question 13.

3.116 If recklessness is to be an alternative fault element where contempt is committed by conduct other than publication, we provisionally propose that recklessness should be established by proving that:

(1) the defendant was aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice; and

(2) in the circumstances as the defendant knew them, it was unreasonable to take the risk.

Do consultees agree?

Consultation Question 14.

3.117 We provisionally propose that "publication" continue to be defined as it is in section 2(1) of the Contempt of Court Act 1981, but with illustrative examples to include online or electronic communications.

Do consultees agree?

EXAMPLES OF CONDUCT WITHIN SCOPE OF GENERAL CONTEMPT

3.118 This part of the chapter outlines some examples of conduct that we consider would fall within the scope of general contempt. For simplicity the discussion presumes that the requisite fault element is present. The conduct in each example constitutes contempt under the current law.

3.119 We do not aim in this section to provide an exhaustive list of the types of conduct that may fall under the general contempt test. Rather, we identify some of the more common ways that general contempt could be committed. In doing so we have several aims. First, we seek to show that our primary aim in formulating general contempt is not to expand or contract the law, but rather to consolidate, clarify and simplify the law by use of an overarching test. Given this, we will ask at the end of this section whether a statutory definition should be accompanied by a non-exhaustive list of examples of conduct that may satisfy that test. Secondly, we identify some specific

questions in relation to some types of conduct, especially where there is uncertainty in the law or there is a case for substantive reform. Thirdly, the discussion lays some groundwork for the discussion of sanctions in Chapter 10. We consider in that chapter whether sanctions should be more serious depending on the type of conduct involved.

3.120 Some examples of contempt have been discussed above (for example, taking photographs in court).[111] The types of conduct we consider here are:

(1) disrupting court proceedings;

(2) obstructing court officers or staff in the execution of their duties;

(3) threatening or assaulting court officers and staff, parties to proceedings, witnesses, or jurors;

(4) misconduct by jurors;

(5) conduct associated with disobeying court orders;

(6) providing false statements or disclosures to the court;

(7) accessing court documents without authorisation; and

(8) misconduct by legal representatives.

3.121 This discussion is followed by the final two parts of the chapter which explain the relationship between our general contempt test and the other forms of contempt that we provisionally propose in the following chapters (which are contempt by breach of court orders or undertakings, and contempt by publication).

Disrupting court proceedings

3.122 The current law treats conduct that disrupts proceedings as an interference with the administration of justice. This may include taking photographs in court;[112] refusing to sit in the appropriate seat in court, against the judge's directions;[113] shouting and singing in court;[114] and much more. In our view, such conduct should continue to be captured by the law of contempt to ensure that proceedings can progress fairly, efficiently and effectively. As the Court of Appeal (Criminal Division) stated recently:

> This part of the law is not about insults or other expressions of disrespect for judges or courts or their decisions. … [It is about] protecting the due administration of justice. The achievement of that aim is not only of interest to those directly involved in legal proceedings. Securing the efficient and fair administration of justice is

111 See paras 3.90 to 3.97 above.

112 *Solicitor General v Holmes* [2019] EWHC 1483 (Admin), [2019] 1 WLR 5253 at [14].

113 *R v Pateley Bridge Justices ex parte Percy* [1994] 5 WLUK 286.

114 *Morris v Crown Office* [1970] 2 QB 114.

> intrinsic to upholding the rule of law, which is in the interests of the public generally.[115]

3.123 We expect that disruption to court proceedings would be captured by the conduct element of general contempt on the grounds that it either carries a substantial risk of non-trivial interference with the administration of justice or has in fact interfered with the administration of justice in a non-trivial way.

3.124 It does not appear to us to be a requirement that the conduct takes place inside the courtroom. For example, disruption may be caused by conduct that occurs in waiting spaces outside the courtroom or other parts of the premises, or outside the court building.[116] Hearings may be disrupted by the conduct of those attending remotely online. The Criminal Procedure Rules refer to conduct that is "in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings".[117]

3.125 In our pre-consultation engagement with stakeholders, we heard concerns about recent cases of protestors gluing themselves to furniture in the courtroom during proceedings brought against them for causing a public nuisance or breach of a protest-related injunction.[118] In some of these cases, arrests for an offence of criminal damage under section 1(1) of the Criminal Damage Act 1971 were made.[119] However, judges and lawyers told us that such conduct should be treated as contempt where it is primarily wrongful because of the interference with the administration of justice – for example, where the purpose of the behaviour is to delay proceedings.

3.126 The impact of this type of conduct on the course of justice was made clear by the High Court in *North Warwickshire Borough Council v Charlesworth*,[120] a case in which the defendant glued herself to the dock and it took three hours to have her removed:

> [The contemnor's] actions in court… caused very significant disruption to the court process. The custodians could not remove [her]. The police had to be called who, in turn, had to call in specialist police officers with [expertise to dissolve the glue]. At the time of [her] actions, the court still had six other defendants' cases to deal with. Another court room had to be convened but the court could not immediately recommence as there were insufficient custodians to bring defendants from the cells into court as a result of the need of multiple officers to remain with [her].[121]

3.127 Gluing oneself to a courtroom fixture is a means of delaying proceedings and interrupting court and thus it seems plain that it is and should be captured by the law

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115 *R v Jordan* [2024] EWCA Crim 229, [2024] 4 WLR 30 at [23].

116 See for example, above.

117 CrimPR, r 48.5(1)(a).

118 BBC News, "Extinction Rebellion trial delayed as accused glues hand to table" (10 May 2021); Damien Gayle, "Insulate Britain members disrupt trial by gluing hands to court furniture" (26 April 2022) *The Guardian*.

119 Jack Hardy, "Extinction Rebellion activist arrested for gluing himself to dock at printing press blockade trial" (10 May 2021) *The Telegraph*; Damien Gayle, "Insulate Britain members disrupt trial by gluing hands to court furniture" (26 April 2022) *The Guardian*.

120 *North Warwickshire Borough Council v Charlesworth* [2022] EWHC 1464 (QB).

121 Above at [12].

of contempt. One judge emphasised to us the importance of dealing with such conduct as contempt to "send a message that [the] solemnity of the court needs to be maintained" and suggested that this message is undermined by any failure to deal with these cases appropriately.

Insults

3.128 Ordinarily it will be unlikely that insults will meet the general contempt threshold. This is because, without more, an insult will not tend to carry a substantial risk of a non-trivial interference with the administration of justice, nor actually interfere with the administration of justice in a non-trivial way, and so tends not to rise to the appropriate level of seriousness to warrant the imposition of liability for contempt. This is not to say that an insult will never satisfy the conduct element of general contempt. The Criminal Procedure Rules expressly contemplate the possibility, referring to "obstructive, disruptive, insulting or intimidating conduct".[122] Where the insult is threatening or intimidating in some way then it may constitute contempt on that basis.[123] In other cases, an insult may be better understood as conduct that disrupts proceedings. In *R v Walker*,[124] a convicted offender who repeatedly interrupted and insulted the judge at sentencing in the Crown Court, by swearing and referring to judges as paedophiles, was found to be in contempt. The Court of Appeal (Criminal Division) stated that:

> outbursts of this character impede and constitute a contempt for the administration of justice. … The law brings citizens together in stressful circumstances for many, and it is important that proceedings are conducted quietly and dispassionately in spite of that factor. The remarks of this appellant, whilst grossly offensive to the judge personally, amounted to a serious affront to society as a whole in its collective attempt to administer justice according to law.
>
> Judges have broad shoulders and have to have them in the face of such matters. But an impression must not be allowed to develop that judges, any more than anyone else in courtrooms, can be abused with impunity.[125]

3.129 These comments suggest that the interference with the administration of justice lies in the disruption to proceedings and the associated authority of the court and its management of proceedings – the point that a person cannot engage in abusive conduct with impunity – rather than the mere offensiveness of the remarks.[126]

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122 CrimPR, r 48.5(1)(a).

123 See *R v Powell* (1994) 98 Cr App R 224 at 227-228, in which the court described a wolf-whistle directed at a juror as potentially "threatening" but ultimately treated it as an insult. On threatening conduct, see paras 3.140 to 3.143 below.

124 *R v Walker* [2016] EWCA Crim 1851.

125 Above at [16]-[17].

126 The remarks do not of themselves need to be offensive. In *R v Wright* [2011] EWCA Crim 2804, [2012] 2 Cr App R (S) 11 a jury delivered a guilty verdict in respect of the contemnor's son in criminal proceedings. The contemnor shouted to his son from the public gallery to "stay strong" and said that the jurors "don't live in our world", describing them as "perfect people". The contemnor continued to address his son, despite being ordered by the judge to be quiet. He was then removed from court.

3.130 However, insult alone may be contempt in the county court and in magistrates' courts. In the county court, "wilfully insult[ing] a judge of the county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from court" is punishable as contempt under section 118(1)(a) of the County Courts Act 1984. The statute empowers the judge to order detention until the rising of the court or, if they think fit, a fine of up to £2,500 and/or committal for up to a month. A magistrates' court is similarly empowered where a person "wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court".[127] By way of example, a comment that "any delay is a result of the ridiculous listing of the Clerk of the Court" was considered capable of amounting to an insult, and thus a contempt.[128] However, this insult does not on its face appear to be conduct that disrupts proceedings or carries a substantial risk of interference with the administration of justice. Accordingly, if insult (without more) is to be brought within the law of contempt then it would need to sit alongside and in addition to general contempt.

3.131 In our pre-consultation engagement we have not heard specific comments on these provisions. Nevertheless, it appears that these powers assist the county court and magistrates' courts in managing proceedings so that they are fair, efficient and effective. They may be valuable tools in courts that do not have the stronger and wider powers of the superior courts.[129]

3.132 Wilful insults will often interfere with the administration of justice in a non-trivial way because they will disrupt proceedings or will affect staff or witnesses. However, even where a non-trivial interference cannot be established, it is valuable for courts to have the power to deal with insults swiftly, but proportionately, fairly, and consistently with procedural requirements.[130] Our provisional view is that, in the county court and in magistrates' courts, the power to deal with wilful insults as contempt should be retained, but only where the conduct and fault elements of general contempt are met. This does not prevent a judge or magistrate using their powers to control proceedings to exclude a person from the courtroom or to deal with an insult as a potential contempt. Where there is a wilful insult then a pause for consideration and, if appropriate, an initial enquiry may be needed to ascertain whether the elements of contempt are met, and where a person persists with wilful insults then it will be likely that subsequent conduct will disrupt proceedings in a way that constitutes a non-trivial interference with the administration of justice. However, insults should not automatically constitute contempt; a finding of contempt should not be available unless a wilful insult meets the general contempt threshold.

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127 CCA 1981, ss 12(1)-(2).

128 *R v Tamworth Justices ex parte Walsh* [1994] 2 WLUK 361, with respect to contempt under the CCA 1981, s 12.

129 The powers of courts are mainly addressed in Chapter 6. We raise this point here as it goes to the scope of what constitutes contempt.

130 We address procedure in the county court and the magistrates' courts in Chapter 8.

Remote hearings

3.133 Where a hearing is held remotely or is accessible from outside the physical premises of the court then liability for contempt may also arise from conduct that occurs outside the courtroom.

3.134 Parliament has already indicated that in-person and remote hearings should be treated in the same way with respect to unauthorised recording of court proceedings: the offence of taking or attempting to take in court a photograph[131] of any person under section 41(2) of the Criminal Justice Act 1925 was essentially replicated in section 85B(1) of the Courts Act 2003 in respect of remote hearings.[132]

3.135 In *Bailey v Stonewall Equality*,[133] which was heard remotely and raised issues relating to sex and gender identity, the Employment Tribunal raised concerns about the inappropriate use of screen names and of the chat function. It described some remote observers as "ill-disciplined, using the chat room to comment on the proceedings, and on one occasion to insult counsel".[134] Additionally, the tribunal noted that "[t]here was trouble with a few observer screen names", such as names that were "obvious harassment of a witness or counsel".[135] These remote observers were disconnected, just as a disruptive observer in a courtroom might be removed.

3.136 The tribunal did, however, allow "screen names that indicated affiliation to one side or other in the sex/gender debate, … as they were deemed cultural markers (such as a lapel badge or item of clothing) which would be unobjectionable in a tribunal room or public gallery".[136] We heard from HMCTS that ensuring that the remote experience mirrors, as far as possible, the ordinary in-person courtroom experience is a priority – in part to replicate the formality of a courtroom, but also to ensure open justice. This is consistent with the suggested approach above that these cases should be dealt with in the same way that the court would deal with comparable conduct in a courtroom. It is likely, however, that using inappropriate screen names or making inappropriate comments via the chat function would commonly be too trivial to meet the threshold for contempt. The court may thus opt not to address it once the behaviour has stopped.

3.137 It is important that the law of contempt can accommodate these increasingly common and new ways of interfering with the administration of justice to ensure comprehensive protection even where a hearing is held remotely or is accessible from outside the physical premises of the court (a hybrid hearing). Our provisional view is that conduct that creates a substantial risk of non-trivial interference with the administration of justice in these circumstances can be adequately accommodated by our provisionally proposed general contempt test.

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131 *R v Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 29.

132 Inserted by Police, Crime, Sentencing and Courts Act 2022, s 199.

133 *Bailey v Stonewall Equality* [2020] Employment Tribunal (Case No 2202172/2020).

134 Above at [13].

135 Above at [14].

136 Above.

Obstructing court officers or staff in the execution of their duties

3.138 It is a contempt at common law and in statute to interfere with court officials in the exercise of their duties.[137] This type of conduct would satisfy our general contempt test. Where the conduct is an assault or threat then this will plainly be a contempt (as discussed above) but court officers or staff may also be obstructed by other conduct in the execution of their duties, such as barricading entry to a property, or theft or damage to property that court officers use to execute their duties.

3.139 The circumstances in which a court officer or official would be executing their duty will vary. However, they may include circumstances in which: court-appointed receivers or sequestrators are seeking to take possession of property;[138] an enforcement officer is executing an arrest warrant;[139] a person is serving the process of the court, such as a witness summons;[140] or administrative court staff are dealing with applications to the court or setting hearing dates.[141]

Threatening or assaulting court officers and staff, parties to proceedings, witnesses, or jurors

3.140 Under the existing law, interfering with participants in proceedings and court officers and staff may amount to contempt. This can include threatening,[142] assaulting,[143] insulting,[144] or intimidating[145] them. Given the crucial role played by court officers and staff, parties to proceedings, witnesses, and jurors in ensuring the administration of justice,[146] it is important that much of this conduct continues to fall within the law of contempt.

3.141 Though the courts have sometimes treated an interference as constituting contempt only where it is physical,[147] we see no reason why a threat or non-physical assault (ie, conduct that puts a person in fear that they will be imminently physically assaulted)

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137 See, for example, *IRC v Hoogstraten* [1985] 1 QB 1077; County Courts Act 1984, s 14(1).

138 *IRC v Hoogstraten* [1985] 1 QB 1077.

139 *Southam v Smout* [1964] 1 QB 308; *Miller v Knox* (1838) 4 Bing NC 574; County Courts Act 1984, s 14(1).

140 *Scott v Easthope* [2003] EWCA Civ 1289.

141 *Re De Court* [1997] Lexis Citation 4780; *R. v Tamworth Justices ex parte Walsh* [1994] 2 WLUK 361. An officer acting unlawfully will not be acting in execution of their duties; eg a bailiff executing an irregular warrant (*Cottrell v Hunt* [1994] CLY 3821) or entering a property unlawfully (*Southam v Smout* [1964] 1 QB 308).

142 *R v Stredder* (1997) 1 Cr App R 209; *R v Sherlock* [2014] EWCA Crim 310; *R v Smith* (1989) 11 Cr App R (S) 353.

143 See, for example, *R v Huggins* [2007] EWCA Crim 732, [2007] 2 Cr App R 8; *R v Powell* (1994) 98 Cr App R 224; *Southam v Smout* [1964] 1 QB 308; County Courts Act 1984, s 14(1); *Scott v Easthope* [2003] EWCA Civ 1289; *Re De Court* [1997] Lexis Citation 4780; *R v Tamworth Justices ex parte Walsh* [1994] 2 WLUK 361.

144 CCA 1981, s 12(1)(a); County Courts Act 1984, s 118(1)(a).

145 See, for example, *R v Curtis* [2012] EWCA Crim 945, [2013] 1 Cr App R (S) 28; *R v Mitchell-Crinkley* [1998] 1 Cr App R (S) 368; *R v Bryan* [2005] EWCA Crim 765, [2005] 2 Cr App R (S) 106.

146 See, for example, *Attorney General v Butterworth* [1963] 1 QB 696; *Littler v Thomson* (1839) 2 Beav 129, 131; *R v Runting* (1989) 89 Cr App R 243, 245; *Re De Court* [1997] Lexis Citation 4780.

147 See, for example, *Re De Court* [1997] Lexis Citation 4780.

could not create a substantial risk of a non-trivial interference with the administration of justice, or actually result in a non-trivial interference with the administration of justice, and so satisfy the conduct element of the general contempt test.

3.142 A question arises as to whether physical assaults, non-physical assaults and threats should all be equated for the purpose of contempt. It matters because there are specific statutory provisions for the county court, where assaulting an officer of the county court while executing their duty is punishable by up to three months' imprisonment or an unlimited fine.[148] In Chapter 10 we consider the powers of the county court and penalties in relation to these provisions.[149] Our question at this point, however, is whether these three types of conduct are sufficiently akin in their seriousness and the risk they will interfere with the administration of justice such that they should be grouped together if inferior courts have specific powers, rather than excluding non-physical assaults and threats from specific powers. Our provisional view is they should be grouped together because they are of comparable seriousness and pose similar risks of interference with the administration of justice.

Consultation Question 15.

3.143 We provisionally propose that, where inferior courts have specific powers to deal with contempt that involves the assault of a court officer then those same powers should apply to non-physical assaults and threats.

Do consultees agree?

Misconduct by jurors

3.144 Many aspects of juror misconduct are criminal offences under the Juries Act 1974.[150] Disclosing deliberations will be an offence under the Juries Act.[151] There are offences relating to jurors doing research to find information that is relevant to the case, sharing research with other jurors, or intentionally engaging in conduct that indicates they intend to try the issue otherwise than on the basis of the evidence in the proceedings; these types of juror misconduct may also constitute contempt.[152] A failure to serve on a jury when summoned to, or attending but being unavailable due to intoxication, may be treated as an offence or as a contempt.[153] Some juror misconduct will not be a criminal offence but will be a contempt. For instance, where a juror disobeys an order

148 County Courts Act 1984, s 14(1)(b). This may also be a criminal offence under s 14(1)(a) but we are concerned in this discussion only with the contempt powers under s 14(1)(b); see also the discussion of "kindred offences" at paras 2.51 to 2.57 above on these powers as contempt powers. There are also specific criminal offences for assaulting, resisting or obstructing a court security officer, with assault punishable on summary conviction by up to six months' imprisonment or an unlimited fine, and obstructing or resisting punishable by a fine of up to £1,000: Courts Act 2003, s 57.

149 See paras 10.163 to 10.170 below.

150 Juries Act 1974, ss 20-20I; Criminal Justice and Courts Act 2015, ss 69-74, amending the Juries Act 1974.

151 Juries Act 1974, s 20D, noting the exceptions in ss 20E-20F.

152 Above, ss 20A-20C; s 22(A1) states that nothing in ss 20A-20C affects what constitutes contempt at common law.

153 Above, s 20(1)-(2).

of a judge to surrender any electronic communications device, then that will be a contempt of court.[154]

Conduct associated with disobeying court orders

3.145 It has long been recognised that the breach of an order constitutes contempt of court. We address contempt by breach of order in Chapter 4. However, it is helpful to provide a short introduction to it here because some conduct associated with it will fall within the scope of general contempt.

3.146 It is possible to draw some distinctions between two very broad types of orders:

(1) Orders made on the application of a party to a dispute.

(2) Orders made for the purpose of protecting the administration of justice or regulating proceedings.

3.147 With regard to the former, there are myriad orders that may be made on application by a party to a dispute. Common examples include freezing orders that seek to ensure the other party will not remove their assets from the jurisdiction, or injunctions issued under statutory powers that seek to ensure a person will refrain from anti-social behaviour. A breach of an order would satisfy our general contempt test because it is an actual interference with the administration of justice. Chapter 4 turns to those matters in detail.

3.148 The latter category, however – that is, orders made with the specific objective of protecting the administration of justice – warrants some discussion in this chapter.

Disobeying an order made for the purpose of protecting the administration of justice or regulating proceedings

3.149 A breach of an order of this kind will constitute contempt because, like a breach in the first category, a breach of an order constitutes an actual non-trivial interference with the administration of justice. Consistent with our provisional proposal to dispose of the distinction between civil and criminal contempt, the breach of any order should constitute general contempt. However, two points are of particular note regarding orders in the second category. First, the conduct done contrary to the order might of itself constitute an interference with the administration of justice (and so general contempt) even if there were no order, but that is not a requirement. Secondly, even though an order in the second category may be directed at the parties to a dispute, conduct by a non-party that is contrary to the order may constitute a breach and so be contempt of court, and that will be a contempt of court by breach of order.

3.150 The following orders are examples of the type of orders that are made for protecting the administration of justice or regulating proceedings:

(1) Civil restraint orders (“CROs”). These are made to restrain a party from making any further applications in current proceedings (limited CRO), issuing certain claims or making certain applications in specified courts (extended CRO), of issuing any claim or making any application in specified courts (general CRO or

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154 Juries Act 1974, s 15A(5).

GCRO).[155] The High Court has recognised that these "are made to protect the administration of justice generally".[156]

(2) Noueiri orders.[157] These restrain a person "from representing others or entering the Royal Courts of Justice to litigate on behalf of others where there is necessity to protect the proper processes of the administration of justice".[158] Under the current law, these have not been treated as made for the purpose of protecting the administration of justice.[159]

(3) Embargoes on draft judgments. These are issued by the court to parties to proceedings, prohibiting them from publishing the court's draft judgment before it is formally made available to the public. The Supreme Court has held that such an order is made "to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded".[160]

3.151 Orders of these types will be directed at parties to the relevant proceedings. However, under the current law, a non-party may also be liable for contempt where they interfere with an order made for the purpose of protecting the administration of justice: "[a]t common law, if the court makes an order regulating its own procedure and the purpose of the order is plainly to protect the administration of justice, then anyone who subverts that order will be guilty of contempt".[161] For the purposes of being clear and specific in the type of conduct that would be prohibited under our provisional proposal, interference with such an order by a non-party is dealt with separately below.

3.152 The courts are best placed to assess whether the purpose of any given order is to protect the administration of justice or regulate proceedings.

Disobeying a declaration

3.153 The Court of Protection may make a declaration as to whether an act in relation to an adult who lacks capacity is lawful.[162] In so doing, the court will decide whether the act is in the person who lacks capacity's best interests.[163] For example, the court may declare that it is in that person's best interests to reside with their mother. This is distinct from an order made by the court that the person must reside with their mother.

3.154 While court orders have a coercive effect on those bound by them, declarations do not operate in this way and thus non-compliance with a declaration cannot constitute

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155 CPR, r 2.3(1).

156 *Solicitor General v Ellis* [2023] EWHC 604 (KB) at [27].

157 *Paragon Finance Plc v Noueiri* [2001] EWCA Civ 1402, [2001] 1 WLR 2357.

158 *Attorney General v Branch* [2021] EWHC 1735 (Admin) at [27].

159 Above.

160 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103 at [23].

161 *Attorney General v Newspaper Publishing Plc* [1988] Ch 333 at 380.

162 Mental Capacity Act 2005, s 15.

163 Above, ss 1(5) and 4.

contempt by breach of an order under the current law.[164] However, it was suggested to us that there may be an argument that, if the court declares (for instance) that something is in the best interests of a party who lacks capacity, to act inconsistently (and knowingly so) with that assessment is to interfere with the administration of justice. It may follow that such conduct should constitute general contempt under our proposal.

3.155 By contrast, it was also put to us that such a declaration serves merely to declare that something is or is not in the best interests of a party. Given that a person cannot be coerced to comply with a statement that is a judicial evaluation, it does not make sense to treat a declaration as serving the same function as an order and thus as triggering contempt liability upon "breach". This view is consistent with that endorsed by the Supreme Court that where a court wishes to be able to enforce compliance it is more appropriate that it makes an order than a declaration.[165]

3.156 Our provisional view is that the latter analysis is correct and thus conduct contrary to a declaration made by the court should not constitute contempt as it does not constitute an interference with the administration of justice, whether viewed as equated to contempt by breach of order or as general contempt. To suggest otherwise would be inconsistent with the nature and purpose of a declaration. (In the event the conduct might otherwise give rise to a substantial risk of a non-trivial interference with the administration of justice then that would fall to be decided separately.)

Subverting an order of the court by destroying the subject matter of an action

3.157 It is currently a contempt where a non-party to proceedings subverts or frustrates the purpose of a court order by destroying the subject matter of the action.[166] It will be captured by general contempt. This is not because the non-party is bound by the order (which, of course, they are not), and nor is it because they have encouraged or assisted a bound party in breaching it. Liability arises here because the non-party has interfered with a court order (of their own volition) and has thus interfered with the administration of justice in the action between the parties.

3.158 Regarding the purpose of the court order, "purpose" does not mean the litigant's purpose in obtaining the order, but rather means "the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil".[167] For example:

> if a stranger to the proceedings is aware that the court has sought to protect the purposes of the administration of justice by maintaining confidentiality of certain information pending trial, and thereafter deliberately brings that information into the public domain, he may well be held to have flouted the court's intention and

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164 See, for example, *St George's Healthcare NHS Trust v S* [1999] Fam 26 at 60; *A (A Patient) v A Health Authority* [2002] EWHC 18 (Fam), [2002] Fam 213 at [122]; *N v ACCG* [2017] UKSC 22, [2017] AC 549 at [26].

165 *N v ACCG* [2017] UKSC 22, [2017] AC 549 at [26], determining the appeal from *Re MN (Adult)* [2015] EWCA Civ 411, [2016] Fam 87.

166 *Attorney General v Newspaper Publishing* [1988] Ch 333; *Attorney General v Times Newspapers* [1992] 1 AC 191.

167 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 223.

> subverted its protective order. In that case, the [conduct] would be tantamount to the destruction of the subject matter of the action.[168]

3.159 In *Attorney General v Times Newspapers*, Lord Brandon describes another example:

> Suppose that there is an action between A and B in which B claims, but A disputes, that B is entitled to demolish A's house and that in that action the court grants A an interlocutory injunction restraining B from demolishing A's house pending the trial of the action. Suppose further that C, of his own volition and in no way aiding or abetting B, himself demolishes A's house while the action between A and B is still pending.[169]

This may amount to contempt by C (where the requisite fault is established) because the conduct "frustrates, thwarts, or subverts the purpose of the court's order and thereby interferes with the due administration of justice in the particular action" between A and B.[170]

3.160 Our provisional view is that it is necessary that this type of conduct continues to be prohibited. It is clear that there is some overlap between the nature of the liability that arises here and in the two previous subcategories of conduct (that is, disobeying an order made for the purpose of the administration of justice, and encouraging or assisting another to breach an order), thus there is an argument that they could be grouped together in the list of examples of contemptuous conduct. However, it is precisely *because* there is so much overlap that it may be clearer and more useful to separate out the different types of conduct where possible.

Encouraging or assisting another to disobey a court order

3.161 Where a person (C) encourages a party (P) to breach an order, or assists P in breaching the order, then C's conduct is recognised as contempt and would be captured by general contempt. Contempt liability here does not arise on the basis that a non-party to litigation is bound by an order made in respect of those proceedings. This would conflict with the fundamental principle that the courts act *in personam*, meaning "[t]hey adjudicate disputes between the parties to an action and make orders against those parties only"[171] and cannot bind by an injunction a person "who is not a party in the cause for the purpose of the cause".[172] Instead, liability arises because a non-party "has assisted the named person to disobey the order and has thereby himself interfered with the administration of justice which requires that the order be obeyed".[173]

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168 *Arlidge, Eady & Smith* (2019) para 6-201; see for example, *Attorney General v Newspaper Publishing* [1988] Ch 333.

169 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 206.

170 Above at 223, citing *Attorney General v Leveller Magazine* [1979] AC 440.

171 *Attorney General v Newspaper Publishing Plc* [1988] Ch 333 at 369.

172 *Iveson v Harris* (1802) 7 Ves Jun 251 at 256; *Attorney General v Newspaper Publishing Plc* [1988] Ch 333 at 378.

173 *Attorney General v Times Newspapers* [1992] 1 AC 191 at 228.

3.162 This type of liability may arise where, for example, an injunction has been issued against a tenant, prohibiting them from using the rented property for particular purposes. A friend of the tenant who makes arrangements, on the tenant's behalf, for the property to be used for one of the prohibited purposes may be liable for contempt if they possess the requisite fault.[174]

Providing false statements or disclosures to the court

3.163 The current law imposes contempt liability on a person who "makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth".[175] Here, it is necessary to prove that the defendant "knew that what he was saying was false and that his false statement was likely to interfere with the course of justice".[176] It will not be sufficient that the statement was made recklessly.[177] Rather, it will require proof that "the alleged contemnor made a statement to the court knowing it to be untrue and knowing that it would be relied upon by the court".[178]

3.164 Lord Justice Moses explained the threat to the administration of justice:

> Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. … [T]he courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.[179]

3.165 This message was echoed in the concerns of several members of the senior judiciary. We were told that false claims against insurance companies are made regularly and this illustrates the lack of respect that some people have for the system and the idea that they can manipulate it for gain with impunity.

3.166 However, one senior judge questioned the need to deal with a person who makes false statements via contempt proceedings as there are a number of other ways the court can respond. These include refusing to believe the witness or referring the

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174 See, for example, *Lord Wellesley v Earl of Mornington* (1848) 11 Beav 180; *Seaward v Paterson* [1897] 1 Ch 545.

175 CPR, rr 32.14 and 31.23. A person who provides false evidence to the court may also be liable for contempt (see, for example, *Apted v Apted and Bliss* [1930] P 246), but nowadays such conduct would likely be dealt with as an offence of perjury under the Perjury Act 1911: *Arlidge, Eady & Smith* (2019) para 10-164.

176 *KJM Superbikes v Hinton* [2008] EWCA Civ 1280, [2009] 1 WLR 2406 at [12] (Moore-Bick LJ), citing *Malgar Ltd v RE Leach (Engineering)* [2000] FSR 393. See also *Neil v Henderson* [2018] EWHC 90 (Ch) at [82]; *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [37]-[39] (Thirlwall LJ), [101] (Bean LJ).

177 This view had been expressed in *Berry Piling Systems Ltd v Sheer Projects Ltd* [2013] EWHC 347 (TCC), [2013] BLR 232 at [28] that it would be sufficient if a statement was made recklessly in the sense that it was saying "something which… [the defendant] consciously has no idea whether it is right or wrong". This was rejected by the Court of Appeal (Civil Division) in *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232.

178 *Norman v Adler* [2023] EWCA Civ 785, [2023] 1 WLR 4232 at [39] (Thirlwall LJ)

179 *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [4].

matter to the Crown Prosecution Service ("CPS") to investigate a potential offence of perjury under the Perjury Act 1911.

3.167 While this raises important questions about how conduct should be addressed by the courts when it may also constitute a criminal offence, that point is not peculiar to this specific issue.[180] It is sufficient to note at this point that this established form of contempt would be caught by our provisionally proposed general contempt.

Accessing court documents without authorisation

3.168 A person who accesses court documents without authorisation is liable for contempt where they had knowledge that authorisation was necessary and that it had not been obtained: "[t]he key feature is the need for knowledge that the inspection [of the documents] in question is a contravention of the rules".[181]

3.169 Under our general contempt test it would not be necessary as a matter of law to prove as a distinct or additional requirement that the defendant knew authorisation was required and not obtained (or, if recklessness is to be sufficient to establish fault, recklessness as to those matters). As a matter of practicality, though, it will likely be necessary to prove that to establish intent (or recklessness) for general contempt.

Misconduct by legal representatives

3.170 The administration of justice relies on the appropriate conduct of legal representatives, as highlighted by the High Court in *Re Balli*:[182]

> It is an essential feature of the due administration of justice that the court should be able to trust that those who conduct litigation as legal representatives (1) are qualified and authorised so to do, and (2) that they can be… relied upon to do so in accordance with certain basic standards, which are laid down in their professions' respective codes of conduct.
>
> … All of this is fundamental to the due administration of justice, to the furtherance and attainment of the overriding objective, and to the observance and upholding of the rule of law.[183]

3.171 This does not mean that all misconduct by legal representatives will constitute contempt under the current law, nor that all misconduct will be captured by general contempt. However, where misconduct carries a substantial risk of a non-trivial interference with the administration of justice, or actually interferes in a non-trivial way with the administration of justice, then we consider that it will be caught by general contempt. This is consistent with the current approach of the courts.

3.172 It has been recognised repeatedly that "not every failure to co-operate, or refusal to assist the court, is a contempt, and not every dereliction of duty or discourtesy to the

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180 See, for example, the discussion of taking photographs in court at paras 3.90 to 3.97 above.

181 *Dobson v Hastings* [1992] Ch 394 at 405.

182 *Re Balli (aka Singh)* [2011] EWHC 1736 (Ch).

183 Above at [16]-[18].

court is a contempt".[184] These matters may be breaches of professional conduct requirements and treated as such by regulatory bodies.[185] However, the type of conduct by legal representatives that might go beyond mere discourtesy or breach of professional duties includes misrepresenting oneself as a qualified solicitor and providing legal services after having been struck off as a solicitor by the SRA. The severity of such conduct was described by the High Court in *Re Balli*:

> Going on the record, appearing before a District Judge as a solicitor advocate, and appearing in the High Court as an instructing solicitor are significant steps warranting authority not only as a party's solicitor but, overarching that, as a person qualified so to do. When that warranty is knowingly false, it is a very serious interference with the administration of justice and reveals a flagrant disregard for the rule of law. The same is true when a person signs a witness statement or makes an application as a solicitor or, purportedly, in the name of a firm of solicitors, or writes a letter as from a firm of solicitors regulated by the SRA. In the proceedings the subject matter of this contempt proceeding, S has done all of these things.[186]

3.173 Such conduct threatens the proper administration of justice as it deceives and misleads the court, other professionals, and clients. It is conduct that would be caught by the general contempt formulation.

3.174 In other instances, conduct may lie closer to the boundary. The general position of the courts is that a solicitor's failure to attend court does not cross the boundary from misconduct to contempt.[187] In *Weston v Central Criminal Court Courts Administrator*, Bridge LJ expressed doubt that such conduct "could ever amount to more than a dereliction of his duty to his client and to the court".[188] However, he accepted that it could amount to contempt where it "had certainly the effect, and possibly the express object, of frustrating or obstructing the legal process in question".[189] This suggests that sometimes the threshold might more clearly be met where the conduct actually interfered with the administration of justice in a non-trivial way (and, of course, the requisite fault is proved).[190] This approach, however, would be consistent with the general contempt test; it would depend on the circumstances whether the conduct in question could be said either to carry a substantial risk of a non-trivial interference with the administration of justice or actually to interfere with the administration of justice in a non-trivial way.

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184 *Weston v Central Criminal Courts Administrator* [1977] 2 QB 32 at 46. See also *Re West* [2014] EWCA Crim 1480, [2015] 1 WLR 109; *R v Izuora* [1953] AC 327.

185 The Solicitors Regulation Authority ("SRA") regulates the conduct of solicitors and the Bar Standards Board regulates that of barristers.

186 *Re Balli (aka Singh)* [2011] EWHC 1736 (Ch) at [36].

187 See, for example, *Weston v Central Criminal Courts Administrator* [1977] 2 QB 32; *R v Izuora* [1953] AC 327.

188 *Weston v Central Criminal Courts Administrator* [1977] QB 32 at 47.

189 Above at 47-48.

190 See also *Re West* [2014] EWCA Crim 1480, [2015] 1 WLR 109, especially at [52] (though the contempt finding was quashed on procedural grounds).

3.175 Misconduct by legal representatives that contravenes professional codes of conduct may also constitute contempt, and indeed could on occasion constitute a criminal offence. Even where conduct would constitute contempt, in deciding whether to pursue a matter as contempt, the courts have regard to "the possibility of duplication of proceedings and the risk of inappropriate double jeopardy".[191] As in other circumstances where conduct may be punished in other ways, the courts are faced with a familiar decision about what is the most appropriate action to take.[192] However, the key point for this chapter is that misconduct by legal professionals has been recognised as a form of contempt and we consider that it would be caught in the same way by the provisionally proposed general contempt.

A non-exhaustive list of examples?

3.176 Given the extensive range of ways that contempt may be committed, the question arises as to whether our proposed general contempt should be accompanied by a non-exhaustive list of examples of conduct that would constitute interferences with the administration of justice. It is possible that including a non-exhaustive list could have the unintended effect of focusing the application of the law of contempt on a narrow set of circumstances listed explicitly in statute. This – given the many ways contempt could be committed – may give a misleading impression that the list, even if not exhaustive, identifies the only types of conduct that are of concern to the courts. It would also have the disadvantage that it may need amendment if it is found to have either of those effects. However, our provisional view is that these risks are outweighed by the greater clarity and certainty that a non-exhaustive list of examples would bring to the law of contempt. This would not only benefit judges and legal professionals tasked with interpreting and applying the law, but also those from using and engaging with the justice system. The instances in a non-exhaustive list may be helpful when government or the courts provide public-facing material, as they do in many areas.

3.177 Our provisional view is that a non-exhaustive list of examples should accompany any statement of what constitutes general contempt.

Consultation Question 16.

3.178 We provisionally propose that any statutory provision setting out what constitutes general contempt should be accompanied by a non-exhaustive list of examples of conduct that is capable of constituting general contempt.

Do consultees agree?

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191 *Re Balli (aka Singh)* [2011] EWHC 1736 (Ch) at [15].

192 See, for example, paras 3.90 to 3.97 (on taking photographs in court) and 3.163 to 3.167 (on providing false statements).

Consultation Question 17.

3.179 We provisionally propose that the following should be included in a non-exhaustive list of examples of conduct that is capable of constituting general contempt to accompany a statutory statement of what constitutes general contempt:

(1) disrupting court proceedings;

(2) obstructing court officers or staff in the execution of their duties;

(3) threatening or assaulting court officers or staff, parties to proceedings, witnesses or jurors;

(4) taking photographs in court;

(5) making non-permitted audio or video recordings of proceedings;

(6) misconduct by jurors;

(7) disobeying a court order made for the purpose of protecting the administration of justice;

(8) subverting an order of the court by destroying the subject matter of an action;

(9) encouraging or assisting another to disobey a court order;

(10) providing false statements or disclosures to a court;

(11) accessing court documents without authorisation; or

(12) misconduct by legal representatives.

Do consultees agree? Are there other examples that should be included?

Chapter 4: Contempt by breach of court orders or undertakings

INTRODUCTION

4.1 This chapter discusses the second of the three forms of contempt that we provisionally propose: contempt by breach of court orders or undertakings. For convenience, we refer to this form of contempt as "contempt by breach of order".

4.2 As we explain in Chapters 1 and 2, our provisionally proposed framework for a new contempt regime dispenses with the categorisation of contempt as either criminal contempt or civil contempt. This second form of contempt captures the archetypal form of civil contempt that is a breach of a court order, and some of our provisional proposals as to liability align with the existing law in that area. However, this form of contempt does not merely mirror or re-state existing civil contempt. In particular, it is broader in its scope.

4.3 The key features of our provisional proposals for contempt by breach of order are as follows:

(1) Where proceedings for contempt are based on failure to comply with a court order or undertaking[1] by those bound by that order or undertaking, liability will be established by proving this form of contempt (rather than general contempt or contempt by publication).

(2) Liability for this form of contempt, consistent with the existing law for proving civil contempt when an order has been breached, will be established by proving beyond reasonable doubt:

(a) the circumstance element, which requires proof that there was an order or undertaking by which the defendant was bound;

(b) the conduct element, which requires proof that the defendant failed to comply with the order or undertaking; and

(c) the fault element, which requires proof that:

(i) the defendant's act or omission that breached the order or undertaking was deliberate (whether or not they intended to breach the order or undertaking);

(ii) the defendant knew there was a court order or undertaking by which they were bound; and

[1] An undertaking is a legal promise to the court, accompanied by a penal notice on its face; see for example HMCTS Form N117 General Form of Undertaking.

(iii) the defendant knew the facts or circumstances that made the conduct a breach of the order or undertaking.

(3) An applicant may seek interim coercive remedies. This will require proof beyond reasonable doubt of each of the elements of this form of contempt, though will not involve a finding of contempt. 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 impoundment of a passport or other documents.

(4) An application for the grant of an interim remedy would not preclude contempt proceedings.

4.4 The chapter is divided into two parts. The first part of the chapter addresses liability, setting out our provisional proposals regarding what must be proved to establish the circumstance, conduct and fault elements of this form of contempt. The second part makes provisional proposals for 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 making a formal finding of contempt.

CONTEMPT BY BREACH OF ORDER OR UNDERTAKING

The circumstance element

4.5 It must be established that there was an order or undertaking that bound the defendant.

4.6 Interferences by third parties (that is, those not bound by the court order or undertaking) would not come within the scope of this form of contempt and would instead be governed by the general form of contempt.

4.7 As we describe in the following, this is nevertheless a broader category than the current scope of civil contempt. Our provisionally proposed form of contempt would govern all breaches of court orders (and undertakings), whether an order made in favour of an individual party in litigation, a summons, or an order binding the world at large.

4.8 However, as with the existing civil contempt, this would not apply simply to any order of the court. To fall within the scope of this form of contempt, the order or undertaking would have to state clearly on its face that failure to comply would constitute a contempt of court (though whether it ought so to state would remain a matter for the court). This is referred to as a "penal notice". Many instructions from the court in the course of litigation will not bear a penal notice – and that is entirely appropriate. For example, if a judge requires a party to provide an additional bundle of authorities and they fail to do so, this may have bearing on the course or success of litigation, or on the extent or basis of costs, but generally it would not (without more) ground liability for contempt of court. Whether or not a court regards its order as worthy of a penal notice will be a matter for the court; however, it is clearly of benefit that the parties are made aware of the consequences of breach.

4.9 Within those parameters, the types of order that ground liability for contempt are many and various. They include many where a breach will currently constitute civil contempt. Amongst such orders are:

(1) freezing orders;

(2) search orders;[2]

(3) mandatory or prohibitory injunctions, including anti-social behaviour injunctions;[3]

(4) disclosure orders;[4]

(5) non-molestation orders;[5]

(6) contact orders;[6] and

(7) forced marriage protection orders.[7]

4.10 It is worth recalling that breach of various civil orders, as well as being contempt of court, may also constitute a criminal offence. For example, section 12 of the Domestic Violence, Crime and Victims Act 2004 makes breach of a non-molestation order a criminal offence. The defendant could not be punished twice for precisely the same breach, of course; if the defendant is prosecuted in the criminal courts for the breach, it would not be possible for the defendant to be punished for the breach as a contempt (and vice versa).[8]

4.11 There are, in addition, other types of court order of which a breach will also constitute contempt, though would not (in the current framework) constitute civil contempt. These include the following:

(1) Disobeying a witness summons will constitute contempt of court, and the judge can proceed of their own motion. Different rules and provisions apply in this context. For example, Part 34 of the Civil Procedure Rules governs the court's power to summons a witness to attend court (what under the Rules of the Supreme Court used to be called *subpoena ad testificandum*) or to produce a document (*subpoena duces tecum*). Part 24 of the Family Procedure Rules does the same with respect to the family courts. Breach of such a summons will

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2 The various interim remedies are set out in Part 25 of the CPR.

3 Anti-social Behaviour, Crime and Policing Act 2014, s 1.

4 See CPR, Part 31.

5 Family Law Act 1996, s 42.

6 Children Act 1989, s 8.

7 Forced Marriage (Civil Protection) Act 2007, s 63A.

8 Care should be exercised when generalising this proposition: in many contexts, the same conduct may constitute both a criminal offence and contempt of court, and be properly punishable as both. For example, an assault on an officer of the court will be both criminal assault and contempt in the face of the court; the gravamen of each is different, and thus there is no reason not to prosecute both the criminal offence and the contempt (though care should be exercised when determining sanction).

constitute contempt of court.[9] In the Crown Court, section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965 provides that those who disobey a witness summons "without just excuse" shall be guilty of contempt and "may be punished summarily as if [the] contempt had been committed in the face of the court".

(2) Section 20(2) of the Juries Act 1974 provides that failure to comply with a jury summons can be punished either in the criminal courts on summary conviction or as if it were criminal contempt of court committed in the face of the court.

(3) Judgment debtors will be in contempt if they fail to attend court to provide information pursuant to an order under Part 71.2 of the Civil Procedure Rules, or otherwise fail to comply with that order.[10] This is not an enforcement of the underlying judgment debt, but enforcement of the order that the judgment debtor provide information to the court. The court cannot proceed of its own motion in these cases – the provision of information may not even be required to be before a judge – though the matter may be referred by the court or court officer to a High Court judge or Circuit Judge for contempt proceedings.

(4) Breaches of reporting restrictions issued under sections 4(2) and 11 of the Contempt of Court Act 1981, and of reporting restrictions made under common law powers, are generally considered to constitute criminal rather than civil contempt (albeit with some exceptions).[11] The distinction lies in the fact that such directions are said to pertain to the administration of justice more generally, particularly given that the orders are addressed to the world at large rather than directed at the conduct of particular litigants. In practice, it may be that this is a distinction without a difference (at least in terms of establishing liability). Criminal contempt requires proof that the defendant intended to interfere in the administration of justice. However, courts have proved "so ready to infer an intention to interfere in the administration of justice… from the alleged contemnor's knowledge of the relevant order and from the conduct itself" that the distinction between criminal and civil contempt in this context may be of little practical effect.[12]

4.12 These contempts arise as a result of breaches of orders, and yet they are differentiated from others that also arise from breaches of orders; liability flows from putatively similar sources (that is, breach of order), although the interference with the administration of justice is conceived of and treated differently. As such, the existing law lacks consistency and is not easily understood. Our provisional view is that, within our provisionally proposed framework for contempt, all court orders ought to be brought within the scope of contempt by breach of order, whether currently

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9 No specific authority appears in the various procedure rules, though breach of a subpoena has long been held to be a contempt of court and the proposition is not in doubt. See, for example, P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") para 11-111.

10 The power to commit is found in CPR, r 71.8.

11 See *Arlidge, Eady & Smith* (2019) from para 3-105; and *Attorney General v The Leveller Magazine* [1979] AC 440 at 449 (Lord Diplock).

12 *Arlidge, Eady & Smith* (2019) para 3-108.

characterised as criminal contempt (whether or not as contempt in the face of the court) or civil contempt.

4.13 We should be clear that we are not suggesting that the differences that currently exist are without possible justification, nor are we suggesting that injustices have arisen in any given case as a result of those differences. The differences that exist may be readily explicable. Those differences, however, do not and should not dictate the elements of substantive liability.

4.14 As noted above, the effect of this provisional proposal would be that all breaches of court orders or undertakings by those subject to those orders or undertakings will fall within the scope of this form of contempt (save where strict liability publication contempt applies, as we discuss in Chapter 5). It should apply to all breaches of orders whether those orders were intended to bind an individual party to litigation or to bind the world at large (whilst recognising that the procedure rules for different jurisdictions may legitimately differ). In short, what this would mean is that the elements of liability and the available remedies and sanctions would be the same, regardless of the kind of order or undertaking at issue.

4.15 The argument for such consolidation lies not only in simplification, but also in the fact that it provides a unifying rationale for all instances of breaches of court orders or undertakings: where a person is subject to a court order then the foundation of liability for contempt lies in disobedience to that order. A court order is quintessentially the administration of justice, so the failure to comply is inherently an interference with the administration of justice. It is for this reason, at least in terms of establishing liability, that we distinguish this form of contempt from the general form of contempt set out in Chapter 3.

4.16 A contempt by breach of order could satisfy the test for our provisionally proposed general form of contempt. Interferences in court orders by third parties (that is, those not bound by court orders) could also fall within the scope of general contempt (and not within the scope of contempt by breach of court order).[13] However, where an order or undertaking is in place and the allegation of contempt turns on disobedience to it, then this form of contempt provides a practical pathway to proof and clear criteria that will enable litigants to know with certainty when their conduct will constitute contempt.

[13] See paras 3.157 to 3.162 below.

Consultation Question 18.

4.17 We provisionally propose that establishing the circumstance element for contempt by breach of a court order or undertaking should require proof that there is:

(1) an order of the court, whether expressed as a summons or otherwise, that applies to the defendant, or

(2) an undertaking given by the defendant,

provided the order or undertaking is accompanied by a penal notice or its equivalent.

Do consultees agree?

The conduct element

4.18 The conduct that constitutes the breach is a failure to comply with the order or undertaking. That is, it will be established by proving that the defendant did not do something the order or undertaking required to be done, or did something the order or undertaking required the defendant not to do. There may be cases where it is not clear whether and to what extent a party has complied with an order – for example, it may not always be clear that the relevant acts were committed by the defendant. It is important to remember that any such uncertainty will be resolved in favour of the defendant. The burden of proof is on the party alleging contempt and proof is to the criminal standard of beyond reasonable doubt. We discuss this at paragraph 4.56 below.

Trivial breaches

4.19 Where the breach is technical or immaterial, in that it does not frustrate the purpose of the order or cause practical injustice or difficulty, it has been said that this ought not bring the breach within the scope of contempt. In *Adam Phones Ltd v Goldschmidt*, computer evidence that was lost as result of (unintentional) breach was found to be "unimportant".[14] It was held that "if the application is wholly a disproportionate response to a trivial or blameless breach of an order then the court should dismiss the application".[15] In support of this proposition, Jacob J cited the further example of *Bhimji v Chatwani*, which concerned a short delay (less than one day) in complying with a seizure order.[16]

4.20 However, it will immediately be seen that the proposition that triviality alone takes a breach out of the scope of contempt is not wholly supported by the authorities above: in each case, the breach was not merely trivial but also insufficiently blameworthy (a matter that goes to fault). The defendants are better viewed as having fallen outside the scope of contempt due to their overall culpability being insufficient to make a finding of contempt proportionate. In *Adam Phones*, the defendant had deleted a

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14 *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 (Ch).

15 Above at 495 (Jacob J).

16 *Bhimji v Chatwani* [1991] 1 All ER 705 (Ch).

computer programme (in breach of the court order) in the genuine belief that a copy had already been sent to the claimants. In *Bhimji*, the delay was a result of legal advice, and the defendants had nonetheless sought to provide protection to the documents that were the subject of the order. Had the delay or the destruction of evidence been demonstrably contumacious, it is less obvious that this should automatically fall outside the scope of contempt.

4.21 We have nevertheless considered whether the conduct element should include a threshold with respect to triviality. We have provisionally concluded that it should not. Our provisional view is that any breach of a court order or undertaking – particularly one that has been reinforced with a penal notice – constitutes a non-trivial interference with the administration of justice.

4.22 The nature and consequences of a breach will nevertheless matter. For instance, the extent of the consequences (such as the effect on process, duration, or the interests of the parties) may be relevant to whether an applicant is granted permission to institute contempt proceedings. Triviality of consequence would necessarily weigh in the court's assessment as to whether it would be proportionate to grant permission. The extent of any consequences will also have a bearing upon the penalty (if any) that follows a finding of contempt.[17] We also bear in mind the requirements of proportionality in litigation generally,[18] and:

> that it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking.[19]

Nevertheless, while the nature and consequences of a breach will be considerations in determining whether permission to bring a contempt application should be granted, they may not be the overriding considerations bearing in mind the interests of justice and the public interest in court orders being seen to be obeyed.

Consultation Question 19.

4.23 We provisionally propose that to establish the conduct element for contempt by breach of a court order or undertaking should require proof that the defendant failed to comply with the order or undertaking, regardless of whether significant consequences followed from the failure to comply.

Do consultees agree?

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17 See Chapter 10.

18 CPR, r 1.1(2).

19 *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch) at [44] (Briggs J), cited with approval in *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2014] EWHC 3771 (Comm) at [21] (Hamblen J).

The fault element

4.24 The question now considered concerns the defendant's state of mind, that is, what they must be shown to have known or intended. The case law on the fault element has been inconsistent and, at times, ambiguous. In our provisional proposals for the fault element, we do not intend to depart significantly from what we have concluded is the better understanding of the current legal position (save with respect to knowledge of the terms in certain orders *contra mundum*, that is, orders that bind "the world", and not just specifically named parties). Rather, our intention is to simplify and clarify the legal position.

4.25 We provisionally propose that three requirements must be satisfied to establish the fault element:

(1) First, it must be shown that the action or inaction that breached the order was deliberate. The conduct itself must not be accidental. Equally, if performance of the obligation were impossible, that would not be contempt of court.[20] However, it is not necessary to show that the defendant specifically intended to breach the order. This reflects the current law.[21]

(2) Secondly, it must be shown that the person knew there was a court order or undertaking with which they were bound to comply. It is not necessary to show that the defendant knew what the terms of the order were (on the basis that the reasonable person, knowing they were bound by a court order, would acquaint themselves with the terms of that order – and to require otherwise would incentivise wilful ignorance as to the terms). The law on this point has been unsettled, though we have provisionally concluded that this represents the better reading of the current law.

(3) Thirdly, it must be shown that the person knew of those circumstances or facts that rendered their conduct contrary to the order (though, again, this does not require them to realise that their conduct was actually in breach). This, again, reflects the position adopted in case law.

4.26 The fault element does not require (as our provisionally proposed general contempt does) an intention to interfere with the administration of justice (nor recklessness as to such an interference, on which we seek consultees views in relation to general contempt).[22] Rather, breach of an order or undertaking is of itself an interference in the administration of justice, and the defendant's knowledge that there exists an order or undertaking that applies to them lies at the core of culpability in contempt by breach of order. This is consistent with the existing law of civil contempt.

Deliberate act or omission

4.27 The defendant must be shown to have acted deliberately with respect to the action or omission that constituted the breach. As we say above, this does not mean that the person needs to have deliberately breached the order, but the action or inaction that

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20 *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch).

21 See, for example, *Varma v Atkinson* [2020] EWCA Civ 1602, [2021] 2 WLR 536 at [54].

22 The fault element for general contempt is discussed at paras 3.65 to 3.117 above.

did breach the order must have been deliberate in the sense of not being accidental. For example, a person falling down a hill and into a construction site that is protected by an injunction has, by their entry, breached that injunction, but their conduct was not deliberate and so there is no sense in which they could be in contempt.

4.28 Impossibility, insofar as it relates to the deliberateness of the conduct, lies at the extreme end of this category: the conduct that breached the order was not deliberate in the sense that compliance was not possible. The interference in the administration of justice lies at the hands of fate or circumstance, not at the hands of the defendant.

4.29 However, impossibility is not the same thing as difficulty. Where compliance is difficult or inconvenient (even extremely so), but nonetheless possible, then any subsequent non-compliance will not have been inevitable but instead a matter of choice. The defendant *chose* non-compliance in the face of unfavourable alternatives. This is not a choice permitted to the defendant; the order is to be followed and matters such as convenience and the proportionality of burden will have been addressed by the court when making the order. To the extent that those matters were not or could not have been raised (perhaps because they had not arisen at the time), the proper course is to ask the court to vary, extend or discharge the order.[23]

Knowledge of the court order

4.30 As the law stands, there cannot be a finding of contempt against a person who did not know that they were subject to a court order; the defendant must have had notice of the order if they are to be expected to comply with it.[24] Our provisional view is that this should remain the case.

4.31 This aspect of the fault element assumes acute importance in the context of injunctions *contra mundum.* These are injunctions that are intended to bind "the world", and not just named parties – though it follows from the above that injunctions can only be enforced against those who know about them and who know that they are bound by them. This is why such injunctions are required to be publicised widely and extensively. For example, it was ordered that the HS2 route-wide injunction (restraining unlawful trespass on and obstruction of land) was to be served in the following ways:

(1) by affixing copies in prominent locations around the perimeter of relevant sites;

(2) through advertisement in the *Times* and *Guardian* newspapers;

(3) by placing advertisements or hard copies in 14 local libraries every 10 miles along the route;

(4) by publishing social media posts on the HS2 Twitter and Facebook platforms;

(5) by serving the order personally on any defendant whom HS2 becomes aware has been on HS2 land without consent; and

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23 *Arlidge, Eady & Smith* (2019) para 12-23.

24 *Masri v Consolidated Contractors* [2011] EWHC 1024 (Comm) at [353] (Clarke J).

(6) by placing copies of the order in prominent locations in proximity to potential defendants or in areas of HS2 land known to be targeted by objectors to the HS2 scheme.[25]

4.32 Liability rightly requires that the person knew of the order. Where a person is shown to have knowledge of, and then rejected the lawful authority of, the order, this wilful disobedience is an exemplar of contempt. We see no reason not to follow the existing law in this respect.

No requirement to show knowledge of the terms of the order

4.33 Our provisional proposal is that there should be no requirement to show that the defendant knew the precise terms of the order, beyond showing that they knew they were bound by an order. To hold otherwise would be to reward the wilfully blind and incentivise people to fail to acquaint themselves with the terms of court orders, knowing they could thereby place themselves beyond the reach of the contempt jurisdiction. Just as with the general doctrine that *ignorantia juris non excusat* (commonly "ignorance of the law is no excuse"), people will be imputed with knowledge of the law providing it was knowable to them (a matter which is addressed through requiring proof that the defendant knew they were bound by a court order), whether or not it was in fact known to them. This accords with our analysis of the existing case law (with one exception, which we consider below at paragraph 4.37 and following).

4.34 The question of whether the defendant need be shown to have known the precise terms of the order has been answered inconsistently in the case law. For example, Christopher Clarke J (as he then was) in *Masri v Consolidated Contractors* noted that knowledge of the terms of the order was a specific requirement in proving contempt.[26] However, though this judgment has never been explicitly called into question in subsequent judgments, the proposition is not readily supported. There is now a clear line of more recent authorities suggesting that what is required is knowledge of the order and not more.

4.35 For example, in 2020, Rose LJ (as she then was), delivering the judgment of the Court of Appeal (Civil Division) in *Varma v Atkinson*, stated that it was enough (for these purposes) that "knowledge of the order is proved".[27] The Court of Appeal specifically rejected the argument that it was necessary to show that the contemnor knew their actions put them in breach of the order. In saying this, the Court did not state explicitly that knowledge of the terms of the order did not need to be shown, though it is perhaps a logical corollary of that position. The line of authorities subsequent to *Varma* do not refer to any requirement that knowledge of the terms be proven.[28]

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25 In *HS2 Ltd v Persons Unknown* (claim number: QB-2022-BHM-000044) (20 September 2022) a copy of the order was published online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1105125/Orders-Basic_Order.pdf.

26 *Masri v Consolidated Contractors* [2011] EWHC 1024 (Comm) at [150] (Clarke J).

27 *Varma v Atkinson* [2020] EWCA Civ 1602, [2021] 2 WLR 536 at [54].

28 See, for example, *National Highways v Heyatawin* [2021] EWHC 3078 at [43] (Dame Victoria Sharp P), *National Highways Ltd v Buse* [2021] EWHC 3404 at [23] (Dingemans LJ), and *National Highways Ltd v Springorum* [2022] EWHC 205 at [25] (William Davis LJ).

Arlidge, Eady & Smith also states that all that is needed is to prove knowledge of the existence of the order,[29] citing *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*.[30]

4.36 Further, were it the case that knowledge of the terms of the order had to be shown, this would be very difficult to square with the authority that it is no defence that a person had not read the order (*In re Witten*[31]) – that is, they can be liable for contempt even if their position is that they did not know the terms of the order.

4.37 The position has been different for some injunctions *contra mundum* (injunctions that bind "the world") where the court is exercising its inherent jurisdiction in respect of protected persons and minors. *Arlidge, Eady & Smith* notes that, for a person to be held in contempt for breach of an injunction *contra mundum*, where that injunction concerned the exercise of the court's inherent jurisdiction in respect of protected persons and minors, knowledge of the *terms* of the order must also be shown.[32] The particular concern in the authorities was that newspapers could not be expected to be acquainted with the terms of orders issued to them by the Press Association in the form of a press release.[33] As *Arlidge, Eady & Smith* explains it:

> this appears to recognise the realities of life in a large media organisation, where it would easily lead to injustice if the mere communication of the order to an office were deemed to entail knowledge of its terms on the part of those who publish.[34]

4.38 We are provisionally of the view that this concern does not justify a requirement that a person be shown to have known the terms of the order. Rather, the injustice in the scenario described by *Arlidge, Eady & Smith* lies in assuming a person had knowledge of the order merely on the basis that it was sent to the office of a large organisation.

4.39 It is certainly correct – and not merely in the context of media organisations – that actual knowledge of the order must not be casually and readily assumed in the absence of clear proof. We accept that, in large organisations, it may be more difficult to establish knowledge of a particular order. However, where a person's actual knowledge of the specific order can be established, and more particularly where that person knows they are bound by the order, we submit that it is less obvious why knowledge of the terms of the order must then also be shown. It may of course be that knowledge of the terms of the order is the only way by which a person could be aware that they were bound by the order, though that matter is fully addressed in establishing the second fault element (that the person knew there was a court order by which they were bound).

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29 *Arlidge, Eady & Smith* (2019) para 3-140.

30 *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456.

31 *In re Witten* (1887) 4 TLR 36.

32 *Arlidge, Eady & Smith* (2019) para 12-97.

33 *Re W (Wards) (Publication of Information)* [1989] 1 FLR 246 at 266 (Sir Stephen Brown P); *Re L (A Ward) (Publication of Information)* [1988] 1 FLR 255 at 259 (Booth J).

34 *Arlidge, Eady & Smith* (2019) para 12-98.

4.40 In any event, our view is that our provisional formulation of the fault elements means that we are not expanding liability in this context. If the defendant had actual knowledge of the order, but was not aware that the people about whom they were writing were the subjects of the order, then they would not meet the third of the mental elements (see "Knowledge of facts" from paragraph 4.45 below). If, however, a person is aware of an order, and that it relates to their work, but chooses not to acquaint themselves with the terms of that order, it is far from obvious that that person can be said to have acted without sufficient culpability.

4.41 Our provisional conclusion is that, so long as it is shown that a person knew themselves to be bound by a court order, no useful purpose is served by additionally requiring proof that the person knew the precise terms of the court order. In 2014, we recommended that an online reporting restriction database should be established that would enable a single point of information for the public – and for journalists and publishers in particular.[35] The government accepted this recommendation, but it has not yet implemented the database. If implemented, the practical difficulties that gave rise to this line of cases would be obviated. However, our understanding from pre-consultation stakeholder engagement is that although there are currently no funded plans to create a database, daily court listings will indicate if there are reporting restrictions in place for a matter.

4.42 On balance, we do not consider that requiring proof only of knowledge of the order – and not knowledge of the terms of the order (which is only currently a requirement in respect of certain orders *contra mundum*) – would constitute an unjustified expansion of liability, given the effect of the requirements that the defendant had both knowledge of the order and knowledge of relevant facts.

Consultation Question 20.

4.43 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant knows that they are bound by the relevant court order.

Do consultees agree?

Consultation Question 21.

4.44 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should not require proof that the defendant knows the precise terms of that order.

Do consultees agree?

[35] Contempt of Court (2): Court Reporting (2014) Law Com No 344, from para 5.04.

Knowledge of facts that made the conduct unlawful

4.45 We now turn to consider the final fault element. There are instances where a person meets the above elements of contempt (namely knowledge of order, breach of terms, and deliberate conduct) but cannot be said to have acted with sufficient culpability to be liable for contempt. We have already said that ignorance of the terms of the order will not be exculpatory. However, if the person were mistaken as to an essential quality of their conduct ("essential" in the sense that it relates to the breach), then they are not sufficiently culpable. This is why, under the current law, the applicant is required to show that the alleged contemnor knew of the facts which made their conduct a breach.[36]

4.46 This element distinguishes knowledge of the law from knowledge of facts: if the defendant is ignorant of the law (that is, what the court order required of them), this has no bearing on their liability; if the person was ignorant of a fact that made their conduct unlawful (in breach), that may well have bearing.

4.47 This is not the same as requiring proof that the person knew they were in breach. Further, it also requires something more than proof that the conduct was deliberate.

4.48 It is easy to elide these two questions (deliberate conduct versus knowledge of facts) and thus to elicit unclear or confusing answers. Consider the following example.

> A bank account in the name of "X Ltd" is subject to a freezing injunction, prohibiting the transfer of funds from the account. A banking operations manager, who knows of the order and of its terms, intends to transfer funds from a different account, "X (Holdings) Ltd", but, because of the way the account information was displayed on the computer screen, mistakenly transfers funds from X Ltd.

4.49 Now consider that the manager was asked the question "did you deliberately transfer money from Bank Account X Ltd?" That person may well answer "yes", on the basis that the act of transferring the money was not accidental – but this does not necessarily mean that the transfer *from Bank Account X Ltd* was deliberate. They acted in the genuine but mistaken belief that they were transferring money from a different account. So this is actually two questions framed as a single question. To be liable for contempt, that single answer "yes" would have to reveal two points: (i) that the act of transferring was deliberate; and (ii) that they knew it was from the frozen account. In this example, the person did not know they were transferring money from the frozen account – they were mistaken as to an essential quality of their conduct – and so they cannot be said to have acted with sufficient culpability. (This is not to say that the bank itself will not be in contempt for having failed to take reasonable steps to prevent breach, but that is a different issue.)

4.50 Consider an alternative example.

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[36] See, for example, *Sheikh Abdulrahman Khalid Bin Mahfouz v El-Rashid* [2017] EWHC 1460 (Comm) at [8] (Teare J).

An area of construction land is subject to an injunction prohibiting access to those without authorisation, but the injunction is silent on how authorisation is obtained. A person knows of the injunction, and so asks a construction worker at an entrance to the land if they can walk across the land. The construction worker grants permission but, unbeknown to the person, had no authority to do so: the authorisation can only be granted by the landowner. The person is therefore deliberately walking on that land, but is doing so in the honest but mistaken belief that they had secured authorisation to access the land.

4.51 The defendant's conduct is entirely deliberate. However, they were unaware of an important fact that made their conduct a breach of the injunction: they were entering without authorisation. As a result of their being unaware of this fact, there is insufficient culpability and their act would not constitute contempt.

4.52 If, alternatively, the order had stated that authorisation may only be sought from the landowner, then the defendant will be held to know that authorisation could only be sought from the landowner and not the construction worker, and so they will not be able to avoid a finding of contempt by arguing that they had asked the construction worker. This is because they are imputed with knowledge of the law – here, that authorisation must be sought from the landowner. This highlights the important distinction in this context between mistakes of law and mistakes of fact.

4.53 Indeed, in neither of the above examples is it relevant that the defendants knew or did not know about the *terms* of the court order. As we note above, people are rightly held to know the terms of the orders if they know themselves to be bound by those orders. So, in the context of the bank transfer, it does not matter whether the defendant actually knew that the order prohibited transfers out of Bank Account X Ltd – ignorance of the law is no defence. Rather, given that the order did prohibit such transfers, we need merely to know whether the defendant knew the transfer was from Bank Account X Ltd. In our example, the manager making the transfer did *not* know that the transfer was from the Bank Account X Ltd, and thus does not satisfy the fault element of this form of contempt.

4.54 It is for this reason that the better explanation of *Adam Phones*[37] (discussed at paragraph 4.19 above) lies in insufficient blameworthiness and not in triviality. The defendant had deliberately deleted a computer programme, and in so doing he was in breach of a court order – but he had done so in the genuine belief that a copy of the programme had been made. The breach, whether trivial or otherwise (and this breach does not seem trivial), was therefore insufficiently blameworthy to bring it within the scope of contempt.

[37] *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 (Ch).

Consultation Question 22.

4.55 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant had knowledge of the facts that made the conduct a breach.

Do consultees agree?

Burden and standard of proof

4.56 The existing law requires that the claimant bears the burden of proof, and that the court must be satisfied beyond reasonable doubt that the defendant has committed contempt of court before making such a finding. We consider that it is appropriate to retain this standard given that imprisonment may result from a finding of contempt. Further, as we discuss in detail in Chapter 8, contempt proceedings must comply with the requirements of the right to a fair trial under article 6 of the European Convention on Human Rights.[38] One of the requirements of the presumption of innocence under article 6 is that any doubt is resolved in favour of the defendant.[39]

INTERIM COERCIVE REMEDIES

4.57 We have been told by stakeholders that contemnors often draw out their non-compliance until the last possible moment (that is, just before they are found in contempt). The current law offers limited measures to encourage compliance (rather than punish for non-compliance) save in the threat of future sanctions (in the form of a suspended order). This problem is exacerbated by the fact that a person can only be found liable once in respect of a breach, with the result that there is no power to punish repeatedly for ongoing breaches. This is due to the operation of the criminal law principle of *autrefois convict* (a person cannot be tried again for an offence of which they have already been found guilty). This means that a person cannot be held in contempt for a breach, and then held in contempt again for the same (either repeated or ongoing) breach. A new order would have to be made and, whilst this does happen in practice, we have been told by stakeholders that it is burdensome for applicants and courts alike.

4.58 We have also been told by a number of lawyers and members of the judiciary that contempt has been "weaponised" by private litigants – particularly in commercial litigation – and now forms an increasingly time-consuming and expensive form of satellite litigation.

4.59 Thus, even if a non-compliant party is subsequently found liable for contempt, the expensive contempt regime (with its limited and draconian sanctions) is not always an effective tool for encouraging prompt and ongoing compliance. Rather, contempt proceedings are ideally proceedings of last resort (and this would remain the case under our proposals).

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38 See from para 8.98 below.

39 *Barberà, Messegué and Jabardo v Spain* (1988) App No 10590/83 at [77].

4.60 We have therefore considered whether the court should have the power to impose certain interim remedies in order to coerce compliance, without having to proceed to a formal finding of contempt. Interim remedies may themselves be weaponised, of course, though they should have hearing times and costs appropriate to interim applications.

4.61 There are, of course, a range of sanctions (short of contempt proceedings) already open to courts in order to punish parties engaging in unreasonable conduct. For example, a court can order that a party be debarred from participating in proceedings, or that costs be assessed on an "indemnity" basis (with the result that the party in whose favour costs have been awarded will be entitled to payment by the other party of their costs reasonably incurred, whether or not they are proportionate).[40]

4.62 However, these measures remain fundamentally punitive in nature, and do not necessarily serve to ensure compliance (save in the threat). We therefore consider that there should be a mechanism that allows the court to ensure compliance without running into the problem of *autrefois convict* and without having to hear expensive and burdensome contempt applications in the first instance.

4.63 We also consider that an interim procedure would go some way towards mitigating the disproportionate satellite litigation in the form of "weaponised" contempt proceedings, inasmuch as interim and coercive (rather than punitive) remedies should justify shorter proceedings and lower costs. The permission filter that we provisionally propose in Chapter 8 will also be of importance in addressing disproportionality in contempt applications relating to breach of an order.

When should an interim remedy be available?

The elements of contempt can be made out

4.64 We have taken the view that an interim remedy should only be available if the court is satisfied (on the balance of probabilities) that the elements of contempt by breach of order or undertaking have been made out, albeit that the court will not make a finding of contempt.

4.65 We did consider whether the court should be required only to find a subset of those elements – for example, only breach. However, it is not clear that it would be appropriate to impose even an interim remedy on a party who cannot, for example, be shown to have known about the order, or to have acted deliberately. This is particularly so if the reason that the party is unaware of the order is that the applicant has not effected proper service.

Imminent breach

4.66 We have also considered whether interim remedies should be available if it were established that breach is imminent. For example, if a person is required not to leave the jurisdiction but there is evidence that they have purchased airline tickets, ought the other party be able to make an interim application to compel them to comply with the order and so prevent the breach? We have provisionally concluded that this would not be appropriate under this interim remedies regime (albeit that there may be other

[40] CPR, r 44.3. See para 9.54 below.

statutory regimes that might permit such applications, such as section 37 of the Family Law Act 1986[41]).

4.67 First, it would add imprecision to the contempt regime. Imminence is a question of degree, and it is not obvious at which point prior to actual breach a person should expect to find themselves subject to an interim remedy application. There will, of course, be instances where breach is inevitable, and so to that end we might say that it is imminent. For example, a person might be required to remove a nuisance by a particular deadline, but it is clear that, as a result of the defendant's delay, it will no longer be physically possible to do so. However, if breach genuinely is inevitable, then there is little to be gained in attempting to compel compliance before the fact.

4.68 Secondly, any interference in the respondent's ECHR rights that would inevitably flow from interim remedies imposed prior to breach would arguably not be sufficiently prescribed by law. Of course, were the law to make provision for a regime of remedies that were engaged prior to breach, then one could argue that any interference would be prescribed by law in a literal sense, but this is only half an answer to the problem. A law so framed would have to allow those affected to foresee with sufficient precision at what point their conduct – which is not in breach of a court order – would nevertheless bring them within reach of an interim application. What is required of a person named in or subject to a court order should be clear and unambiguous, and not merely the starting point or nucleus of an imprecise cloud of obligation. In those circumstances, the question of whether such measures constitute a proportionate interference in Convention rights does not even arise.

4.69 Thirdly, and though not an argument against making the order subject to further conditions, it is worth noting that, at the point that the court makes the underlying order, it can make that order subject to whatever conditions it sees fit, to ensure, so far as possible, that the party complies with the order. This is the better method of ensuring compliance, because it will be clear to parties at the outset what is required.

Breach capable of remedy

4.70 The interim remedy, being coercive rather than punitive in nature, would only be available where the continuing effect of non-compliance can be remedied by subsequent compliance. If the balloon has been popped, there is no benefit in attempting to re-inflate it. Where the effect of non-compliance has caused material detriment, or where it is no longer possible meaningfully to comply, then it may be right that full contempt proceedings be initiated (reflecting, as such proceedings would, the serious interference in the administration of justice).

4.71 By way of example, if a person leaves the jurisdiction in defiance of a court order, it is possible that they could subsequently return to the jurisdiction without any party having suffered detriment. Alternatively, if a person holds a prohibited protest, or publishes confidential material, the potential for damage arises upon breach.

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41 Family Law Act 1986, s 37(1): "Where there is in force an order prohibiting or otherwise restricting the removal of a child from the United Kingdom or from any specified part of it, the court by which the order was in fact made… may require any person to surrender any United Kingdom passport which has been issued to, or contains particulars of, the child".

4.72 However, where the prohibited conduct is continuous in nature, interim remedies may still have benefit. For example, if a company fails to prevent an ongoing escape of pollutants, there is still benefit in allowing for a coercive interim remedy to incentivise swift compliance to address the ongoing pollution.

Standard of proof for interim remedies

4.73 The standard of proof in contempt proceedings is to the criminal standard (beyond reasonable doubt). We have considered whether a lower standard of proof can be justified where the court is not being asked to make a finding of contempt and is, instead, being asked only to impose an interim remedy.

4.74 We have provisionally concluded that it would be appropriate to require a lower standard of proof. Specifically, we propose that the elements of contempt by breach of order should be proven on the balance of probabilities. In proposing interim remedies, our objective is to allow for a regime that demands less court time and is less expensive than applications for contempt. A regime that required contempt to be proven beyond a reasonable doubt, albeit without a formal finding of contempt, would not achieve this objective.

4.75 We are also concerned that problems may be caused for a judge dealing with a substantive contempt matter if findings to the same standard of proof have already been made by a different judge at an interim stage.

4.76 We also considered whether there should be a yet lower standard, in line with the normal standard for interim remedies, namely that the applicant must show a "good arguable case". Our provisional conclusion is that this would not be appropriate. Interim remedies in other contexts (such as freezing injunctions) are directed at maintaining the status quo pending the outcome of litigation; this is not the objective of the proposed interim remedies, which are instead coercive. We therefore consider that there is a clear distinction between the "contempt" interim remedies and other interim remedies. The contempt interim remedies, though temporary, are nevertheless serious measures, and ought not to be imposed lightly.

What remedies should be available?

4.77 The essence of the interim remedy is that it is coercive rather than punitive; it is designed to encourage compliance rather than punish for non-compliance.

4.78 We accept that these interim remedies will not be of assistance in all cases. Where a party is determined to disobey the court, or put themselves beyond the reach of the court, an interim remedy may be of little help. Similarly, the nature of the remedies proposed may mean that they will not be realistic options in all cases, for example where a defendant has limited or no means. Our view is that this is inescapable. Even some of the less financially burdensome measures, such as confiscation of passports, may have little purchase where the non-compliant party is of very limited means. (Some of the current difficulties in dealing with people of limited means – that is, that

they risk finding themselves committed to prison for want of other sanction[42]– are addressed in Chapter 10 on sanctions.)

4.79 We provisionally conclude that the following remedies could be available as coercive, interim measures:

(1) an order that the defendant pay a fixed, perhaps periodic, deposit of money into court that would be returned upon compliance (or forfeit as a fine, subject to further order of the court following a finding of contempt);

(2) sequestration of assets (a process – already available as a coercive remedy for contempt applications – by which property is placed in the hands of sequestrators, who manage the property and receive any rents and profits, the proceeds of which may either be returned to the defendant upon compliance or forfeit subject to further order of the court following a finding of contempt);[43] and

(3) an order that the defendant surrender a passport or any other document that would allow the defendant to leave the jurisdiction.

4.80 Though these remedies are fundamentally coercive in purpose, they are nevertheless serious and potentially highly restrictive measures. For example, passport orders are "potent order[s] with significant implications".[44] A passport order involves a clear restriction on the subject's liberty.[45] Similarly, a writ of sequestration binds the defendant's property. Nevertheless, if the defendant were to comply with the order, then the passport and/or sequestered property would be released. This is also true in the case of the deposit of money: should the defendant comply with the underlying order, then the money will be returned. The benefit of such an order, particularly in the context of sequestered property and deposited money, is that it provides some security if the order is not complied with and the court proceeds to hear a contempt application. If the court made a finding of contempt, then the sequestered property or deposited money could be made subject to further court order as part of the sanction (for example, they could be applied to any fine).

4.81 However, that property or money can be returned to the defendant is not to trivialise the effect of the remedy in the meantime; there still needs to be a relationship of proportionality in each case between the means employed and the aim sought to be realised.

Fixed terms

4.82 We are also of the provisional view that, in order to avoid the interim remedies themselves becoming innately punitive, they should be for a fixed term (that is, not indefinite). This will also assist with the coercive nature of the remedy. The timescale

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42 There is a clear legal principle that a custodial sanction cannot be justified merely on the basis of the contemnor's inability to pay a fine in the alternative (see eg *Edward Ellis v HM Solicitor General* [2023] EWCA Civ 585 at [50] (Coulson LJ)), though we have heard anecdotally from stakeholders that such a principle may not always have been applied.

43 See paras 10.120 to 10.131 below.

44 *Re P (Discharge of Passport Order)* [2020] EWHC 3009 (Fam), [2021] 2 FLR 212 at [32] (Cobb J).

45 See, for example, Child Support Act 1991, s 39B.

of the interim remedy should encourage active case management that provides for a clear statement that there is a time by which the defendant should comply with the underlying order lest the court proceed to hear a full contempt application.

Subsequent contempt proceedings and double counting

4.83 The effect of the interim remedy does not (through the operation of *autrefois convict*) serve to debar subsequent contempt proceedings. Indeed, if the interim remedy fails in its objective, then it would seem entirely right to bring contempt proceedings.

4.84 Of course, any subsequent sanction for contempt would have to take account of the fact that the interim remedy had been imposed; as we have noted, though not punitive in essence, the interim remedies are nevertheless serious. The final penalty should reflect the totality of the contempt (unlike the interim remedy, which does not), so avoiding double counting may require the court to reduce the final penalty in light of the interim remedy.

4.85 We also observe that failure to comply with the interim remedy (inasmuch as it is within the defendant's power to do so) will mean that there are now two substantive orders of which the defendant is in breach: the original order and the interim remedy. In one sense, there is no reason why a person should not then be subject to two respective contempt applications. However, the tidier view is probably that the interim remedy be deemed simply to have failed, and the court move straight to contempt proceedings for the breach of the original order. The failure to comply with the interim remedy can then be reflected in the penalty for the contempt.

Consultation Question 23.

4.86 We provisionally propose that interim remedies should be available to the court in order to ensure compliance with court orders or undertakings without the court having to make a finding of contempt.

Do consultees agree?

Consultation Question 24.

4.87 We provisionally propose that such interim remedies should be available where a court is satisfied that each of the elements of contempt by breach of order or undertaking has been made out.

Do consultees agree?

Consultation Question 25.

4.88 We provisionally propose that the standard of proof to obtain an interim remedy should be the civil standard (that is, on the balance of probabilities).

Do consultees agree?

Consultation Question 26.

4.89 We provisionally propose that interim remedies should only be available where any detrimental effect of non-compliance can be remedied by subsequent compliance.

Do consultees agree?

Consultation Question 27.

4.90 We provisionally propose that the court should have power to order the following, fixed-term interim remedies:

(1) an order that the defendant pay a fixed, perhaps periodic, deposit of money into court (which would be returned upon subsequent compliance or otherwise forfeit subject to further order of the court following a finding of contempt);

(2) sequestration of assets, the property or proceeds of which would be forfeit subject to further order of the court following a finding of contempt; and

(3) an order that the defendant surrender a passport or any other document that would allow the defendant to leave the jurisdiction.

Do consultees agree?

Consultation Question 28.

4.91 Should other interim remedies be available?

Chapter 5: Contempt by publication when proceedings are active

INTRODUCTION

5.1 In the two preceding chapters we set out the first two of the three forms of contempt that comprise our provisional proposals on liability for contempt of court. Chapter 3 sets out our provisional proposals for general contempt. Chapter 4 addresses contempt by breach of court orders or undertakings.

5.2 This chapter turns to the third of our three provisionally proposed forms of contempt: contempt by publication when proceedings are active.

5.3 This form of contempt largely parallels the form of contempt that was established by the Contempt of Court Act ("CCA") 1981.[1] Under the "strict liability rule" in section 1 of the CCA 1981, "conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so", and the rule applies when proceedings are active.[2] We consider the definition of "active" in the course of the chapter. For the purposes of introducing this form of contempt, it is sufficient to note that proceedings are active in criminal matters from the point of arrest, in non-criminal matters from the point when arrangements are made for a hearing, and in appeals from the point of originating process such as when an application is made for permission or leave to appeal or notice of appeal is given.[3]

5.4 Our provisional proposals in this chapter do not replicate the CCA 1981 form of liability. There is, however, substantial common ground and the CCA 1981 provisions are generally the points of reference against which we explain our provisional proposals.

5.5 The chapter proceeds in four parts. Part one considers the fault element for this form of contempt. We explain that although contempt liability under the CCA 1981 is based on the application of the section 1 "strict liability rule", the effect of the defences available under the Act may be that this form of contempt is not in fact strict liability in the sense that expression is usually understood. Rather, it incorporates an element of fault. Our provisional proposals state liability in terms of fault and, consistently with the presumption of innocence, place the burden of proof on the applicant who seeks to establish liability, rather than (the existing position) where the burden falls on the defendant to establish a defence. The second section in this part looks at who may be liable for contempt, considering in particular the position of corporate defendants as against individual defendants.

5.6 Part two turns to the conduct element. It first addresses the threshold for liability. We provisionally propose that the threshold should be the same as the current CCA 1981

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1 CCA 1981, ss 1-2, sch 1.

2 Above, ss 1, 2(3)-(4).

3 Above, sch 1(4), (4A), (16); see further from paras 5.83 to 5.119 below.

threshold; that is, it must be established that the publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[4] It then turns to what constitutes a "publication" for the purposes of this form of contempt, considering (among other matters) liability for materials that have been previously published, perhaps years earlier, which are available online and may prejudice criminal proceedings. It also considers publications made outside England and Wales, and publications made to a section of the public. Part three looks at the scope of this form of liability, considering when proceedings should be said to be active. We provisionally propose retaining arrest as the point at which criminal proceedings become active. We also consider whether there are measures that may add more clarity to the law, especially in relation to family proceedings. Part four addresses the defence that permits incidental discussion of matters of public interest.

THE FAULT ELEMENT

5.7 In Chapter 3 we explain our provisional proposals for general contempt by publication, including our provisional proposal that it must be proved the defendant had an intention to interfere with the administration of justice.[5] To establish general contempt by publication it is not a requirement to prove that proceedings are active. In these respects our provisional proposals for general contempt by publication parallel the existing common law contempt by publication.

5.8 Where a publication may affect particular proceedings that are active, however, the existing law governing contempt by publication is found in the CCA 1981, which sets a much lower fault threshold. This reflects the need to protect the rights of the parties in those proceedings, aiming especially to protect a defendant's right to a fair trial by ensuring that there is no publicity that might prejudice them in a criminal case by influencing the jury.[6]

Liability under the CCA 1981

5.9 Under the CCA 1981, it is not necessary to prove any intent to interfere with the administration of justice. This is different from the existing common law of contempt, as preserved by section 6(c), which does require proof of such an intention (as does our provisionally proposed general contempt by publication).[7] However, though characterised in the statute as a "strict liability rule", the availability of defences under section 3 of the CCA 1981 means that – although intent will not be relevant – liability is not "strict" in the traditional sense that liability can be established regardless of fault.

5.10 Section 3 of the CCA 1981 provides the defence of innocent publication or distribution. A person "is not guilty of contempt of court under the strict liability rule":

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4 CCA 1981, s 2(2).

5 See para 3.67 to 3.76 above.

6 See *Report of the Committee on Contempt of Court* (1974) Cmnd 5794. See also *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74).

7 See Chapter 3.

(1) … as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active; or

(2) … as the distributor of a publication containing any [matter to which that rule applies] if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.

5.11 The defendant bears the burden of proof in establishing a defence on the balance of probabilities.[8]

5.12 The effect is that (when proceedings are active) even where a defendant has published material that "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced",[9] they will not be liable for contempt if they took all reasonable care to ensure that proceedings were not active. Similarly, a distributor in those circumstances who did not know the material contained prejudicial content will not be liable where they took all reasonable care to ensure the material they distributed did not contain prejudicial content.

5.13 *Arlidge, Eady & Smith* argues that in practice this will mean that a publisher will almost always need to enquire about whether proceedings are active before publishing material about an individual who may be subject to proceedings. The example cited is *R v Duffy*, where an investigative journalist gave an undertaking to police to provide them with information about a crime committed by a specific person, but only once the article was ready for publication.[10] The police did not tell the journalist that the person had already been arrested for that crime. In these circumstances, where the newspaper in its publication then claimed credit for "smash[ing] a nation-wide drugs ring", the court accepted that the journalist neither knew nor had any reason to suspect that the proceedings were active despite not having actually asked that question of police. It was held that the question did not need to be asked in these particular circumstances, but *Arlidge, Eady & Smith* suggests it will be "rare" that the defence can be invoked by a publisher when police are not actually asked if a person has been arrested.[11] It is argued that a distributor wishing to rely on the defence will in practice need to show "that they have put in place some system of scrutiny to prevent the publication of prejudicial material".[12]

5.14 During our pre-consultation engagement we have been told by stakeholders that the defences are rarely relied upon, and that is consistent with the discussion of these defences in the cases and commentary. Our provisional view, however, is that this does not mean the defences are irrelevant. Rather, it seems more likely that the

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8 CCA 1981, s 3(3).

9 Above, s 2(2).

10 *R v Duffy* (9 February 1996) (unreported). See also P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") paras 4-283–4-287.

11 *Arlidge, Eady & Smith* (2019) para 4-291. See also further paras 5.91 to 5.102 below where we discuss whether a general approach by police to not naming suspects prior to charge should provide a basis for changing the point at which proceedings are defined as active.

12 *Arlidge, Eady & Smith* (2019) paras 4-291–4-292.

Attorney General ("AG") would not commence proceedings where there was evidence that a defence would succeed, the sufficiency of evidence being a factor that is considered under the contempt code.[13]

Provisional proposals

5.15 The current law places a significant onus on a publisher or distributor who seeks to avoid liability for creating a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced. Our provisional view is that, if liability is to be avoided in these circumstances, it is right that a person proposing to publish material should have made direct and specific inquiries about whether proceedings are active. Similarly, distributors of material that will potentially carry such a risk should have systems in place to prevent publication.

5.16 However, our further provisional view is that – in keeping with our analysis of the CCA 1981 as being a statute that does not impose strict liability but is fault-based – the defendant should not bear the burden of proving that they took all reasonable care. Rather, the applicant (who will be the AG)[14] should bear the burden of proving the defendant was at fault, and that fault must be established by proving that the publisher was reckless as to whether proceedings were active, or the distributor was reckless as to whether the material created the requisite risk of interference. Where an applicant cannot prove this, then contempt will not be established. This sets a higher threshold than the current law. Section 3 of the CCA 1981 imposes on the publisher the burden of proving that (having taken all reasonable care) they did not know and had no reason to suspect that the relevant proceedings were active, and imposes on the distributor the burden of proving that (having taken all reasonable care) they did not know that the publication contained material that created the requisite risk of interference and had no reason to suspect that it was likely to do so. With respect to the different matters on which the liability of a publisher and distributor may depend (whether proceedings are active for the publisher and whether the material carries a risk of interference for the distributor), these are freestanding; one may be liable independently of the other being liable, but the requisite fault must of course be established.

5.17 The effect of changing the law so that the applicant must prove that the defendant was at fault by establishing recklessness is not simply to change who bears the burden of proof but to shift the balance towards freedom of expression, by requiring that any infringement be justified by the party seeking to restrict expression. It also aligns with orthodox principles of criminal responsibility that demand proof of fault, especially where the consequence may be imprisonment. We use reckless in the established sense of its use following *R v G*, which is the same sense in which it is used in our consideration of recklessness in Chapter 3.[15] A publisher would be reckless if they knew there was a risk that proceedings were active and went ahead and unreasonably published prejudicial material regardless of that risk. A distributor would

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13 See Attorney General's Office ("AGO"), *Contempt public interest framework* (20 July 2022) ("The Contempt 'Code'").

14 See further our discussion and provisional proposals at paras 7.52 to 7.68 below on the role of the AG and the limited circumstances in which an application may be commenced by a person other than the AG.

15 *R v G* [2003] UKHL 50, [2004] 1 AC 1034; see para 3.80 above.

be reckless if they knew there was a risk the distributed material contained material that would prejudice active proceedings but they went ahead and unreasonably took the risk of distributing the material anyway. Our provisional view is that it is reasonable to expect that a distributor not be reckless when proceedings are active as the defendant's article 6 right to a fair trial is acutely engaged at that time. This can be distinguished from circumstances where proceedings are not active and the risk of interference with a defendant's fair trial rights is thus far lower. In that case we provisionally propose that liability for general contempt by publication should arise, which would require proof of specific intent to ensure sufficient culpability.

5.18 We have considered whether, for distributors, there should be any further elaboration as to when a distributor will be reckless. For example, we have considered whether an internet content platform such as Facebook or Instagram should (as a distributor) have any positive obligation to monitor content for active proceedings, but that seems impractical and too onerous.

Consultation Question 29.

5.19 We provisionally propose that for contempt by publication where proceedings are active, a defendant may be liable for contempt regardless of whether there was an intent to interfere with the administration of justice, but the applicant should be required to prove that:

(1) a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect proceedings were active; and

(2) a defendant distributor was reckless as to whether the distributed material "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced", in the sense that they knew there was such a risk and unreasonably took that risk by distributing the material.

Do consultees agree?

Who may be liable for contempt?

5.20 When a publication falls foul of contempt by publication under the CCA 1981 then, because of the low fault threshold, more than one person potentially may be liable for contempt. While the author of the publication – typically in the media context, the journalist – will be the obvious defendant, they may not be the only defendant. *Arlidge, Eady & Smith* identifies the following as potential defendants: proprietors; publishers; editors; other individuals who contributed to the published work (such as other journalists who contributed to a story); printers; and distributors.[16] The authors provide

[16] *Arlidge, Eady & Smith* (2019) paras 4-234–4-275.

a detailed analysis of the potential liability of each and the basis on which liability may be incurred, including addressing vicarious liability and corporate liability.[17]

5.21 In our pre-consultation engagement, stakeholders regularly had conflicting views on who should be held responsible for a publication that created a risk of serious prejudice or impediment to proceedings and thus will constitute contempt under the CCA 1981.[18] One view expressed to us was that it is unfair to pursue proceedings against individual journalists or editors where a prosecution could be brought against a media corporation instead. A typical contempt action against a media organisation might see the application made against both the media outlet (which will often be both proprietor and publisher) and an individual journalist. It is well established that corporations can be liable for contempt and this, it has been argued, was a presumption and policy that underpinned the CCA 1981.[19] The corporate media outlet is liable on the basis of vicarious liability, being responsible for the acts of the journalists whose work it publishes.[20]

5.22 We would welcome views from consultees about whether there should be any prioritisation of some defendants over others and, if so, which defendants should be prioritised. Our provisional view is that no potential defendant should be excluded from liability and that culpability may attach to any person or organisation responsible for publication and distribution. The potential exposure to liability serves to protect the right of a defendant to a fair trial in a criminal case by incentivising those involved in the publication or distribution of material to ensure that seriously prejudicial material does not reach the public or a section of the public. It may be that the AG might take the view in any given case that there is a public interest in instituting contempt proceedings against only some defendants, but our provisional view is that there is no case for legal exclusion of some defendants.

Consultation Question 30.

5.23 In circumstances where more than one person or organisation may be the subject of proceedings for contempt by publication where proceedings are active, should the law prioritise some defendants over others? If so, which defendants should be prioritised and why?

5.24 Should any potential defendants be excluded from liability for contempt by publication where proceedings are active? If so, which potential defendants should be excluded from liability and why?

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17 *Arlidge, Eady & Smith* (2019) paras 4-234–4-275.

18 CCA 1981, s 2(2).

19 *Arlidge, Eady & Smith* (2019) para 4-247, citing Report of the Committee on Contempt of Court (1974) Cmnd 5794 ("Phillimore Report") para 153.

20 *Arlidge, Eady & Smith* (2019) paras 4-244–4-251, citing *R v Duffy* (9 February 1996) (unreported); *R v Thomson Newspapers Ltd ex parte Attorney General* [1968] 1 WLR 1.

THE CONDUCT ELEMENT

The conduct threshold

5.25 Where proceedings are active, the existing law for the conduct element for contempt by publication is stated in section 2(2) of the CCA 1981: it must be established that the publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

5.26 This conduct threshold is higher than that which, in Chapter 3, we provisionally propose for the general form of contempt, which may apply to a publication whether or not proceedings are active. There, we provisionally propose that the conduct element for general contempt should be satisfied where a person's conduct (including a publication) creates a substantial risk of a non-trivial interference with the administration of justice or results in an actual non-trivial interference.[21] We explain that there are two limbs to the test – the risk that a consequence will follow from the conduct (being a substantial risk), and the nature of the consequence (being a non-trivial interference with the administration of justice) – and that this mirrors the existing common law conduct threshold.

5.27 Regarding the first of these limbs, we explain in Chapter 3 that a "substantial risk" has been interpreted by the courts to mean a risk which is "practical"[22] (as opposed to theoretical), "not remote",[23] "not insubstantial",[24] or "not minimal".[25] Our provisional view in Chapter 3 is that it should be sufficient for liability for general contempt to establish a "substantial risk" of a non-trivial interference with the administration of justice. That is, the degree of risk should be the same to establish general contempt as it is to establish contempt under the CCA 1981 "strict liability" rule.

5.28 In the second limb, however, the bar is higher: rather than the "non-trivial interference" threshold for general contempt, the interference must be such that proceedings are "seriously impeded or prejudiced".

5.29 Given that the CCA 1981 sets a lower fault threshold (in effect, of recklessness) when proceedings are active, the higher conduct threshold is appropriate; it ensures that contempt law only captures conduct that seriously impedes or prejudices particular proceedings in these circumstances. In our pre-consultation engagement, we have not heard concerns that the conduct threshold is inappropriate for liability under the CCA 1981 regime.

5.30 In our 2012 review we heard some views from stakeholders that the threshold for contempt should be aligned with the test for staying proceedings as an abuse of process.[26] In considering an application for an abuse of process, the court must consider whether "the risk of prejudice is so grave that no direction by a trial judge,

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21 See paras 3.3 to 3.30 above.

22 *Attorney General v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874 at 881.

23 *Attorney General v British Broadcasting Corporation* [1997] EMLR 76 at 80.

24 *Attorney General v News Group Newspapers* [1987] QB 1 at 15.

25 Above. See also *Attorney General v British Broadcasting Corporation* [1997] EMLR 76 at 80.

26 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.48.

however careful, could reasonably be expected to remove it", making it impossible for the defendant to have a fair trial.[27] We provisionally proposed that the tests should not be aligned.[28] Consultees generally took the view that contempt and abuse of process relate to different issues, have different priorities, arise in different contexts and involve different outcomes. Our provisional conclusion is that the 2012 analysis still stands.

5.31 In our pre-consultation engagement it was observed by several consultees that professional journalists are in a different position to lay people posting on social media. In particular, professional journalists have the benefit of training to be able to understand what the law requires and judge more effectively what can and cannot be published. It was put to us by one consultee that there should be different thresholds of responsibility for professional journalists and lay people. While it is clear that a trained journalist will be better able to navigate the waters of contempt, our provisional view is that this does not mean thresholds should be different. The potential consequences of prejudicial publicity do not vary with the status of the publisher, and the need to prohibit and deter prejudicial publicity dictates the need for a single threshold. A variable threshold would also pose practical challenges. There would be an inevitable challenge of determining into what category a publisher would fall, and academic or legal professionals active on social media may be as well (or much better) trained in the law of contempt than journalists. This means that a category-based approach is inappropriate.

5.32 Our provisional view is that the conduct threshold for our provisionally proposed form of contempt by publication when proceedings are active should be the same as the conduct threshold for liability under the CCA 1981.

Consultation Question 31.

5.33 We provisionally propose that for contempt by publication where proceedings are active, the conduct threshold should be the same as that which currently applies under the Contempt of Court Act 1981. That is, the applicant should be required to prove that the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Do consultees agree?

Publication

5.34 In Chapter 3 we explain our provisional proposals to retain the current CCA 1981 definition of publication, subject to also including online or electronic communications as an illustrative example in the non-exhaustive list of what constitutes publication. That definition would apply to any form of contempt that requires proof of publication,

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27 See *Montgomery v HM Advocate* [2003] 1 AC 641 at 667; *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659.

28 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.49.

whether general contempt by publication or contempt by publication while proceedings are active.

5.35 The first contentious issue with respect to liability for contempt by publication under the CCA 1981 relates to the stipulation in section 2(3) that the strict liability rule applies only where proceedings are active "at the time of publication". As material published online will often remain accessible long after it is first published, this issue requires consideration in our provisionally proposed form of contempt by publication where proceedings are active, just as it does under the CCA 1981.

"At the time of publication": material first published before proceedings were active

5.36 Section 2(3) of the CCA 1981 states that the strict liability rule applies to a publication "only if the proceedings in question are active … at the time of the publication".

5.37 Although there may be no relevant active proceedings when materials are first published, those materials may remain accessible online and may create a substantial risk of prejudice in subsequent proceedings. For example, a news outlet may have published material in 2019 that describes allegations that a person (A) has committed a crime, including potentially in reports of a criminal trial in a previous case, whether or not the person was found guilty. That material remains online and continues to be publicly accessible from the point of its initial publication, surfacing when someone searches for A by name. Such publications are commonly referred to as "archived publications". The contempt problem arises when A is arrested and charged with a criminal offence in 2024; those archived publications may now carry a substantial risk of serious prejudice or impediment to proceedings if they come to the attention of the jury in the new, active proceedings.

5.38 The question that arises is how contempt law should deal with archived publications. Should there be liability for contempt of court in these circumstances and, if so, on what basis? In our 2012 contempt project we reviewed the law in some depth.[29] However, the position is somewhat different now because the risk of prejudice to a trial has been mitigated significantly with the enactment of juror misconduct offences following our report.[30] Nevertheless, the problem remains with respect to contempt.

5.39 In 2012 we took the view that publication should be seen as a continuing act. This is derived from the Scottish decision in *Beggs*, which was subsequently approved by Mr Justice Fulford (as he then was) in *R v Harwood*:

> It appears to me unrealistic to make a distinction between the moment when the material is first published on the web site and the succeeding period of time when it is available for access on demand by members of the public. It appears to me that the better view is that the situation affecting the web site may be compared with a situation in which a book or other printed material is continuously on sale and

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29 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 3.50-3.86; Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, paras 2.26-2.205.

30 Juries Act 1974, ss 20A-20D.

available to the public. During that whole period, I consider that it would be proper to conclude that the material was being published.[31]

5.40 Though we had reservations about the analogy with book publishing, we observed that conceptualising publication as a continuing act had the practical advantage that the CCA 1981 could capture the risk posed to the administration of justice.[32]

5.41 That being said, there were problems in using that interpretation. First, the defendant publisher's conduct was lawful at the time of first publication and they have done nothing to make it unlawful, and so that is an unusual basis for liability.[33] We have since considered analogous issues in our Intimate Image Abuse report, noting that where a person possesses an intimate image with consent, but consent is later withdrawn, it is unfair to impose liability on the defendant who is unaware of that change in circumstance.[34] Secondly, publishers would need constantly to monitor their material and any events that may make it relevant to active proceedings. We took the view that this could be an expensive and time-consuming endeavour and may not be a proportionate restriction on their right to freedom of expression under article 10 of the ECHR.[35]

5.42 Following consultation in 2012, we recommended a scheme by which the AG would be responsible for notifying publishers that there was offending material, courts would have the power to order that material be removed, and a publisher who failed to remove material would be liable for contempt.[36] The AG would also have a responsibility to notify publishers when proceedings are no longer active. We recommended clarifying section 2(3) of the CCA 1981 to put the "continuing publication" interpretation onto a statutory footing and defining the meaning of "first publication" in the legislation (that is, the time when the communication first became accessible to the public at large or any section of it).[37] We also recommended that the section 3 defences[38] would only be available in relation to first publications, given that the system of notice by the AG would apply when proceedings subsequently became active.[39]

5.43 In our current pre-consultation engagement, we have again heard concerns about the status of archived material and the way it exposes publishers to contempt. Media stakeholders have told us that in their view it is not proportionate or necessary to require an online archive to be "sanitised" (as they put it) on every occasion that a

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31 *HM Advocate v Beggs (No 2)* [2002] SLT 139 at [22], cited with approval in *R v Harwood* [2012] EW Misc 27 at [11].

32 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.59.

33 Above, para 3.53.

34 Intimate Image Abuse (2022) Law Com No 407, para 10.131.

35 Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, para 2.80.

36 Above, paras 2.130 to 2.205.

37 Above, para 2.131.

38 As set out in para 5.10 above.

39 Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, paras 2.135 and 2.145.

high-profile trial or retrial commences because of any perceived risk (as opposed to any substantial risk) that jurors might access prejudicial (or even seriously prejudicial) material. They have told us that directions to juries not to conduct internet research are or should be standard and are the proportionate response to any concerns. They also told us that the criminal justice system requires that jurors be trusted to abide by their oath or affirmation and to comply with judicial directions.

5.44 Our provisional view is that although juror misconduct offences and adherence to judicial directions are critical to fair trials, they do not displace the need for liability under contempt law where previously published material carries a substantial risk of serious prejudice or impediment to a criminal trial, provided that the publisher has notice of that risk. To put it differently, the misconduct offences and adherence to directions do not sufficiently mitigate the risk of prejudice. If seriously prejudicial information is in the public domain it may reach jurors through other means and through no fault of their own, including via social media, where it is reposted by others unaware of the potential prejudice it may cause. But this should not mean that every archive must be "sanitised" upon relevant proceedings being active.

5.45 Our provisional proposal for contempt by publication where proceedings are active is that there should be liability for previously published material if the defendant has notice that relevant proceedings are active. The media may have been put on notice by the parties in a criminal case. In 2012, we provisionally proposed that the AG should have responsibility for notifying the media that proceedings are active and identifying to the publisher the specific material considered to be potentially prejudicial. We recognise that this would place a significant burden on the Attorney General's Office ("AGO"), and this raises a challenge as to how best to address the reality that contemporary publication occurs online. If the law of contempt is to keep pace with that reality and to respect freedom of expression, then it needs to do so systematically, but practically. In keeping with the AG's function as guardian of the public interest with respect to contempt,[40] action falls appropriately under the remit of the AG. This does not mean the AG must constantly monitor archives. Rather, it means that the AG should act where they are aware of proceedings and prejudicial material either by virtue of their own research and observation, or having had their attention drawn to it and reached a view that it carries the requisite risk. We are not proposing that the AG should have a responsibility or duty to take such action (and thus reach a different conclusion than we did in 2012). This is because we are mindful of the burden that would place on the AG and their office, and of the practicality that the prosecution or defence in a criminal case may be well placed to put a publisher on notice quickly and easily. However, given their public interest contempt role, it may well be the AG that puts a publisher on notice.

5.46 We recognise that the availability of previously published material is not only an issue with respect to online publications; this issue may arise also in respect of a printed publication, which could similarly remain accessible (for example, in bookshops or libraries). However, as a matter of practicality, printed publications will be less accessible and will have more limited potential reach than online publications. This lesser accessibility will render it less likely that the previously published material would create the requisite risk of serious impediment or prejudice to proceedings. Moreover,

[40] See paras 7.5 to 7.11 below.

previously published print material has a stated publication date, and a publisher will not have control over previously published materials in bookshops or libraries in the way they have control over their online archive. Given these practical issues, such a publisher may be insufficiently culpable were publication of printed material to be treated as a continuing act.

5.47 For these reasons, we limit the application of our provisional proposal to online archives; that is, previously published print material is excluded from the scope of our provisional proposal. In instances where previously published print material may carry a risk of interference with the administration of justice, there are jury offences where a juror seeks out material and jury directions to prevent that. In the event that a bookshop were to promote the sale of books that contain prejudicial material then, on the basis that the bookshop is a distributor, this would fall to be considered as a potential fresh contempt.

Consultation Question 32.

5.48 We provisionally propose that a publisher may be liable for contempt of court:

(1) where previously published online material subsequently creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced;

(2) the publisher has notice that relevant proceedings are active; and

(3) the publisher has notice of the specific material that is potentially prejudicial to those active proceedings.

Do consultees agree?

Place of publication

5.49 It is not necessary that a publication should be made in England and Wales for it to create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. A person outside the jurisdiction may publish material that has that effect, most notably where the material is accessible in England and Wales. The CCA 1981 is silent on the position with regard to whether such a publication falls within the scope of the Act.

5.50 In our pre-consultation engagement this concern has been raised by a small number of stakeholders, including a judge and an academic.

5.51 In our 2012 review we observed that where material was written in England and Wales or uploaded to a server by a person who was in England and Wales then it would appear likely that would constitute publication in the jurisdiction, but it is unlikely that it would be sufficient if it was merely made accessible to individuals in England or

Wales.[41] However, there was considerable uncertainty about how the law should approach the issues and we asked the following consultation questions:

> Do consultees consider that the absence of a definition of the place of publication creates problems in practice? Is a statutory definition of the place of publication necessary? If so, what form should that definition take? For example:
>
> (1) should it be necessary that the publication was produced within England and Wales; or
>
> (2) should it be necessary that the publication was targeted at a section of the public in England and Wales; or
>
> (3) should it be sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad?[42]

5.52 Consultees' views were mixed. We heard that defining the place of publication is not necessary, with some saying that if there is to be a definition, only publications within England and Wales should result in a finding of contempt by publication. Others said that there should be a definition and the publication should be produced within England and Wales. One consultee said that "a requirement that the publication was produced in England and Wales is unduly restrictive and those producing publications just over the border in Scotland and elsewhere outside England and Wales may escape prosecution for geographical reasons alone". Others suggested that it should be possible to proceed against publishers for publications created, uploaded and hosted abroad that are accessible here, but the emphasis should be on publications that are "accessible" and which pose a substantial risk of serious prejudice. One consultee argued that:

> the correct test is whether the material poses a substantial risk of serious prejudice in England and Wales, irrespective of the place in which the material was written, created and hosted. The place of production and any section of the public that the publication was targeted at would be relevant factors in assessing whether there was a substantial risk of serious prejudice. However, there remains a practical issue in dealing with a contempt where the publisher is outside the jurisdiction and cannot be brought within it.

5.53 Numerous consultees made the point that enforcement will be difficult in practice. One said that "it is impossible to police websites [or] material that is posted abroad. The reality is that any measures implemented by statute are only going to bind UK publishers".

5.54 In our report we summarised the responses in terms of the options in the consultation questions:

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41 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 3.94.

42 Above, para 3.95.

> In general, there was more support for a statutory definition than for maintaining the status quo, although the issue was closely balanced. Six consultees responded that either there was no need for a statutory definition, or that the lack of one was not creating problems in practice. Nine consultees responded that a statutory definition was needed or that there would be benefits in such a definition.
>
> If a statutory definition were to be introduced, only two consultees were in favour of [it being necessary that the publication was produced in England Wales] and only three consultees were in favour of [it being necessary that the publication was targeted at a section of the public in England and Wales]. Twelve consultees were supportive of [it being necessary sufficient that material which poses a substantial risk of serious prejudice is accessed in England and Wales even if written, created, uploaded and hosted abroad]. Various consultees explained that the issue is a complex one with "no easy answers" but that [the third of those options] was the definition best directed at the mischief which section 2(2) of the 1981 Act seeks to address, namely, the likelihood of the jury being exposed to material which gives rise to a substantial risk of serious prejudice.[43]

5.55 We did not make recommendations in relation to the place of publication issue in contempt. Instead, we recommended that the issue should be addressed in a future project on social media.[44]

5.56 Since 2012 we have explored related issues in social media contexts.

5.57 In our 2020 consultation paper on Harmful Online Communications, we addressed the question of jurisdiction over the provisionally proposed harmful communications offence:

> The proposed new [harmful] communications offence has been drawn in such a way that the offence is complete when the defendant "sends or posts" the communication. The commission of the offence does not require that the communication is received, or that it actually causes harm amounting to at least serious emotional distress.
>
> If, therefore, the act of sending takes place in England and Wales, the offence would be committed regardless of whether the communication is received outside the jurisdiction. This should, we think, avoid potential complications arising from the technology used to send the communication. It shouldn't matter if, for example, a sender based in London uploads a message from their laptop to a website hosted in another jurisdiction: the act of sending took place in England and Wales, so the offence took place within jurisdiction.
>
> On the other hand, where the communication is received in England or Wales, but sent from outside of the jurisdiction, no offence is committed in England and Wales. This may, in one sense, seem undesirable. Even if harm is caused, or likely to be caused, in England and Wales, no offence is committed in England and Wales if the

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43 Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, paras 2.210-2.211.

44 Above, para 2.216.

sender is outside of the jurisdiction. However, inclusion of a territorial provision penalising acts committed abroad seems to us to be disproportionate, given that the offence is relatively low-level. Further, although the offence is designed better to address online abuse and its harmful impacts, this is not a result offence but a conduct offence, penalising wrongful conduct committed within the jurisdiction.[45]

5.58 In short, the aim was to criminalise conduct committed within the jurisdiction of England and Wales, not outside. We then asked consultees whether they agreed that "the offence should not be of extra-territorial application".[46]

5.59 In the final report (Modernising Communications Offences), we noted that "there was strong support for our view that any offence should be limited to conduct within the jurisdiction".[47] We acknowledged responses received from consultees, including that it would be difficult to prosecute individuals overseas.[48] However, we also acknowledged that there were concerns that a person normally resident in England or Wales could evade liability if they post communications while temporarily outside the jurisdiction.[49] On this basis, we considered whether to expand, even in a limited way, the scope of the application of the offence so that communications sent from outside the jurisdiction with a likely audience within the jurisdiction could be covered.[50]

5.60 We noted the case of *R v Smith (No 4),* in which the Court of Appeal (Criminal Division) considered whether a person who committed the offence of obtaining services by deception could be prosecuted in England in circumstances where the obtaining had taken place abroad, but *a substantial part* of the deception had occurred in England.[51] In that case, recognising the cross-border nature of modern fraud,[52] the Court found that when substantial activities constituting a crime take place in England, courts in England should have jurisdiction even if elements of them take place abroad.[53] This has become a well-established test.

5.61 However, in the final report we said that since our recommended offence is complete at the point of sending or posting, communications posted abroad would simply not engage the expanded jurisdiction test set out in *Smith*.[54]

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45 Harmful Online Communications (2020) Law Commission Consultation Paper 248, paras 5.212-5.214.

46 Above, para 5.215.

47 Modernising Communications Offences (2021) Law Com No 399, para 2.262.

48 Above, para 2.264.

49 Above, paras 2.265-2.266.

50 Above, para 2.267.

51 Above.

52 *R v Smith (No 4)* [2004] EWCA Crim 631, [2004] QB 1418 at [61].

53 Above at [56].

54 Modernising Communications Offences (2021) Law Com No 399, para 2.267.

5.62 In order to address circumstances where a person who is ordinarily resident within the jurisdiction temporarily leaves the jurisdiction and posts abroad, we recommended a "modest extension" to the application of the offence.[55] We said:

> the offence should apply to communications sent or posted either within England and Wales or outside the jurisdiction by a person habitually resident in the jurisdiction. For completeness, we reiterate that any prosecution arising from a communication sent or posted abroad by a person habitually resident in England and Wales would only take place where there is sufficient evidence to provide a realistic prospect of conviction and it is in the public interest to prosecute.[56]
>
> …the offence will never apply to those who are not either present in, or habitually resident in England and Wales. The offence will extend only to those who are ordinarily subject to the criminal law of England and Wales.[57]

5.63 Should this be applied to contempt, the position would be that a person who publishes prejudicial material from outside the jurisdiction but was not "ordinarily resident" in England and Wales would not be liable for contempt, but a person who is ordinarily resident would be. While that is arguably problematic as both publications might prejudice proceedings to the same degree, it would have the result that an individual cannot escape liability merely by posting while outside England and Wales.

5.64 In our Intimate Image Abuse consultation paper in 2021, we noted the test set out in *Smith (No 4)* that a court in England has jurisdiction where the act has a "substantial connection" with England and Wales.[58] We pointed out that the CPS guidelines for the offences of disclosing or threatening to disclose private sexual photographs and films with intent to cause distress[59] had explained that this means, in practice "that the 'court would need to be satisfied that it was in substance an offence committed within the jurisdiction'".[60] However, we noted what was said on the issue in our report on Modernising Communications Offences and emphasised that cross-jurisdictional challenges "do not necessarily indicate anything inherently wrong with the offences and are not unique to intimate image abuse".[61] Accordingly, we did not ask a consultation question on this issue. We said the challenges "go beyond the wording of

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55 Modernising Communications Offences (2021) Law Com No 399, paras 2.273-2.274.

56 Above, para 2.272.

57 Above, para 2.273. This recommendation was implemented by the Online Safety Act ("OSA") 2023, s 185.

58 Intimate Image Abuse (2021) Law Commission Consultation Paper No 253, para 3.68.

59 Criminal Justice and Courts Act 2015, s 33. The offence was repealed by the OSA 2023, ss 190, 240(1).

60 Intimate Image Abuse (2021) Law Commission Consultation Paper No 253, para 3.68, citing Crown Prosecution Service ("CPS") Guidance (which has since been revised). See CPS guidance on jurisdiction: CPS, *Communications Offences* (undated), which states that: "An offence must have a 'substantial connection with this jurisdiction' for courts in England and Wales to have jurisdiction. It follows that, where a substantial number of the activities constituting a crime takes place within England and Wales, the courts of England and Wales have jurisdiction unless it can be argued, on a reasonable view, that the conduct ought to be dealt with by the courts of another country. See *R v Smith (Wallace Duncan) (No.4)* [2004] EWCA Crim 631. Substantial connection may be satisfied where either the suspect or the victim are in England and Wales".

61 Intimate Image Abuse (2021) Law Commission Consultation Paper No 253, para 3.69.

individual offences and will be affected by international law and developing practice in the wider criminal law".[62]

5.65 In the final report on Intimate Image Abuse, we reached a similar conclusion to that which we reached in Modernising Communications Offences: that the offence is complete upon the *posting*. We said:

> the sharing offence recommended in this report is complete at the point an image is sent. It is the conduct of sharing, and not the result, that warrants criminalisation. This means, for example, that someone in England who uses their phone to upload an intimate image to a website hosted in the US would have committed the sharing offence in this jurisdiction.[63]

5.66 We observed that there are several offences which provide for prosecution in England and Wales of acts committed abroad, but only where the perpetrator is a UK national or habitually resident in the jurisdiction and the act would also amount to an offence in the country in which it occurred.[64] We also acknowledged that "extraterritorial provisions require significant resources from other jurisdictions, including extradition proceedings".[65] We did not make a recommendation on extra-territoriality. Instead, we invited Government to "consider whether intimate image offences would benefit from specific extra-territorial statutory provision".[66]

5.67 Informed by these previous analyses and recommendations, our provisional view is that it is appropriate to clarify the legal position when online publication occurs outside the jurisdiction and that there are three principal options for doing so:

(1) The place of publication is irrelevant. Liability may attach to a publication regardless of where it was produced or uploaded.

(2) The place of publication is relevant. Liability may attach to a publication that has been produced or uploaded in England and Wales.

(3) The place of publication is relevant. Liability may attach to a publication that:

  (a) has been produced or uploaded in England and Wales; or

  (b) has been produced or uploaded outside England and Wales by a person habitually resident in England and Wales or by an organisation with a place of business within England and Wales.

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62 Intimate Image Abuse (2021) Law Commission Consultation Paper No 253, para 3.70.

63 Intimate Image Abuse (2022) Law Com No 407, para 15.10.

64 Above, paras 15.12-15.19. These paragraphs refer to several offences including, for example, terrorism offences.

65 Above, para 15.19.

66 Above, para 15.24. Provisions in the Criminal Justice Bill as introduced on 14 November 2023 (sch 2, part 1, cl 12) would have extended extra-territorial provisions to new intimate image offences, however that Bill stopped its progress through Parliament when the General Election was called in May 2024.

5.68 In our provisional view, the third of these options may be preferable on the basis of the same reasoning as in our previous reviews. While liability would not attach to publications that are uploaded outside England and Wales by persons not habitually resident in England and Wales or by an organisation with a place of business not within England and Wales, were the first option adopted there would in any event be practical problems with enforcement. However, we have not reached a firm provisional conclusion and so ask the following consultation question in open terms as regards the options.

Consultation Question 33.

5.69 We provisionally propose that it is appropriate to clarify the legal position when online publication occurs outside the jurisdiction.

Do consultees agree?

Consultation Question 34.

5.70 Where online publication occurs outside the jurisdiction, how should place of publication be relevant? For example:

(1) the place of publication should be irrelevant: liability should attach to a publication regardless of where it was produced or uploaded; or

(2) the place of publication should be relevant: liability should attach to a publication that:

(a) has been produced or uploaded in England and Wales; or

(b) has been produced or uploaded outside England and Wales by a person habitually resident in England and Wales or by an organisation with a place of business within England and Wales; or

(3) the place of publication should be defined in some other way (please specify).

Publication to the public at large

5.71 To fall within the scope of the CCA 1981 regime, the relevant publication must be addressed to "the public at large or any section of the public".[67] While the notion of addressing a publication to "the public at large" is uncontroversial, more contentious is what constitutes "a section of the public". The statute does not define these terms.

5.72 In our 2012 consultation paper we made the following observations:

[67] CCA 1981, s 2(1).

> There appears to be no definitive rule or standard that can determine whether a publication is addressed to the public or a section of it. Rather, the matter falls to be decided on a case-by-case basis. Likely relevant factors when making such assessment include the size of the group, the nature and function of the group, the means of control over access to the group or the specific publication and the context in which the publication was made. The essential contrast is with private communications. …
>
> Considerations of whether the use of an internet service constitutes publication to the public or a section of it will vary significantly both between the various services and depending on how a service is used. Email, for example, would generally seem analogous to private correspondence. Social networking sites … usually have privacy settings that enable a user to restrict access to their publications, but users may fail to utilise them.
>
> We consider that the law in this area should be left to develop on a case-by-case basis since there are no hard and fast rules about what can amount to "a section of the public" and, in practice, this issue appears thus far to have generated limited litigation.[68]

5.73 Our provisional view is that this remains the position. As *Arlidge, Eady & Smith* emphasises, "what is a section of the public must always be a matter of fact and degree".[69]

5.74 It appears that a communication to one person will not constitute a communication to a section of the public, though we agree with *Arlidge, Eady & Smith* that the position may be different if that one person is a journalist or, we would expect, any other person who one might reasonably expect would pass that information to others.

> A communication to even one journalist, however, might be classified as being made to the public at large. It is difficult to see why a communication to someone who is known to be a journalist should not ordinarily be taken as authorising the passing of the information to his readership, unless perhaps the information has been passed in such a way as to negate any such authorisation.[70]

5.75 Following consultation we considered in our report that it was "unclear what the legal position would be where the communication was not available to the public at large but only to a limited number of 'friends' or 'followers'" and reached the following conclusion:

> We doubt that statutory provisions could adequately define when a communication crossed the threshold of a "section of the public". How would it be possible to provide in clear statutory language some formula to account for whether, for

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68 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 3.24, 3.28-3.29 (references omitted). See also *Arlidge, Eady & Smith* (2019) para 4-63, where the authors present ten considerations that they see the case law and commentary indicating will be relevant when determining is a publication has been made to a section of the public.

69 *Arlidge, Eady & Smith* (2019) para 4-63, citing *Dingle v Turner* [1972] AC 601 at 623 (Lord Cross).

70 *Arlidge, Eady & Smith* (2019) para 4-63, citing *Speight v Gosnay* (1891) 60 LJQB 231; *McManus v Beckham* [2002] EWCA Civ 939, [2002] 1 WLR 2982.

example, a tweet to 1000 followers is a communication to "a section of the public"? There is a myriad of different forms of new media, a variety of privacy settings which can be applied to them, and differences in the number of users with access to the material even if privacy settings are used. We consider it highly unlikely that a workable explanation of "section of the public" could be developed which would appropriately account for this, without employing significant complexity and the need for regular updating as the technology develops.[71]

5.76 Our conclusion was that "although there is some vagueness about the definition as it currently stands, we think it only realistic to allow the law to develop on a case-by-case basis", and we recommended that the statutory provision remain unchanged.[72]

5.77 We have more recently considered in the context of intimate image abuse the question of when information is shared privately and when it is shared publicly. We noted that an image could be shared "in a very limited and conditional way" and that this could occur:

> in places that are exclusively private (such as sending a photo by post), or in places that allow public sharing, but a private method is chosen (such as sharing on Facebook but using a private message rather than a public group).[73]

5.78 We made the following observations about online spaces.

> In online spaces, these concepts are arguably even less clear. [One consultee] asked whether WhatsApp groups could ever be public. Many WhatsApp groups are used for small group, or one-to-one communications. However, some organisations may use WhatsApp groups to share information with wider audiences. Events such as demonstrations may set up WhatsApp groups to allow anyone attending on the day to share information and pictures after the event. [Other consultees] mentioned Facebook groups. In the consultation paper we described a closed Facebook group with five people in as "intrinsically private". Closed Facebook groups can have thousands of people in and the entry requirements simply involve a "request" to join that is approved by a group admin. That admin may not know the people they are admitting and it is arguably public despite being a "closed" group. Similarly one could have a public Instagram page that only has five followers. If the owner of that page shared an intimate image there, they do so in the knowledge that only five people will be likely to see it. However, it is an open page and therefore anyone on Instagram could access the page if they wanted.[74]

5.79 Though we acknowledged that there will on occasion be ambiguity as to when spaces are "semi-public", we reached the conclusion that a case-by-case basis is the appropriate approach.[75] Our provisional view is that the same analysis applies to

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71 Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340, paras 2.43-2.44.

72 Above, para 2.45.

73 Intimate Image Abuse (2022) Law Com No 407, para 10.138.

74 Above, para 10.142.

75 Above, paras 10.146-10.147.

sharing information in the context of contempt: there are no clear lines about what will constitute communication to "a section of the public".

5.80 In our pre-consultation engagement for this review only one stakeholder raised concerns about the provision. A media stakeholder told us that the terminology of a "section of the public" was so vague that it means people will not know how to guide their conduct in order to avoid liability for contempt. This, the stakeholder told us, is especially troubling considering the growth in the use of online communications, where publication of material to the public is easier and quicker than ever before. We were told that further guidance addressing what may amount to a section of the public is essential to allow laypeople to guide their behaviours in an online sphere to avoid accidentally committing strict liability contempt.

5.81 Our provisional view is that there is inherent and inevitable uncertainty about when a communication can be said to have been made to a section of the public, and that it is not clear that further guidance in statute will be of assistance in clarifying what will constitute such a communication in any given circumstance. It may be that there could be merit in a statutory indication that a communication in a group with private or limited membership will not of itself prevent a communication constituting a publication to a section of the public, but our provisional view is that would not add any meaningful further certainty to the law. However, we welcome any views about potential statutory elaboration.

Consultation Question 35.

5.82 We provisionally propose that the definition of publication as "publication to the public at large or to a section of the public" remain unchanged and that there should be no further elaboration on the meaning of the definition.

Do consultees agree?

SCOPE: WHEN ARE PROCEEDINGS ACTIVE?

5.83 In the introduction to this chapter we note some of the key points at which it is said that proceedings are "active" for the purposes of contempt liability under the CCA 1981. In this part of the chapter we look at this in more detail and consider whether there is a case for reform in some respects. Whether proceedings are active is a critical factor under the CCA 1981 because the strict liability rule only applies if proceedings are active. Similarly, it will be a critical factor in our provisionally proposed form of contempt by publication when proceedings are active.

5.84 We first explain the progress of cases in general terms before turning to the CCA 1981 definitions of active proceedings and then to some contentious issues in relation to those definitions.

How cases proceed

5.85 Criminal cases begin with a police investigation. In the course of an investigation – and potentially even at its outset – police will identity one or more persons who may have committed an offence. These are suspects. A suspect may be arrested where

there are reasonable grounds for suspecting the person has been involved with a crime and their arrest is necessary.[76] After arrest, a person may be held in custody for a period of time and then either released unconditionally, released on police bail, or charged. After a person has been charged then, depending on the seriousness of the offence, they may be released on police bail or they may be brought before a magistrate (who will determine whether they may be released on bail or remanded in custody until a subsequent application for bail at the Crown Court or until trial). After charge, the person is referred to as "the accused" or "the defendant".

5.86 Minor offences will be heard by magistrates or District Judges (magistrates' courts), sitting without a jury. Where a criminal offence is indictable only (in general terms, a serious offence) then the matter will be heard in the Crown Court with a jury. "Either way" offences are more than minor but not among the most serious; they are so called as they may be tried as a summary offence in a magistrate's court or as an indictable offence in the Crown Court, depending on the circumstances. A criminal case may have a number of preliminary hearings where, for example, the defendant may elect to plead guilty, where hearing dates are set, and (if the defendant is pleading not guilty) where issues relating to the admissibility of evidence may be determined. There may be orders that restrict reporting on some aspects of the case, and a breach of an order would constitute contempt.[77] The CCA 1981 strict liability regime applies regardless of any restrictions. Where a defendant has pleaded guilty then there will be no trial and the next stage is a sentencing hearing and the passing of sentence. Where a matter goes to trial then a defendant may be found guilty or not guilty and the trial ends in conviction or acquittal. On conviction, the next stage is sentencing. Sometimes the jury will be unable to reach a verdict and are discharged, so the trial is concluded without either a conviction or acquittal and the prosecution may or may not seek a re-trial.

5.87 In non-criminal proceedings (that is, civil, family, Court of Protection and administrative proceedings), there may be a requirement to comply with pre-action protocols before an action is commenced by the service or filing of originating process. Arrangements for a hearing may not be made until many months or even years after those initial stages. It is not uncommon for actions to be settled or withdrawn by the parties at any point prior to a trial. The vast majority of non-criminal matters are determined by a judge alone without a jury. Where a matter goes to trial then there will be a determination of the dispute, with the court deciding remedies (such as making an award of damages).

5.88 Decisions in criminal and civil matters may generally be appealed, though there may be a process that requires a person to obtain permission to appeal from the court.

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[76] Police and Criminal Evidence Act ("PACE") 1984, s 24. The reasons why an arrest may be considered necessary are set out in s 24(5).

[77] Orders will typically be made under the CCA 1981, s 4(2). Alongside the contempt regime there exist statutory provisions that automatically restrict reporting on particular aspects of a case without any separate consideration to an order being required. A contravention of these automatic reporting restrictions tends to constitute a criminal offence, rather than contempt. See, for example, Children and Young Persons Act 1933, ss 49(1) and (9).

Active proceedings under the CCA 1981

5.89 The CCA 1981 prescribes when criminal, non-criminal and appellate proceedings are "active".[78]

- Criminal proceedings are active from the point when:
  - there has been an arrest (with or without warrant) or the issue of an arrest warrant or summons;[79]
  - a certification is made under section 54 of the Criminal Procedure and Investigations Act 1996 (which may result in new proceedings against a person whose acquittal had been tainted by an offence involving witness or juror intimidation);[80] or
  - an appellate court has remitted the case to the court below or ordered a new trial.[81]
- Criminal proceedings are concluded by acquittal, sentence, or "any other verdict, finding, order or decision which puts an end to the proceedings".[82]
- Appellate proceedings are active from the time when they are commenced by application for leave to appeal, notice of appeal, or other originating process.[83] They remain active "until disposed of or abandoned, discontinued or withdrawn".[84]
- For all other proceedings:

  > Proceedings other than criminal proceedings and appellate proceedings are active from the time when arrangements for the hearing are made or, if no such arrangements are previously made, from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn; and for the purposes of this paragraph any motion or application made in or for the purposes of any proceedings, and any pre-trial review in the county court, is to be treated as a distinct proceeding.[85]

5.90 In our pre-consultation engagement three contentious issues have emerged: whether proceedings should be active in criminal cases from the point of arrest or from the point of charge; whether extradition proceedings should be active from the point at

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78 CCA 1981, s 2, sch 1.

79 Above, sch 1(4). See also sch 1(16) on criminal proceedings that become active again at the conclusion of an appeal.

80 Above, sch 1(4A).

81 Above, sch 1(16).

82 Above, sch 1(5). This provision and sch 1(6)-(11) also sets out some further actions that will bring about the conclusion of criminal proceedings.

83 Above, sch 1(15).

84 Above, sch 1(15)(c).

85 Above, s 2, sch 1(12).

which an arrest warrant is issued; and when some non-criminal proceedings (especially family proceedings) can be said to have concluded.

When should criminal proceedings be considered active?

5.91 There have for many years been arguments made that proceedings should not be active from the point of arrest but only from the point of charge.

5.92 In our 2012 review we considered these arguments, and noted that the Phillimore Report recommended that proceedings should be considered active from the point of charge.[86] However, we provisionally proposed retaining arrest as the starting point because moving to charge "could increase the risk of serious prejudice to the proceedings, particularly in cases of notoriety or if there were only a short period of time between charge and trial".[87] Consultees were divided in their views, though media stakeholders unanimously expressed concern that in some cases, there can be many months between the point of arrest and trial, so imposing reporting restrictions over such long time periods disproportionately infringes freedom of expression.

5.93 In our pre-consultation engagement we have again heard from media stakeholders that proceedings should not be considered active until the point of charge, though additional issues have arisen since our 2012 review. Among the concerns has been that police no longer name a suspect who has been arrested and so the media cannot ascertain in practice whether proceedings are active, unless they know through other sources who has been arrested (which may happen if, for instance, the arrest was made in a public place).

5.94 The police approach follows the recommendation of the *Inquiry into the Culture, Practices and Ethics of the Press* (commonly referred to as the Leveson Inquiry) that:

> save in exceptional and clearly defined circumstances (for example, where there is an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.[88]

5.95 This recommendation was taken up by the College of Policing, the professional body responsible for providing guidance to police forces for effective practice, which published the following guidance:

> Suspects should not be identified to the media (by disclosing names or other identifying information) prior to the point of charge, except where justified by clear

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86 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.17; Phillimore Report, para 123.

87 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.17-2.19.

88 The Leveson Inquiry, *Inquiry into the Culture, Practices and Ethics of the Press* (2012) Pt G, Ch 3, para 2.39.

circumstances, such as threat to life, the prevention or detection of crime, or a matter of public interest and confidence.[89]

5.96 In *Bloomberg LP v ZXC*, the Supreme Court held that, in general, a person under criminal investigation had, prior to being charged, a reasonable expectation of privacy under article 8 of the ECHR in respect of information relating to that investigation.[90]

5.97 The News Media Association told us that "often the media are unaware that an arrest has taken place and it can be difficult to verify this as this information is no longer routinely confirmed by police forces following *ZXC*". As a result, there is a chilling effect because the media cannot publish information about a person for fear that the person may be under arrest, but there is no way they can know with any certainty. Additionally, it was explained to us that the bar for arrest can be very low, whereas the bar for charging presents a higher threshold, and a lot of arrests do not lead to charge. The effect is that journalists can end up effectively self-censoring when there is no need, which may itself erode freedom of the press and freedom of expression.

5.98 We appreciate the concerns that have been raised by media stakeholders. They may be particularly important if a publisher is trying to resist an argument that they were reckless as to whether proceedings were active. For example, the existing law (discussed above at paragraph 5.10) presumes that a journalist can avail themselves of the defence of innocent publication if they have made an enquiry of police. However, if police will not disclose the identity of an arrestee, including potentially neither confirming nor denying that the person about whom the media is enquiring has been arrested, then there is a question about whether that defence will be meaningful in practice. The same argument would apply to our provisional proposal that places on the applicant the burden of proving recklessness as to whether proceedings are active.

5.99 However, arguably this does not justify moving the point at which criminal proceedings are considered to have become active. For the active period to commence at charge may significantly increase the risk of serious prejudice to proceedings as a result of reporting between arrest and charge, particularly in high-profile cases and where the identity of the arrestee is known to the public from the very point of arrest.[91] We also note that the fact proceedings are active does not mean that all publications are prohibited; rather, the law of contempt will only capture publications that carry a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Where there may be a considerable period of time between arrest and trial, which may be a consideration where a suspect has been

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89 College of Policing, *Guidance on Media Relations* (First published 24 May 2017, updated 27 July 2022). Governments have also expressed support for pre-charge anonymity; see for example, Lord Wolfson of Tredegar *Hansard* (HL), 16 March 2021, vol 811, col 168: "The Government believe that, in principle and in general, there should be a right to anonymity pre charge in respect of all offences".

90 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] AC 1158. See also *Sir Cliff Richard OBE v BBC and South Yorkshire Police* [2018] EWHC 1837 (Ch), which the News Media Association and several media outlets argued saw privacy protections result in unreasonable restrictions on press freedom with respect to reporting on investigations: News Media Association, "Newspapers voice press freedom concerns following Cliff Richard BBC ruling" (19 July 2018); News Media Association, "Overview of Sir Cliff Richard v BBC and South Yorkshire Police", (c.18 July 2018).

91 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.17.

released on police bail pending further investigation,[92] then the "fade factor" may make it less likely that the contempt threshold will be crossed.[93]

5.100 We were also told by one media stakeholder that paragraph 7(ca) of schedule 1 to the CCA 1981 raises a problem for the media. The provision states that proceedings have been discontinued when "in the case of proceedings in England and Wales commenced by arrest without warrant, if the person arrested is notified that the person is not to be prosecuted …".[94] The position put to us was that there may be a lengthy period between arrest and the decision not to prosecute (which aligns with the argument that the trigger for active proceedings should be charge rather than arrest), but it seems the concern is also about the difficulty of knowing that a decision has been made not to prosecute.

5.101 We invite consultees to share their views on whether criminal proceedings should continue to be considered to be active from the point of arrest. We recognise that a journalist may make inquiries of police as to whether a particular person has been arrested and police may neither disclose the identity of the person arrested nor confirm or deny whether the particular person is the arrestee, nor state or confirm that a person will not be prosecuted. We recognise that the effect of the current position which treats criminal proceedings as active from the point of arrest therefore results in a restriction on freedom of expression to the extent that it prevents publication of material that carries a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. We also recognise that from time to time it may be that a consequence of a refusal by police to disclose such information is that information is not published even though it would not have any serious prejudicial effect on active proceedings. On some occasions information will not be published even where it would have no effect at all, because it would relate to a person who has not in fact been arrested but the publisher has no alternative but to be cautious. That is, we recognise that treating criminal proceedings as active from the point of arrest has a chilling effect in some instances. However, given the concerns we discuss at paragraph 5.99 above, arguably that restriction is necessary and proportionate to protect the fair trial rights of the person who has been arrested. On that basis, it may be appropriate to continue treating criminal proceedings as active from the point of arrest.

Consultation Question 36.

5.102 We invite consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest.

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92 PACE 1984, ss 34, 37.

93 We do not consider the "fade factor" to be offset in circumstances where relevant previously published material remains accessible online (ie online archives). Though the material remains available online, the public's interest in it may wane over time. We thus think there is likely to be a fade factor in these cases nevertheless.

94 CCA 1981, sch 1, para 7(ca), inserted into the Act by the Policing and Crime Act 2017 (Consequential Amendments) Regulations 2018, reg 4(2)(b).

Extradition

5.103 When a suspect in a criminal investigation is outside the jurisdiction then authorities may seek their extradition to England and Wales. To request the extradition of a suspect, authorities will obtain from a court in England and Wales a warrant for the person's arrest, which (with relevant information or evidence) is then forwarded to the foreign country.[95]

5.104 Under the CCA 1981, the issue of the arrest warrant renders proceedings active irrespective of whether the warrant pertains to a person in or outside the jurisdiction.[96] If a person is not arrested within one year then proceedings will no longer be considered active, though if there is an arrest after that time then proceedings will become active on arrest.[97]

5.105 In our 2012 review of contempt we considered whether in extradition matters it was appropriate that proceedings are active from the time a warrant is issued. The concern was that a "significant delay may occur before the suspect can be apprehended and returned to this jurisdiction" and that may result in "an extended period during which media coverage is restricted".[98] Our provisional view was that the concerns this would unduly restrict reporting prior to arrest were alleviated by the fade factor (which would make it less likely that a publication would meet the threshold of serious prejudice or impediment), as well as by the fact that the active period expires if a year passes without arrest.[99] As such, we provisionally proposed that the issue of an arrest warrant should trigger the active period in extradition cases.[100] Many consultees agreed. However, media stakeholders generally took the view that in extradition cases the trigger should be either the point of arrest or the point when the extradition subject arrives and is charged in the jurisdiction.

5.106 In pre-consultation engagement on this occasion we have not heard any views on this issue. However, our provisional view is that the current position should be retained. The restriction on freedom to publish is mitigated in the ways we describe, and consistency, rather than exceptions, is to be preferred.

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95 The Extradition Act 2003 provides the basis for extradition to or from an EU member state and a limited number of non-EU countries. Extradition arrangements to all other countries are made under prerogative powers and pursuant generally to bilateral treaties. A domestic warrant is a formal requirement when seeking extradition from an EU country: Extradition Act 2003 s 142. Since Brexit, the European Arrest Warrant has been replaced by the EU/UK Surrender Arrangement (EU/UKSA) under the EU-UK Trade & Cooperation Agreement, Part Three, Law Enforcement and Judicial Cooperation in Criminal Matters, Title VII, Surrender (Articles 596-632).

96 CCA 1981, sch 1(4).

97 Above, sch 1(11).

98 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.22.

99 Above.

100 Above.

Consultation Question 37.

5.107 We provisionally propose that in extradition cases the current position should be maintained and proceedings should be active from the time a warrant for arrest is issued in England and Wales.

Do consultees agree?

When do proceedings cease to be active?

Criminal proceedings

5.108 The contentious issue with respect to the conclusion of criminal proceedings is whether, when a person has been convicted, proceedings should cease to be active at the point of verdict (or guilty plea) or whether they should remain active until the defendant has been sentenced. Under the CCA 1981 criminal proceedings are active until sentence.[101]

5.109 In 2012 we asked consultees whether this should be changed to the point of verdict. We observed that it was less likely that any publication between verdict and sentencing will substantially risk serious prejudice or impediment to the trial because by the sentencing stage only judges or magistrates are the decision makers.[102] We also noted that many media outlets treat the verdict as the final point in practice and that there is a case that the law should reflect that reality.[103] However, we expressed some reservations:

> It is also necessary to caution against the creation of a climate – particularly in notorious cases – that might give rise to the perception that a judge or magistrate has been inappropriately influenced by prejudicial material when passing sentence.[104]

5.110 We received mixed responses, with some stakeholders telling us that judges are unlikely to be influenced by media coverage during the sentencing stage, therefore the law should be amended so that proceedings cease after delivery of the verdict. Others preferred proceedings to be considered "active" until delivery of sentence to avoid any possibility of prejudice or perceived prejudice. We did not, however, make a recommendation in our final report on when proceedings should cease to be active.[105]

5.111 In our pre-consultation engagement media stakeholders have alerted us to one occasion where a judge warned journalists that in the eight-week period between conviction and sentencing they should not publish anything that had not been said in

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101 CCA 1981, sch 1, para 5(a).

102 See Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.23-2.24.

103 Above, para 2.24.

104 Above.

105 The final report was primarily concerned with matters until the point of verdict, that being the time during which jury concerns are engaged: Contempt of Court (1): Juror Misconduct and Internet Publications (2012) Law Com No 340.

open court. They were warned that "Any reporting of speculation and you could find yourselves in contempt of court. Anything you say could prejudice the sentencing judge".[106] We are not aware of other such instances and, to the contrary, the accepted wisdom is that judges are unlikely to be influenced by commentary.[107]

5.112 More significant, however, is the problem of perception. In high profile cases there may well be campaigning and advocacy, especially by media outlets, in relation to what sentence should be handed down in a case. Where a sentence corresponds with that then there is a risk that judges will be perceived to have been influenced and it is conceivable that campaigners could claim to have had influence, regardless of whether there is evidence to that effect. Those risks are mitigated by the ability of judges to state in sentencing remarks that they are aware of media speculation but that it has not been a consideration. The increasing transparency of sentencing in high profile cases may also assist; broadcast of sentencing in such cases is becoming common and Lord Burnett, Lord Chief Justice until 2023,[108] has argued that this has increased the public understanding of sentencing.[109]

5.113 Our provisional view is that although it is less likely that publications will carry a risk of serious prejudice or impediment to proceedings in the period between verdict and sentence, the better position is that proceedings should still be considered active until sentence has been passed. This does not prevent publications prior to sentence that explain how sentencing works or which speculate on possible sentences. There is a benefit to be had from the prevention and deterrence of publications that may give the impression that judges have been influenced by campaigning.

Consultation Question 38.

5.114 We provisionally propose that in criminal cases where there has been a conviction, proceedings should be considered active until sentencing has been handed down, which maintains the current law.

Do consultees agree?

Family proceedings

5.115 We have heard from stakeholders that there is a deal of uncertainty about when it can be said that proceedings cease to be active in family cases. The concern is that where a decision may be made about, for example, a child maintenance order, there may be further hearings scheduled many months in the future to review the order. We were told that sometimes proceedings are paused and then subsequently reactivated, and

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106 Press Association, Media Lawyer Live Alert, "Judge warns journalists against causing prejudice" (9 October 2017).

107 See for example, S Harrison and M Hanna, *McNae's Essential Law for Journalists* (26th ed, 2022) p 311.

108 Lord Burnett was succeeded by Baroness Carr as the Lady Chief Justice in 2023.

109 Lord Burnett of Maldon LCJ, "Open Justice Today" Speech to Commonwealth Judges and Magistrates Conference (10 September 202) paras 36-39.

that there may be multiple proceedings. This makes it difficult for parties or members of the family to know when they may speak publicly about their cases.

5.116 Under the CCA 1981, it appears to us that proceedings are likely to remain active in such instances given the definition in schedule 1 that proceedings are:

> active from the time when arrangements for the hearing are made … until the proceedings are disposed of or discontinued or withdrawn; and … any motion or application made in or for the purposes of any proceedings … is to be treated as a distinct proceeding.[110]

5.117 In those circumstances, it appears that parties and family members are hampered in discussion of their cases. We would welcome evidence about whether and how the status of proceedings in such matters (or in any similar circumstances) might be addressed.

Consultation Question 39.

5.118 In family, Court of Protection or other proceedings where orders may be made and review hearings set down for the future, or in similar circumstances where the nature of proceedings is that they may be dormant for some time, what should be the status of proceedings between the hearings?

5.119 Where there is uncertainty about whether proceedings are active, how might that most effectively be addressed?

THE PUBLIC INTEREST DEFENCE

5.120 Section 5 of the CCA 1981 provides the following defence:

> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

5.121 The defendant must meet an evidential burden then the applicant must prove beyond reasonable doubt that the defence cannot be established.[111]

5.122 The purpose of the section is to provide some protection for freedom of expression. In particular, it recognises that the fact that proceedings are active cannot be a justification for prohibiting discussion of matters of public interest. However, what constitutes “discussion” and when any risk of impediment and prejudice will be “merely incidental” have been subject to debate.

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110 CCA 1981, s 2, sch 1(12).

111 *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [93].

5.123 The House of Lords considered section 5 in *Attorney General v English*.[112] Regarding discussion, Lord Diplock rejected the proposition that this should be narrowly interpreted. It was to be interpreted liberally; robust public discussion of "controversial matters of general public interest" was held to be permissible and that was not restricted merely to "the airing of views and the propounding of debating of principles and arguments".[113] Regarding the phrase "merely incidental to the discussion", Lord Diplock held that this meant that the creation of the risk of impediment or prejudice was "no more than an incidental consequence of expounding its main theme".[114]

5.124 This has not necessarily been helpful for those assessing whether a risk is merely incidental and so judging whether a publisher can avail themselves of the defence. In *Attorney General v Random House Group Ltd*, Tugendhat J drew on a line of authority that cited the interpretation of the test by the Divisional Court in *Attorney General v TVS Television Ltd*:

> A better test is surely to look at the subject matter of the discussion and see how closely it relates to the particular legal proceedings. The more closely it relates the easier it will be for the Attorney-General to show that the risk of prejudice is not merely incidental to the discussion.[115]

5.125 So, for instance, it has been held that where a publication discusses "the actions which had led to the trial" then any risk they create to proceedings will not be "merely incidental" to the discussion of the matter of public interest.[116] In *Attorney General v Random House Group Ltd* it was held that a book about counter-terrorism policing aimed "to inform the public on matters of the greatest public interest, and it does so in a serious way" and the discussion was within "the scope of public affairs and other matters of general public importance".[117] However, some passages provided "a detailed narrative as to what went on" in relation to matters that were the subject of a an active criminal case, discussing "the very acts which led to the trial".[118]

5.126 In our 2012 consultation paper, we recognised that section 5 raised two conflicting concerns:

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112 *Attorney General v English* [1983] 1 AC 116.

113 Above at 143-144.

114 Above at 143.

115 *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [91], citing *Attorney General v TVS Television Ltd*, *The Times*, 7 July 1989 (Lloyd LJ). The interpretation in *TVS Television* was approved in obiter comments by the Divisional Court in *Attorney General v Guardian Newspapers* [1992] 1 WLR 874 at 882 (Mann LJ).

116 *Attorney General v Guardian Newspapers* [1999] EMLR 904 at [56] (Collins J); *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [94].

117 *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [89].

118 Above at [90] and [94].

(1) section 5 may not be compatible with the ECHR because a public interest defence cannot operate where a publication conflicts with the absolute right to a fair trial under article 6;[119] and

(2) the ambit of section 5 is too narrow and may have a chilling effect on publishing about important social issues.[120]

5.127 We provisionally concluded that section 5 strikes the appropriate balance between ensuring the right to a fair trial, whilst also permitting the media to report on important matters of public concern.[121] Specifically, we said that "the courts in applying section 5 must necessarily consider the impact of articles 6 and 10 when deciding whether the risk of impeding or prejudicing proceedings is incidental to the public interest value of the discussion".[122] We also said that cases involving section 5 are relatively rare in practice, and this may be down to the fact that the AG chooses not to proceed in matters where section 5 would apply.[123] Generally, consultees were in favour of retaining section 5 in its current form on the basis that it strikes the right balance. In our final reports we made no recommendations in relation to section 5.

5.128 In our current pre-consultation engagement, we received only a few views. Some media stakeholders noted the defence was rarely used and surmised that it meant the defence is working well because proceedings are not being brought against publishers who discuss matters of public interest, merely incidental to the course of active proceedings. Some academic stakeholders suggested that the term "incidental" was odd and not especially clear. One stakeholder emphasised that the section should not operate narrowly to safeguard the article 6 right to a fair trial.

5.129 Our provisional view is that section 5 operates to ensure, as Lord Diplock put it, that:

> bona fide public discussion in the press of controversial matters of general public interest [is not gagged] merely because there are in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue.[124]

5.130 We are not aware of any evidence that it places fair trial rights at risk – and we are of the view that it should not operate with that effect. We are not aware that it unduly constrains public discussion on matters of public interest. It may be, however, that the defence could be expressed in a different way, as the case law indicates that the courts have searched for ways to interpret the section so that its effect is clear and practical.

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119 H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (2006) pp 279-284. See Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.53.

120 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.53.

121 Above, para 2.54.

122 Above.

123 Above, para 2.55. We also provisionally proposed that the AG publish a policy regarding when proceedings would be instituted: paras 2.55 and 2.60-2.63. A policy was subsequently published: see para 7.93 below.

124 *Attorney General v English* [1983] 1 AC 116 at 143 (Lord Diplock).

5.131 Further, our provisional view is that, mindful that fair trial rights may be affected by interferences with the administration of justice, the law should operate to the above effect so that public discussion on matters of public interest is not subject to disproportionate or unnecessary restrictions, even when proceedings are active. There could, however, be different ways of achieving that outcome. We invite consultees to provide views about the form a defence should take. Approaches could include, for example: the word "incidental" should be defined (for instance, in terms of how closely the publication relates to the proceedings or the extent to which the publication discusses the actions which led to the proceedings); or the defence should not use the word "incidental" and should instead use a different word or phrase; or the public interest in freedom of expression should be an express part of the defence; or it may be that consultees are of the view that the section 5 defence should be retained unchanged.

5.132 It should be noted that we have provisionally proposed that contempt by publication where proceedings are active will only be established where the publication carries "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[125] As such, any defence that would have the effect of accepting that there is that degree of interference, and then permitting that interference, would need to be carefully justified by consultees, especially where such an interference could affect the fair trial rights of a defendant in a criminal case.

Consultation Question 40.

5.133 We provisionally propose that there should be a defence that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active.

Do consultees agree?

We invite consultees' views on the form that defence should take.

[125] See para 5.33 above.

Chapter 6: Contempt protection and powers

INTRODUCTION

6.1 In this chapter we first examine which courts, tribunals and other bodies are protected by the law of contempt. We then look at the powers they have to address conduct that apparently constitutes contempt.

6.2 We consider the position of all courts that have jurisdiction in England and Wales, including the Supreme Court. Similarly, we consider all tribunals that have jurisdiction in England and Wales, including tribunals that deal with matters reserved to the UK Parliament and which operate across the UK. We also include the devolved tribunals in Wales, as the Welsh Government has requested that we consider these. We exclude devolved tribunals in Scotland and Northern Ireland; as the Law Commission of England and Wales, these are outside our Terms of Reference.

6.3 With respect to tribunals, Elliott and Thomas have remarked on the "bewildering diversity" of tribunals in the UK.[1] These include UK, Great Britain, England and Wales, England-only and Wales-only tribunals. Tribunals hear hundreds of thousands of cases per year. Alone, those administered by His Majesty's Courts and Tribunal Service ("HMCTS") disposed of over 250,000 matters in 2022-23.[2] Several significant features of the structure and operation of tribunals are captured in the overview provided by the judiciary website:[3]

> There are many tribunals, covering a wide range of areas affecting day-to-day life.
>
> Some [issues] dealt with by tribunals are UK-wide, eg, immigration and asylum, and others cover parts of the UK, eg, mental health covers England only.
>
> Tribunals often sit as a panel, incorporating a legally qualified Tribunal Judge as well as panel members with specific areas of expertise. They hear evidence from witnesses but decide the case themselves. Some tribunals have limited powers (depending on the jurisdiction of the case) to impose fines and penalties or to award compensation and costs. Other types of tribunal decisions might result in the allowance or disallowance of a benefit, leave or refusal to stay in the UK, or the extent of provision of special educational help for school-age children.
>
> Some tribunals are administered through local authorities (for example, the School Exclusion Panels), some by government departments (eg, Valuation Tribunals) and others through His Majesty's Courts and Tribunals Service (HMCTS), an agency of the Ministry of Justice.

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1 M Elliott and R Thomas, *Public Law* (4th ed 2020) p 690.

2 HMCTS, Annual Report and Accounts 2022-23, p 6.

3 Courts and Tribunals Judiciary, Introduction to Tribunals (undated). Some of the statements have been re-ordered to better suit the way we have structured our discussion.

6.4 In our analysis of protection and powers we devote particular attention to the tribunals that deal with the bulk of disputes in England and Wales. These are the First-tier Tribunal ("FtT") and the Upper Tribunal ("UT"), the Employment Tribunals (England and Wales) ("ETs") and the Employment Appeal Tribunal ("EAT").[4] We also give specific consideration to the devolved tribunals in Wales, which are included in our Terms of Reference.[5]

6.5 Contempt protection is not limited to bodies that are called courts or tribunals. We also consider whether other bodies may be protected. We look particularly at the Parole Board for England and Wales.

6.6 The chapter begins by explaining our terminology and analytical framework of "protection" and "powers". In the first half of this chapter we consider protection. We examine the basis on which a court, tribunal or other body may have contempt protection. We provisionally propose that the existing test – whether a body is exercising the judicial power of the state – is the appropriate test. We then look at what bodies may satisfy that test. We provisionally propose that, for certainty, any statement of the test should be accompanied by a non-exhaustive list of the bodies that meet that test and so have contempt protection. We do the same for the devolved tribunals in Wales. The second half of the chapter turns to powers. We outline the existing powers of superior courts, inferior courts, tribunals and other bodies. We then consider the case for reform. We provisionally propose a simpler and uniform framework of powers which, in particular, would harmonise the powers available to all inferior courts, tribunals and other bodies, including the devolved tribunals in Wales.

APPROACH AND TERMINOLOGY

The framework for analysis

6.7 In this chapter we use "protection" and "powers" as the framework for analysis of how the law of contempt applies in courts, tribunals and other bodies.

6.8 "Protection" refers to whether a court, tribunal or other body is protected by the law of contempt or, put differently, whether the law of contempt applies in that court or tribunal. If the court or tribunal is not protected, then it is not possible to be in contempt of that court or tribunal. It is a particularly significant issue in relation to the discussion of tribunals, some of which are not currently protected by the law of contempt.

6.9 "Powers" are the powers that are available to a court or tribunal that has contempt protection. Specifically, we use the term to cover:

- The powers of a court or tribunal to address conduct which potentially constitutes contempt. These powers will be:
    - The power of a court or tribunal to deal with such conduct itself. That is, the power of a court or tribunal to initiate or entertain proceedings for contempt,

[4] The FtT and UT are established by the Tribunals, Courts and Enforcement Act ("TCEA") 2007. The ETs and EAT are established by the Employment Tribunals Act 1996.

[5] See paras 1.11 to 1.12 above.

whether in relation to contempt of itself or of another judicial body, and whether proceedings must be instituted on application or on a court's own motion, or both.

- The power of a court or tribunal 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. Referral may sometimes be associated with procedural terminology such as certification or transfer; we use the term referral powers to capture any such referral, however called. We do not use the term to cover the option to refer a matter to the Attorney General ("AG") to commence proceedings for contempt.

- The power to impose a sanction for contempt. That is, having made a finding of contempt, the power of a court or tribunal to impose a sanction on the defendant.

In this chapter we look at powers to entertain or refer contempt proceedings. Powers to impose sanctions are examined in Chapter 10, though they are mentioned at times in this chapter (especially in relation to inferior courts) because they are inevitably tied to the power to deal with a contempt.

6.10 We have avoided the use of "jurisdiction" in our terminology because "jurisdiction" is used in different ways. It is commonly used with reference to geography, especially with regard to distinguishing the operation and powers of the courts or tribunals with respect to devolved or reserved matters. That is the way we used it in the introduction to this chapter. However, where contempt is discussed it may have different meanings depending on the context. It is sometimes used to refer to contempt protection and powers together; for instance, some tribunals may be said to have a contempt jurisdiction. On other occasions it is used to refer to the powers a court or tribunal has with respect to contempt; for instance, a court may be described as exercising its contempt jurisdiction when imposing a sanction for contempt. We prefer the terms protection and powers because they carry more specific and narrower meanings in the contempt context. Protection is particularly helpful in discussing tribunals, where there may be no existing contempt protection.[6]

Superior courts, inferior courts, tribunals and other bodies

6.11 Courts fall into one of two broad categories.[7]

(1) Superior courts of record. This category consists of:

(a) the "higher courts", which is a term we use to refer collectively to the Senior Courts (the High Court, the Court of Appeal, and the Crown

[6] It is also a term used in the case law: see, for example, *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 419 (Lord Bridge of Harwich); *Peach Grey & Co v Sommers* [1995] ICR 549 at 558 (Rose LJ).

[7] We take our distinction from that used in the Senior Courts Act 1981; for example, ss 15(1), 19(1) and 45(1) (superior courts of record) and ss 28, 29(3) and 42(1)-(2) (inferior courts).

Court)[8] and the Supreme Court, all of which are superior courts of record;[9] and

(b) any other court that is identified in legislation as being a superior court of record, including (for example) the Court of Protection, the UT, the EAT, the Court Martial Appeal Court and the Special Immigration Appeals Commission ("SIAC").[10]

(2) Inferior courts. This category captures all courts that are not superior courts of record, including (for example) the county court and the magistrates' courts.

6.12 However, where contempt is concerned, the court landscape is more complex. As we explain below, what constitutes a "court" (or a "court of law" as it is sometimes called) for the purposes of contempt is not limited to the superior courts of record and inferior courts.[11] Many tribunals will also be courts for the purposes of contempt. Some, such as the UT and EAT, are superior courts of record and others meet the definition of a "court" for the purposes of contempt. In addition, a body may not be called a court or a tribunal, but may nonetheless be a superior court of record. SIAC is one such example. Finally, there are bodies (notably the Parole Board[12]) that are not called courts, but are courts for the purpose of contempt, though these are not superior courts of record.

6.13 As a result, for the purposes of contempt, courts, tribunals and other bodies that have contempt protection can be seen as sitting under one of two categories:

(1) Superior courts of record (as defined above);[13] and

(2) Inferior courts, tribunals and other bodies. (We define "inferior courts" above. We will explain below the scope of this category with respect to tribunals and other bodies, including the Parole Board.)

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8 Senior Courts Act 1981.

9 Above, ss 15(1), 19(1), 45(1); Constitutional Reform Act 2005, s 40(1).

10 Mental Capacity Act 2005, s 45(1); TCEA 2007, s 3(5); Employment Tribunals Act 1996, s 20(3); Courts-Martial (Appeals) Act 1968, s 1(2), Armed Forces Act 2006, s 272; Special Immigration Appeals Commission Act 1997, s 1(3). The Special Immigration Appeals Commission, for instance, decides appeals against immigration decisions (such as deportation or citizenship revocation) that have been made on national security grounds. Its published outcomes indicate that it decides up to around 20 matters each year: SIAC Outcomes 2007 onwards.

11 See from para 6.17 below.

12 The status of the Parole Board as a "court" for the purposes of contempt of court was recently clarified in *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [57]. For a discussion of contempt protection in the Parole Board, see paras 6.55 to 6.58 below.

13 The Contempt of Court Act ("CCA") 1981 uses the term "superior court" rather than "superior court of record". A "superior court" under s 19 of that Act "means the Supreme Court, the Court of Appeal, the High Court, the Crown Court, the Court Martial Appeal Court, the Employment Appeal Tribunal and any other court exercising in relation to its proceedings powers equivalent to the High Court". An election court would, for instance, be a superior court under this residual category: Representation of the People Act 1983, s 123(2). The CCA 1981 definition will be relevant to the powers a body has to impose sanctions (see Chapter 10) but does not affect the protection and powers discussed in this chapter.

6.14 Our analysis of protection and powers proceeds using these two groups. We look first at protection in the superior courts and then at protection in inferior courts, tribunals and other bodies. We then look at powers in the superior courts and powers in inferior courts, tribunals and other bodies. Across both protection and powers the position regarding superior courts is largely straightforward. The bulk of discussion is devoted to inferior courts, tribunals and other bodies.

CONTEMPT PROTECTION IN SUPERIOR COURTS OF RECORD

6.15 There is no ambiguity or uncertainty about contempt protection in this category: superior courts of record are inherently protected by the law of contempt.[14]

6.16 We do not make provisional proposals that would change this position. However, our provisional view is that it would be helpful for the superior courts of record to be included by name in any list of bodies that have contempt protection. This view is reflected in consultation question 43 below.

CONTEMPT PROTECTION IN INFERIOR COURTS, TRIBUNALS AND OTHER BODIES

6.17 By contrast with the superior courts of record, there is wide variation in the extent to which inferior courts, tribunals and other bodies are protected. We begin by explaining the common law test for whether a body, however it is named (court, tribunal, board, or any other title), is a "court" for the purposes of contempt. We then look at which inferior courts, tribunals and other bodies are or potentially should be protected.

When will an inferior court, tribunal or other body have contempt protection?

6.18 At common law a body will have contempt protection if it is an "inferior court".[15] The question of when a body can be considered an inferior court was addressed by the House of Lords in *Attorney General v BBC*.[16] It was held by a majority that "courts which discharge judicial functions" and "form part of the judicial system of the country"[17] – that is, courts which exercise "the judicial power of the state"[18] – are properly categorised as inferior courts, and are thus protected by the law of contempt. By contrast, bodies that discharge "administrative" functions and "resolve problems which arise in the course of the administration of the government" are not inferior courts.[19]

6.19 Lord Scarman explained the nature of a "court" in some detail:

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14 *Balogh v St Albans Crown Court* [1975] QB 73 at 92 (Lawton LJ); *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [57]; *Surratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55, [2008] 1 AC 655 at [6].

15 "Inferior court" was the terminology in the Rules of the Supreme Court (Revision) 1965 O 52, r 1(2)(a)(iii) (those rules being the predecessor to the CPR).

16 *Attorney General v BBC* [1981] AC 303.

17 Above at 339-340 (Viscount Dilhorne).

18 Above at 359-360 (Lord Scarman).

19 Above at 339-340 (Viscount Dilhorne).

> I would identify a court in (or "of") law, ie a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (ie administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law.[20]

6.20 Viscount Dilhorne "recognise[d] that this conclusion still leaves an area of uncertainty" as it:

> still leave[s] it open to argument whether a court established by Parliament discharges administrative or judicial functions, about whether or not it is a court of law but the area of uncertainty will be much diminished.[21]

6.21 The uncertainty greatly troubled Lord Fraser of Tullybelton:

> Uncertainty is a serious objection because of the large number of tribunals set up by modern legislation, many of which might be on the borderline. It is undesirable that anyone intending to publish information in the newspapers or on radio or television relating to proceedings pending before a tribunal should have to examine in detail the functions and constitution of the tribunal in order to ascertain whether it is protected by the law against contempt.[22]

6.22 During the same period that *Attorney General v BBC* was before the courts, Parliament was debating the Bill that would become the Contempt of Court Act ("CCA") 1981. There was extensive discussion about which bodies should be protected by the law of contempt, and several amendments were proposed that sought to specify those to which the legislation should apply.[23] Among them, Lord Fraser proposed that the Bill should be accompanied by a schedule which would list protected courts and tribunals.[24] He considered that the Bill would be "lacking in precision" without such a list.[25] Lord Fraser's proposed list included: Magistrates' Courts; County Courts; Coroners' Courts; Courts Martial; Lands Tribunals; Industrial Tribunals; Employment Appeal Tribunals; and any "court or tribunal [of] which the

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20 *Attorney General v BBC* [1981] AC 303 at 359-360 (Lord Scarman).

21 Above at 340 (Viscount Dilhorne).

22 Above at 353 (Lord Fraser).

23 *Hansard* (HL), 9 December 1980, vol 415, cols 672 and 677; *Hansard* (HL),15 January 1981, vol 416, cols 222 and 223.

24 *Hansard* (HL) 10 February 1981, vol 417, cols 163-164.

25 Above.

Chairman is, or has the status of, a judge of the High Court in England and Wales, or of the Court of Session in Scotland".[26]

6.23 Ultimately, however, neither a list nor the residual catch-all of courts or tribunals chaired by a High Court judge or equivalent was included.[27] Instead, borrowing the wording from *Attorney General v BBC*, section 19 of the CCA 1981 simply provided that a "court" "includes any tribunal or body exercising the judicial power of the state".[28] Subsequently, Lord Donaldson MR expressed the view in *Pickering v Liverpool Daily Post and Echo Newspapers Plc* that the definition in section 19 "must be intended to reflect the common law concept of what is a 'court' for the purposes of the common law jurisdiction of the courts in relation to contempt of court".[29]

6.24 In sum, protection by the law of contempt at both common law and under the CCA 1981 rests on whether the relevant court or tribunal exercises the judicial power of the state.

"Exercising the judicial power of the state"

6.25 When can it be said that a court is exercising the judicial power of the state?

6.26 Unsurprisingly, the question has received considerable judicial attention. Typically it has arisen when litigants have argued that various tribunals are (or are not) "courts".[30] The room for argument and uncertainty identified by Viscount Dilhorne has been realised: there remain difficulties in applying the test and there are varying degrees of disagreement and uncertainty about which tribunals and other similar bodies are courts for the purpose of contempt.[31]

6.27 The question has been considered directly in the contempt context and analogously in the context of vexatious litigant cases. The latter group of cases are not constrained by the definition of a court in section 19 of the CCA 1981 and so consider the different tests proposed in *Attorney General v BBC*, but the conclusions are to the same effect. That is, it seems likely that the outcome will be the same – at least for tribunals – whether using the Lord Scarman and CCA 1981 "exercising the judicial power of the state" test or whether following the approaches of Lord Edmund-Davies (that it is "largely a matter of impression") or Viscount Dilhorne ("a body which discharges

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26 *Hansard* (HL) 10 February 1981, vol 417, col 196.

27 *Hansard* (HL) 17 February 1981 vol 417 col 591.

28 *Attorney General v BBC* [1981] AC 303, 359-360 (Lord Scarman). See *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin) at [30].

29 *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1990] 2 WLR 494 at 501.

30 See, for example, *Attorney General v Associated Newspaper Group Plc* [1989] 1 WLR 322; *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1990] 2 WLR 494; *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370; *Peach Grey & Co v Sommers* [1995] ICR 549; *General Medical Council v BBC* [1998] 1 WLR 1573; *Vidler v UNISON* [1999] ICR 746; *Re Ewing* [2002] EWHC 3169 (QB); Ewing v Security Service [2003] EWHC 2051 (QB); *Ofcom v Floe Telecom Ltd* [2006] EWCA Civ 768 at [54]; *Attorney General v Singer* [2012] EWHC 326 (Admin); *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC); *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564.

31 See *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [140].

judicial rather than administrative functions and forms part of the judicial system of the country rather than the administration of the government").[32]

6.28 *Arlidge, Eady & Smith* argues that when any given body is held to be a "court" may:

> rest in the end on "legal policy" considerations, such as whether its proceedings require the protection of the law of contempt. That will depend in turn upon balancing a number of factors, such as the extent to which citizens may be adversely or favourably affected by decisions of the tribunal; whether the tribunal is constituted in a manner which particularly requires protection; and whether the type of decision it makes is susceptible to outside pressure or lobbying.[33]

6.29 The case law, however, reveals a systematic approach to the determinations. We draw several observations from the cases.

(1) There is "no sure guide, no unmistakable hall-mark by which a 'court' … may unerringly be identified".[34]

(2) Nevertheless, there are factors that will indicate whether a body is exercising the judicial power of the state and is thus a "court".

(3) The factors may be stated at high levels. For example, Lord Scarman cited as "one of the best definitions" of judicial power that given by the High Court of Australia in *Huddart, Parker & Co*: judicial power is "the power … to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".[35] Bodies with judicial power have the "power to give a binding and authoritative decision (whether subject to appeal or not)".[36]

(4) The factors may be stated in more granular terms. For instance, in *Peach Grey & Co v Sommers* it was held that an industrial tribunal was a court and the factors that indicated it exercised judicial functions were:

(a) it was established by Parliament;

(b) it had a legally qualified chair appointed by the Lord Chancellor, with other members drawn from panels compiled by the Secretary of State for Employment;

(c) it sat in public;

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[32] See for example *Re Ewing* [2002] EWHC 3169 (QB) at [40]; *Peach Grey & Co v Sommers* [1995] ICR 549 at 557-558, citing *Attorney General v BBC* [1981] AC 303 at 339 (Viscount Dilhorne), 351 (Lord Edmund-Davies).

[33] P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*"), para 13-73.

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

[35] Above at 359 (Lord Scarman) citing *Huddart, Parker & Co v Moorehead* (1908) 8 CLR 330 at 357 (Griffith CJ).

[36] Above.

(d) it decided cases that affect the rights of parties;

(e) it could "compel the attendance of witnesses, administer oaths, control the parties' pleadings by striking out and amendment and order discovery";

(f) parties could be legally represented;

(g) it had "rules of procedure relating to the calling and questioning of witnesses and addresses on behalf of the parties";

(h) it could award costs;

(i) it was required to give reasons for its decisions; and

(j) its decisions could be appealed, on a point of law, to the EAT and Court of Appeal.[37]

(5) Those factors indicated that it exercised judicial functions notwithstanding other factors, such as:

(a) it was not a court of record;

(b) its awards had to be enforced by the county court;

(c) it was not bound by rules of evidence (although it observed them in practice); and

(d) rights of audience were not limited to lawyers.[38]

(6) Other factors that have indicated that a body is a court include:

(a) the body is not making recommendations that the executive is free to accept or reject;[39]

(b) the power to deprive a person of their liberty is not a touchstone of whether a body is a court; restoring liberty is also a long-recognised function of courts;[40]

(c) whether a statute indicates that Parliament intended the body to have contempt protection: this is an "unequivocal indication that Parliament

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37 *Peach Grey & Co v Sommers* [1995] ICR 549 at 557.

38 Above at 557 (Rose LJ).

39 *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1990] 2 WLR 494 (CA) at 502 (Lord Donaldson).

40 Above at 502 (Lord Donaldson MR); cited with unanimous approval in the House of Lords in *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 417 (Lord Harwich) and 426 (Lords Brandon, Templeman, Goff & Lowry agreeing)

always intended that the tribunal should be a court to which the law of contempt applie[s]". [41]

(7) The presence of some factors will not necessarily mean that a body is a court. Lord Scarman held that a body may be required "to act judicially", and that means "its proceedings must be 'conducted with the fairness and impartiality which characterise proceedings in courts of justice, and are proper to the functions of a judge'", but it "does not make it a court of law".[42] In *General Medical Council v BBC* the Court of Appeal examined this in the context of the professional conduct committee of the General Medical Council:

> [The committee] has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. … [The committee] is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. … [The committee] is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct.[43]

(8) The absence of some factors will not necessarily mean a body is not a court, and not every court will have the same features.[44] In *Ewing*, for instance, it was said of the Information Tribunal that it:

> does not have every characteristic of, say, the High Court or county court: most obviously, for example, its hearings will ordinarily take place in private (the reason for that, I might add, being clear). But courts do not … all have identical functions, characteristics and procedures ….[45]

Mr Justice Davis ultimately concluded that the Information Tribunal was a court for the purposes of section 42 of the Supreme Court Act 1981, relying on

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41 In *Pickering*, the sole basis of reasoning in the House of Lords was that the inclusion of the Mental Health Review Tribunal as a body to which s 12 of the Administration of Justice Act 1960 applied (that section being concerned with the publication of information about proceedings of a court sitting in private) was "an unequivocal indication that Parliament always intended that the tribunal should be a court to which the law of contempt applied": *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 417 (Lord Harwich).

42 *Attorney General v BBC* [1981] AC 303 at 340 (Viscount Dilhorne) citing *Royal Aquarium and* B *Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (Fry LJ). See also *General Medical Council v BBC* [1998] 1 WLR 1573 at 1579.

43 *GMC v BBC* [1998] EWCA Civ 949, [1998] 1 WLR 1573 at 1578 (Stuart-Smith J).

44 See, for example, *Peach Grey & Co v Sommers* [1995] ICR 549 at 557 (Rose LJ).

45 *Re Ewing* [2002] EWHC 3169 (QB) at [41].

statements from *Attorney General v BBC* and *Peach Grey &* Co to support this conclusion.[46]

(9) Nomenclature is not significant:

> There are many bodies or tribunals (so called) which exercise purely administrative functions and which are not properly to be categorised as courts. … But equally there are bodies bearing the name of, say, a commission or tribunal which (even though they bear the name "commission" or "tribunal") can properly be identified as courts. That a body may be labelled a court does not mean that it is a court; any more than that a body is labelled a tribunal means that it is not a court.[47]

(10) The extension of contempt to tribunals was seen in *Attorney General v BBC* to engage European Convention Human Rights ("ECHR") obligations. This is because, by virtue of the wider application of the law of contempt, it would affect freedom of expression, with Lord Scarman's view being that the courts should not embark on such an extension.[48] This point has largely not been taken up in the cases.[49]

Provisional conclusions and provisional proposals

6.30 Our provisional view is that the existing "exercising the judicial power of the state" test and the factors that have been considered reflect 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". The factors are, in our provisional view, sufficient to avoid determinations coming down to policy decisions.[50]

6.31 We are, however, concerned that the current regime lacks certainty and predictability. The uncertainty that troubled Lord Fraser in *Attorney General v BBC* remains.[51] Put simply, 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. That, in

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46 *Re Ewing* [2002] EWHC 3169 (QB) at [40].

47 Above at [42].

48 *Attorney General v BBC* [1981] AC 303 at 352 (Lord Fraser), 354 and 362 (Lord Scarman)

49 In *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [152] it was said that if the appellant's reliance on the freedom of expression passages in *Attorney General v BBC* were the basis of an argument that judges should not expand the scope of contempt by determining whether any given body was a court, then the case law indicated it was too late to do so: "That Rubicon has already been crossed". However, the freedom of expression concern remains extant in *Arlidge, Eady & Smith* (2019) paras 13-77-13-79.

50 Whether a body is a tribunal and whether it has contempt protection are different matters. In Devolved Tribunals in Wales (2021) Law Com No 403, we decided that whether a body is a tribunal depended on whether it "adjudicated upon disputes between parties by making binding decisions" (para 2.5). However, whether a body exercises the judicial power of the state (and therefore has contempt protection) is a different question.

51 See para 6.21 above.

our provisional view, is unsatisfactory. *Arlidge, Eady & Smith* suggests that the litigation in *General Medical Council v BBC* could have been avoided had a statute indicated whether the Council was a body that had contempt protection.[52] The same argument could be made with respect to any number of other bodies. 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. The non-exhaustive nature of this list means that bodies which are not contained in the list are not necessarily excluded from having contempt protection; through case law, the courts may declare bodies to be protected by the law of contempt.

6.32 Before we discuss what inferior courts, tribunals and other bodies might be included in such a list, we seek consultees' views on these provisional proposals regarding protection.

6.33 The scope of these first two consultation questions is limited to protection. Whether a body has contempt protection is separate question from what powers a protected body would have. As we indicated in the introduction and explore in more detail below (and in Chapter 10 with respect to sanctions), although superior courts of record have the full range of contempt powers, the powers of inferior courts, tribunals and other bodies will be more constrained. At this point we are only asking about protection.

Consultation Question 41.

6.34 We provisionally propose that the test for whether a body is a "court" for the purposes of contempt should be whether it is exercising the judicial power of the state.

Do consultees agree?

Consultation Question 42.

6.35 We provisionally propose that the test for whether a body is a "court" for the purposes of contempt should be accompanied by a non-exhaustive list of the bodies that are considered "courts".

Do consultees agree?

What inferior courts, tribunals and other bodies are or should be protected?

6.36 We turn now to what bodies currently have contempt protection. This will inform our consultation questions about what bodies should have protection.

Inferior courts

6.37 It is well established that inferior courts are protected by the law of contempt. In *Attorney General v BBC*, Lord Scarman said that the judicial system of the country

[52] *Arlidge, Eady & Smith* (2019) para 13-82.

was “not limited to the courts of the civil power. Courts-martial and consistory courts (the latter since 1540) are as truly entrusted with the exercise of the judicial power of the state as are civil courts”.[53] Lord Salmon referred to “the principles relating to contempt of court which have for ages necessarily applied to the long-established inferior courts such as county courts, magistrates’ courts, courts-martial, coroners’ courts and consistory courts”.[54]

6.38 As those statements suggest, longstanding contempt protection for these courts is not based on the application of the “exercising the judicial power of the state” test but either by virtue of history or the alternative test of whether they are part of the “judicial system”. Our provisional view is that all bodies which are to be protected – including those that are named courts – should meet our provisionally proposed test for whether a body is a court for the purpose of contempt.

6.39 Our provisional view is that it is uncontroversial that the following courts exercise the judicial power of the state and we provisionally propose that they should be included in a non-exhaustive list of inferior courts that have contempt protection:

(1) the county court;[55]

(2) the family court;[56]

(3) coroners’ courts;[57]

(4) magistrates’ courts;[58]

(5) election court;[59]

(6) consistory court;[60]

(7) the Service Civilian Court, the Summary Appeal Court and the Court Martial, which are part of the military court system.[61]

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53 *Attorney General v BBC* [1981] AC 303 at 360 (Lord Scarman).

54 Above at 342 (Lord Salmon).

55 The county court is established by the County Courts Act 1984, s A1(1), which was inserted by the Crime and Courts Act 2013, s 17(1). It is a court of record: s A1(2).

56 The family court is established by the Matrimonial and Family Proceedings Act 1984, s 31A, which was inserted by the Crime and Courts Act 2013, s 17(3). It is a court of record: s 31A(2).

57 *R v West Yorkshire Coroner ex parte Smith (No.2)* [1985] 1 QB 1096; *Attorney General v BBC* [1981] AC 303 at 342.

58 The magistrates’ courts powers to deal with contempt derive from statute. For example, see CCA 1981, s 12.

59 Representation of the People Act 1983, s 123(2).

60 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, ss 25, 70(4), 71(5), 72(6) and 93A.

61 These courts are established by the Armed Forces Act 2006, ss 140, 277, 309(5) and 311(1).

6.40 In the consultation question below, we seek consultees' views about whether there are any other inferior courts that exercise the judicial power of the state and should thus be included in a non-exhaustive list of protected inferior courts.[62]

First-tier Tribunal and the Employment Tribunals (England and Wales)

6.41 The Tribunals, Courts and Enforcement Act ("TCEA") 2007 established the FtT, a first instance tribunal, and the Employment Tribunals Act 1996 established the Employment Tribunals, which are established separately for England and Wales and for Scotland. In referring to the "ETs" we refer only to the ETs for England and Wales.

6.42 The FtT has seven chambers:

- General Regulatory Chamber ("GRC")
- Health, Education and Social Care Chamber ("HESC")
- Immigration and Asylum Chamber
- Property Chamber
- Social Entitlement Chamber
- Tax Chamber
- War Pensions and Armed Forces Compensation Chamber

6.43 The TCEA 2007 is silent on whether these chambers are courts for the purposes of contempt. The case law has established that some of them are.

6.44 The ETs were the subject of the decision in *Peach Grey &* Co, discussed above, where it was held that they are courts for the purposes of contempt.[63] This has been approved by the Court of Appeal.[64]

6.45 In the FtT there is a deal of uncertainty and variation across the different chambers.

6.46 It appears likely that the FtT (Property) and the FtT (HESC) would be classified as courts for the purpose of contempt. This is largely because two predecessor tribunals – the Leasehold Valuation Tribunal and the mental health review tribunals were held to be courts[65] – and these have since been subsumed into (respectively) the FtT (Property) (in the residential property division) and FtT (HESC).

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62 The Judicial Committee of the Privy Council has a "rarely-used" jurisdiction to hear appeals from some inferior courts, but our provisional view is that none of these exercise the judicial power of the state: Judicial Committee of the Privy Council, Role of the JCPC (undated).

63 *Peach Grey & Co (a firm) v Sommers* [1995] 2 All ER 513.

64 *Irwell Insurance Co Ltd v Watson* [2021] EWCA Civ 67, [2021] 4 All ER 805 at [32] (Bean LJ), [50]-[51] (Flaux and Males LJJ agreeing).

65 *Attorney General v Singer* [2012] EWHC 32 (Admin); *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1990] 2 WLR 494.

6.47 The FtT (HESC) has been held by the UT to be a court for the purposes of contempt in respect of its jurisdiction over special educational needs and disability.[66] The UT judgment in *Proprietor of Ashdown House School v JKL* included the following:

> If it is accepted that mental health review tribunals and the Leasehold Valuation Tribunal, both of which are now part of the unified First-tier Tribunal created by the 2007 Act, were judicial rather than administrative bodies and did exercise the judicial power of the state and were accordingly courts for this purpose, the same must apply to their successor bodies and it would be curious if some parts of the First-tier Tribunal (or indeed some parts of one of the Chambers therein) were courts for the purpose of the law of contempt, but that other parts were not ….[67]

6.48 This line of reasoning suggests that as the FtT (HESC) has been held to be a court with respect to its special educational needs and disability jurisdiction, it might be expected that it should also be considered a court across its other three jurisdictions as well. These are mental health, care standards, and primary health lists. The same could be said regarding the FtT (Property), which has land registration and residential property divisions.

6.49 The FtT (Tax) has described itself "as a tribunal exercising the judicial power of the state" in *Hastings Insurance Services Ltd v HM Revenue and Customs*.[68] However, it did so in the context of its open justice obligations, rather than for the purposes of contempt.[69] As such, the status of the FtT (Tax) remains uncertain with respect to contempt.

6.50 The other FtT chambers have not been expressly categorised as courts for contempt purposes. It might be argued that following the line of reasoning in *Proprietor of Ashdown House School v JKL* (above) that as appellate courts have held that at least two chambers are courts for the purposes of contempt, then all chambers should be so considered. However, before reaching that conclusion it might be noted that the TCEA 2007 did not grant contempt protection to the FtT. Instead, where litigants are uncooperative and unreasonable they may strike out a case[70] or make an order for costs.[71] There are also some powers to refer to the UT so it can make orders, and a

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66 *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC).

67 Above at [144].

68 *Hastings Insurance Services Ltd v HM Revenue and Customs* [2018] UKFTT 478 (TC) at [5].

69 Above at [4]-[5].

70 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r 9(3)(b); The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, r 8(3)(b); The Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008, r 8(3)(b); The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, r 8(4)(b); The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 8(3)(b); The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, r 8(3)(b). The FtT (Immigration and Asylum Chamber) may not strike out a case on these grounds.

71 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r 13(1)(b); The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, r 10(1)(b), though not in mental health cases (r 10(2)); The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 10(b); The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, r 10(b); The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, r 9(2)(b).

breach of those orders would be a contempt.[72] But whether the TCEA 2007 granted contempt protection is not to the point: the critical question is whether an FtT chamber is exercising the judicial power of the state.

6.51 As certain chambers of the FtT have been found to exercise the judicial power of the state, our provisional view is that there is a *prima facie* case to conclude that all chambers of the FtT exercise the judicial power of the state. As such, we provisionally propose that the ETs and all chambers of the FtT should be included in a non-exhaustive list of courts for the purposes of contempt, and we seek views from consultees (in consultation question 43, below) on whether all chambers of the FtT are exercising the judicial power of the state.

The Parole Board

6.52 The Parole Board for England and Wales describes itself as:

> An independent body that carries out risk assessments on prisoners to determine whether they can be safely released into the community. It was established in 1968 under the Criminal Justice Act 1967[73] and became an independent executive non-departmental public body on 1 July 1996 under the Criminal Justice and Public Order Act 1994.[74]

6.53 Its role has significantly evolved from when it was first established; the Criminal Justice Act 1967 envisaged that it would be a small body of 17 experts who could only make *recommendations* for release.[75] However, today the Parole Board has nearly 300 members, conducting over 8,000 oral hearings annually.[76] It not confined to making recommendations and it is empowered to:

- direct the release of indeterminate sentence prisoners once they have served the minimum punitive term imposed by the trial judge;
- direct the release of certain serious and dangerous offenders serving an extended sentence or a sentence for offenders of particular concern ("SOPC") which have a period of discretionary Parole Board release;
- review determinate sentence prisoners recalled to prison and decide whether they are safe to be re-released on licence before the end of their sentence;

The FtT (Social Entitlement Chamber) and the FtT (War Pensions and Armed Forces Compensation Chamber) do not have this power.

72 See paras 6.101 to 6.104 below.

73 Criminal Justice Act 1967, sch 2 (repealed).

74 The Parole Board, About Us (June 2019).

75 Ministry of Justice, *The Parole Board for England and Wales: tailored review* (October 2020) at [16].

76 Parole Board for England and Wales, *Annual Report and Accounts 2022/23*, HC 1669 (18 July 2023) p 11.

- make recommendations to the Secretary of State with regard to whether an offender should progress to open conditions.[77]

6.54 In its 2020 report on the Parole Board for England and Wales, the Ministry of Justice noted:

> The decisions are inherently judicial in nature as the Parole Board fulfils the role of a court in determining whether a person is safe to be released from prison, and perhaps as importantly, ensures the ongoing lawful detention of those who remain a risk to the public. [78]

6.55 Is the Parole Board a court for the purposes of contempt?

6.56 In *R (Bailey and Morris) v Secretary of State for Justice*, the Divisional Court held that "the authorities show beyond doubt that the Board's function of deciding whether to direct a prisoner's release must be, and is, a judicial, not an administrative one".[79] The Supreme Court's decision in *Pearce* was cited:

> Although in the past its functions were to advise the Home Secretary on the exercise of the Royal prerogative power to release prisoners before the end of their sentence, it now has statutory responsibilities for itself making the decision about early release, that is to say release on licence sooner than the end of the court's sentence. The Secretary of State (now of Justice) is obliged to follow any directions for release which it may give. *In so doing, the Board acts judicially and as a body independent of the executive*. It is properly treated as a court for the purposes of the European Convention on Human Rights. In *Weeks v United Kingdom* (A/11) (1987) 10 EHRR 293 the Strasbourg Court explained that the relevant attributes of a court are that it is independent and impartial and that its procedures are fair, which includes the requirement that the prisoner is able properly to participate in the proceedings of the Board: paras 61-65.[80]

6.57 Accordingly, it was held:

> The Board exercises the judicial power of the state in the sense in which that phrase has been used in the [contempt] authorities …. Accordingly, a failure to answer a relevant and necessary question posed by the Board could constitute a contempt of court.[81]

6.58 Our provisional view is that the Parole Board should be included in a non-exhaustive list of bodies that are courts for the purposes of contempt.

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77 Ministry of Justice, *The Parole Board for England and Wales: tailored review* (October 2020) at [17]; Parole Board Rules 2019, r 19.

78 Ministry of Justice, *The Parole Board for England and Wales: tailored review* (October 2020) at [19].

79 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [51], citing *R (McGetrick) v Parole Board* [2013] EWCA Civ 182, [2013] 1 WLR 2064.

80 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [51], citing *R (Pearce) v Parole Board* [2023] UKSC 13 at [5] (emphasis added by the Divisional Court).

81 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [57].

Other tribunals and bodies

6.59 There are many tribunals and bodies other than the FtT, ETs and Parole Board. Clearly not all will be exercising the judicial power of the state, though it is very likely that some are. We do not attempt to identify or address every possible tribunal or body that may be doing so. Instead, we identify a range of such bodies and present some indication of their activities and functions. We seek consultees' views as to which of them are and so should be included in a non-exhaustive list of courts for the purposes of contempt.

6.60 Some hear thousands of matters annually. The Traffic Penalty Tribunal determines appeals against Penalty Charge Notices for traffic offences in England (outside London) and Wales. It received over 22,000 appeals in 2022-23, with around 2,000 going to a hearing.[82] Its London counterpart, the Environment and Traffic Adjudicators, received over 45,000 appeals, with around 30% of those going to a hearing.[83] It might be noted, however, that while degree of activity may point to the significance of bodies for the day to day life of people in England and Wales, that does not mean that the judicial power of the state is being exercised.

6.61 The Valuation Tribunal for England ("VTE") listed over 7,000 matters in 2021-2022.[84] The Competition Appeal Tribunal ("CAT") reports that it decides several thousand matters each year, of varying degrees of complexity, and:

> is now – in addition to its staple of regulatory appeals – the major court of first instance for the hearing of private competition and market actions, including a number of cases transferred from the High Court.[85]

6.62 Others are far less active. For example, the Copyright Tribunal has made around 20 decisions in the last decade.[86] Very few applications have been made to the Pathogens Access Appeals Commission since its creation in 2001.[87]

6.63 There are tribunals that regulate professions. The General Medical Council ("GMC") is established under statute and the Medical Practitioners Tribunal Service ("MPTS") is a committee of the GMC.[88] The MPTS convenes a Medical Practitioners Tribunal to hear and determine allegations regarding fitness to practise.[89] It functions independently of the GMC, publishes its decisions, and reports annually to

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82 Traffic Penalty Tribunal England and Wales, *Annual Report 2022-23,* pp 6, 8.

83 Environment and Traffic Adjudicators, *Annual Report 2022-23*, p 10.

84 Valuation Tribunal Service, *Annual Report and Accounts 2021-2022,* p 8. The Valuation Tribunal for England is established under the Local Government and Finance Act 1988, s 136 and sch 11 (Part 1).

85 Competition Appeal Tribunal, *Annual Report and Accounts 2021-2022,* p 5.

86 Copyright Tribunal, Copyright Tribunal decisions and orders (last updated 13 September 2021).

87 A Guide to the Role of Special Advocates and the Special Advocates Support Office - Open Manual (2nd ed, 2022) para 210. The Commission was established by the Anti-Terrorism, Crime and Security Act 2001, s 70.

88 Medical Act 2003, s 1.

89 Above, s 35D.

Parliament.[90] There may be a strong case to suggest that the MPTS is exercising the judicial power of the state and so a Medical Practitioners Tribunal would have contempt protection.[91]

6.64 There are individuals and bodies in relation to whom some conduct will constitute contempt. For example, where a person is subject to regulation by that individual or body and fails to comply with the regulator's requirements then, following certification by the individual or body, the High Court may then treat these failures "as if" they were a contempt of court. For example, the Parliamentary and Health Service Ombudsman, in their capacity as the Parliamentary Commissioner for Administration,[92] may certify to the High Court obstructive conduct that would constitute contempt if it occurred in a court. The High Court then may enquire into the matter and "deal with [the defendant] in any manner in which the [High Court] could deal with him if he had committed the like offence in relation to the [High Court]".[93] Similar provisions apply to: the Director General of the Independent Office for Police Conduct;[94] inspectors appointed by the Secretary of State to investigate the affairs of a company;[95] inspectors appointed by the Financial Conduct Authority or the Prudential Regulation Authority;[96] Local Commissioners;[97] and an ombudsman appointed for the purposes of the ombudsman scheme administered by the Office for Legal Complaints.[98] It is not clear to us that these bodies are exercising the judicial power of the state and we note the comments of the UT in *Proprietor of Ashdown House School v JKL* that these are bodies that are "clearly not" courts or tribunals.[99] However, should consultees take a different view then the consultation question below allows for that.

6.65 Bodies that consultees may wish to suggest for inclusion on (or exclusion from) a non-exhaustive list could include:

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90 Medical Act 2003, s 52B. The MPTS website includes its published decisions and provides a range of information about its work: MPTS Medical Practitioners Tribunal Service.

91 Prior to the establishment of the MPTS, fitness to practice decisions matters were considered by the professional conduct committee of the GMC. The Court of Appeal held that that committee was not exercising the judicial power of the state: *GMC v BBC* [1998] EWCA Civ 949; [1998] 1 WLR 1573 at 1578 (Stuart-Smith LJ).

92 *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* ("Erskine May") (25th ed, 2019) para 6.46; Parliamentary Commissioner Act 1967, ss 4-5. The Parliamentary Ombudsman post and the Health Services Commissioner for England (also known as the Health Services Ombudsman) (established by the Health Service Commissioners Act 1993, s 1) are held by the same person and the posts are often referred to jointly as the Parliamentary and Health Service Ombudsman.

93 Parliamentary Commissioner Act 1967, s 9(2).

94 Police Reform Act 2002, sch 3 para 19ZB.

95 Companies Act 1985, s 436. The Secretary of State and investigators may also certify failures to comply with certain requirements under s 453C.

96 Friendly Societies Act 1992, s 67(6).

97 Local Government Act 1974, ss 29(8) and 34G(9).

98 Legal Services Act 2007, s 149.

99 *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [138].

(1) Tribunals and bodies administered by HMCTS, including: the Gender Recognition Panel; Gangmaster Licensing Appeals; the Proscribed Organisations Appeal Commission; and the Reserve Forces Appeal Tribunal.

(2) Tribunals and bodies not administered by HMCTS, including: the Company Names Tribunal; the Copyright Tribunal;[100] the Environment and Traffic Adjudicators;[101] the Pathogens Access Appeals Commission;[102] the Traffic Penalty Tribunal;[103] and the Valuation Tribunal for England;[104] the Plant Varieties and Seeds Tribunal;[105] and the Police (Discipline) Appeals Tribunal.[106]

(3) Tribunals and bodies that regulate professions, including: the Medical Practitioners Tribunal Service; Solicitors Disciplinary Tribunal; and the Bar Tribunals and Adjudication Service.

(4) Other bodies that consultees consider are exercising the judicial power of the state.

6.66 Where consultees make a case for the inclusion or exclusion of a tribunal or other body then we would welcome reference to the factors set out above.[107]

Provisional proposals

6.67 In the following question we set out our provisional proposals with respect to the bodies that we have provisionally concluded are exercising the judicial power of the state and so should be included on a non-exhaustive list of bodies that have contempt protection. We also ask consultees whether there are other inferior courts, tribunals or other bodies that should be identified as exercising the judicial power of the state and so should also be included on the list.

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100 Copyright, Designs and Patents Act (CDPA) 1988, s 145.

101 Traffic Management Act 2004, s 81.

102 Anti-Terrorism, Crime and Security Act 2001, s 70.

103 Traffic Management Act 2004, s 81.

104 The Valuation Tribunal for England is established under the Local Government and Finance Act 1988, s 136 and sch 11 (Part 1).

105 Plant Varieties Act 1997, s 42.

106 Police Act 1996, sch 6.

107 See para 6.29 above.

Consultation Question 43.

6.68 We provisionally propose that, if the test for whether a body is protected by the law of contempt is whether it is exercising the judicial power of the state, the following should be included in a non-exhaustive list of the bodies that have contempt protection:

(1) all superior courts of record, including the High Court, Court of Appeal, Crown Court, Court of Protection, the Upper Tribunal, the Employment Appeal Tribunal, the Special Immigration Appeals Commission, and the Court Martial Appeal Court.

(2) the following inferior courts: the county court, the family court, coroners' courts, magistrates' courts, consistory courts, election court, the Service Civilian Court, the Summary Appeal Court and the Court Martial.

(3) all chambers of the First-tier Tribunal;

(4) the Employment Tribunals (England and Wales); and

(5) the Parole Board for England and Wales.

Do consultees agree?

Should any other inferior courts, tribunals or other bodies be included in a list? If so, which ones?

Devolved tribunals in Wales

6.69 Devolved tribunals in Wales are tribunals "all of whose functions are functions that (a) are exercisable only in relation to Wales, and (b) do not relate to reserved matters".[108]

6.70 The devolved tribunals within the scope of our project are: the Welsh Tribunals as defined by section 59 of the Wales Act 2017; the Valuation Tribunal for Wales ("VTW"); school admission appeal panels ("SAA"); and school exclusion appeal panels ("SEA"). For our discussion these are divided into the section 59 tribunals and the other devolved tribunals.

6.71 As the structure of the 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.[109] We begin, however, by outlining the existing structure.

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108 Wales Act 2006, sch 7A(9)(2).

109 Devolved Tribunals in Wales (2021) Law Com No 403; Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023). See also: Welsh Government, *A New Tribunal System for Wales: white paper – summary of responses* (January 2024).

The section 59 tribunals

6.72 The Welsh tribunals as defined by section 59 of the Wales Act 2017 are:

(1) the Agricultural Land Tribunal for Wales ("ALTW");

(2) the Mental Health Review Tribunal for Wales ("MHRTW");

(3) the Residential Property Tribunal for Wales ("RPTW");[110]

(4) the Education Tribunal for Wales ("ETW");

(5) the Adjudication Panel for Wales ("APW"); and

(6) the Welsh Language Tribunal ("WLT").

We refer to these as "the section 59 tribunals".

6.73 The President of Welsh Tribunals ("PWT") is responsible for the section 59 tribunals.[111] Each section 59 tribunal has a judicial lead, who is the most senior judge; they are usually referred to as the President, or less commonly, the Chairperson.[112] The Welsh tribunals also each have their own procedure rules.[113] All of the section 59 tribunals are administered by the Welsh Tribunals Unit of the Welsh Government.[114]

6.74 The section 59 tribunals receive the following numbers of applications:

(1) The MHRTW received 2118 applications/ referrals and heard 954 cases in the period April 2021 – March 2022.[115]

(2) The RPTW received a total of 181 applications from April 2022 to March 2023.[116] 38 of these were to the rent assessment committees, 51 were to the leasehold valuation tribunals, and 92 were to the residential property tribunals.[117]

(3) The ETW received 151 applications in the financial year 2021 – 2022.[118]

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110 The RPTW has three constituent tribunals: residential property; leasehold valuation; and rent assessment committees.

111 Wales Act 2017, s 60.

112 Devolved Tribunals in Wales (2021) Law Com No 403, glossary.

113 The Agricultural Land Tribunals (Rules) Order 2007; The Mental Health Review Tribunal for Wales Rules 2008; The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016; The Education Tribunal for Wales Regulations 2021; The Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations 2001; The Welsh Language Tribunal Rules 2015.

114 Devolved Tribunals in Wales (2021) Law Com No 403, Appendix 4, para 4.2.

115 Mental Health Review Tribunal for Wales, *Annual Report 2021-2022* (June 2021) p 10, 12.

116 Residential Property Tribunal Wales, *Annual Report 2022-2023* (2023) p 7.

117 Above.

118 President of Welsh Tribunals, *Annual Report April 2021 to December 2022* (2023) p 5.

(4) The ALTW received 28 applications in the 2022 – 2023 reporting period.[119]

(5) The APW received six applications in the period April 2022 – March 2023.[120]

(6) The WLT received one application in the 2022 – 2023 reporting period.[121]

Other devolved tribunals in Wales

6.75 The VTW, and the SAA and SEA panels are not section 59 "Welsh tribunals". They have no formal relationship with the PWT and are not administered by the Welsh Tribunals Unit.[122] However, they are all devolved Welsh authorities.[123]

6.76 These tribunals have their own sets of rules. In the VTW, practice and procedure are governed by the Valuation Tribunal for Wales Regulations 2010. SAA and SEA panels are regulated by a statutory code[124] and guidance[125] respectively, as well as their own regulations, and are administered by the Welsh Government.[126]

6.77 Every hearing in the VTW and in the SAA and SEA panels will be supported by a clerk whose role is to advise on the relevant law and procedure.[127] The clerk in the VTW is the tribunal's chief executive.[128]

6.78 The composition of the other devolved tribunals contrasts greatly with the section 59 tribunals. These tribunals do not have judicial leads in the same way the section 59 tribunals do. Where section 59 tribunals always have a tribunal judge who is legally qualified, these do not. A VTW panel is typically comprised of three members. The compositions of the SAA and SEA panels were described in the Devolved Tribunals in Wales report:[129]

> [SAA] panels are made up three or five members. One of those members must have experience in education, or be the parent of a pupil registered at another school. Another must be a "lay" member: someone "without personal experience in the management of any school or the provision of education in any school".[130]

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119 Agricultural Land Tribunal Wales, *Annual Report 2022-2023* (2023) p 9.

120 Adjudication Panel for Wales, *Annual Report 2022-2023* (2023) p 8.

121 Welsh Language Tribunal, *Annual Report 2022-2023* (2023) p 7.

122 Devolved Tribunals in Wales (2021) Law Com No 403, Appendix 4, para 4.2.

123 Government of Wales Act 2006, sch 9A.

124 Welsh Government, *School admission appeals code* (November 2023).

125 Welsh Government, *Exclusion from schools and pupil referral units* (November 2019).

126 Education (Admission Appeals Arrangements) (Wales) Regulations 2005.

127 VTW, *Best Practice Protocol 2B: The role of the tribunal clerk* (undated) at [2]; Welsh Government, *School admission appeals code* (November 2023) para 3.4; Welsh Government, *Exclusion from schools and pupil referral unis* (November 2019) para 4.5.1.

128 The Valuation Tribunal for Wales Regulations 2010, reg 15.

129 Devolved Tribunals in Wales (2021) Law Com No 403, Appendix 4, paras 4.58 and 4.62.

130 Education (Admission Appeals Arrangements) (Wales) Regulations SI 2005 No 1398 (W 112) sch 1 para 1.

> Composition of [SEA] panels is similar to that of [SAA] panels; a panel consists of three or five members, including lay members,[131] members working in education or education management, and members who are or have been governors of maintained schools.[132]

Existing contempt protection

6.79 There has been no case law that considers whether any of the section 59 tribunals or the other devolved tribunals in Wales are exercising the judicial power of the state and are thus protected by the law of contempt.

The likely new structure of Welsh tribunals and provisional proposals on contempt protection

6.80 If the reform proposals in the Welsh Government white paper proceed then there will be a First-tier Tribunal for Wales ("FtTW") headed by the PWT and incorporating all of the section 59 tribunals and the VTW.[133] This would bring the VTW under the supervision of the PWT.[134] The jurisdiction of the SEA panels would be brought within the ETW.[135] The jurisdiction of the SAA panels would eventually be incorporated into the unified tribunal system as well.[136]

6.81 With respect to contempt protection in the devolved Welsh tribunals under the likely new structure, we have heard from government and judicial stakeholders that there is a strong case for alignment across tribunals in England and Wales and so the FtTW should have the same protection as the FtT. The scale of activity in the devolved Welsh tribunals is obviously much lower than that in the FtT, and the same would be expected after their incorporation into an FtTW. However, if the test is whether a body is exercising the judicial power of the state, the degree of activity is not the critical factor.

6.82 Our provisional view is that the basis for contempt protection of an FtTW chamber is that it should be the same as the basis for contempt protection of an FtT chamber: the test should be whether the body is exercising the judicial power of the state. We provisionally conclude at paragraph 6.51 that there is a *prima facie* case that all chambers of the FtT exercise the judicial power of the state. As the FtTW is the parallel to the FtT, our provisional view is that there is also a *prima facie* case that all chambers of the FtTW exercise the judicial power of the state. Therefore, we

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131 The lay member should have a legal background "where possible": Welsh Government, *Exclusion from schools and pupil referral unis* (November 2019) para 4.4.7.

132 The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations SI 2003 No 3227 (W 308) sch 1 para 2(2).

133 The FtT for Wales would be formed of the section 59 tribunals and the VTW. Devolved Tribunals in Wales (2021) Law Com No 403, para 3.54; Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023), para 55.

134 Devolved Tribunals in Wales (2021) Law Com No 403, para 5.63; Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023), para 58.

135 Devolved Tribunals in Wales (2021) Law Com No 403, para 3.90; Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023), para 61.

136 Welsh Government, *A New Tribunal System for Wales: white paper* (19 June 2023), para 65. On this, the Welsh Government departed from the Law Commission's recommended that the SAA panels should not form part of the unified tribunal system in Wales: Devolved Tribunals in Wales (2021) Law Com No 403, para 3.111.

provisionally propose that all chambers of the FtTW should be included in a non-exhaustive list of bodies that have contempt protection. Other devolved bodies in Wales which are not part of the FtTW would not be included in the non-exhaustive list. This does not preclude contempt protection as they may be protected if they are considered to be exercising the judicial power of the state, but our provisional view is that those bodies should not be included in a non-exhaustive list. We welcome consultees' views on these matters.

Consultation Question 44.

6.83 We provisionally propose that the test for whether a devolved Welsh tribunal is a "court" for the purposes of contempt should be whether it is exercising the judicial power of the state.

Do consultees agree?

Consultation Question 45.

6.84 We provisionally propose that, if the test for whether a devolved Welsh tribunal is protected by the law of contempt is whether it is exercising the judicial power of the state, then all chambers of a First-tier Tribunal for Wales (if created) should be included in a non-exhaustive list of the bodies that have contempt protection.

Do consultees agree?

POWERS TO ADDRESS CONDUCT THAT APPARENTLY CONSTITUTES CONTEMPT

6.85 Having considered which courts, tribunals and other bodies should be protected by the law of contempt, we now turn to the powers they should have to address conduct that apparently constitutes contempt. As we explain at paragraph 6.9 above, within this category of powers we distinguish between:

(1) The power of a court or tribunal to deal with such conduct itself. That is, the power of a court or tribunal to make a finding about whether there has been a contempt, whether in proceedings before it or whether in relation to proceedings in an inferior or lower court or tribunal, and whether proceedings are instituted on application or of a court's own motion.

(2) The power of a court or tribunal 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.

6.86 In the discussion that follows, first we will outline the existing powers of the superior courts and all protected inferior courts, tribunals and other bodies.[137] Then, we will consider the case for reform and some contentious issues that arose in our pre-consultation engagement with stakeholders. Ultimately, we will provisionally propose

[137] See the list of protected inferior courts, tribunals and other bodies at para 6.68 above.

that all protected inferior courts, tribunals and other bodies should have the power to address conduct that apparently constitutes contempt. The effect is that they would have the power to deal with *most* types of this conduct themselves and the power to refer *all* types to another court or tribunal. Such an approach will make for a simpler and more coherent framework, enabling judges to understand better their powers and to feel more confident in utilising them where necessary. While we seek consultees' views on issues relating to the powers of superior courts, we do not make provisional proposals for reform.

Existing powers to address conduct that apparently constitutes contempt

6.87 As explained, a court, tribunal or other body with powers to address conduct that apparently constitutes contempt may have the power to deal with such conduct itself and/or the power to refer it to another court or tribunal. Below, we take each category in turn and outline which courts, tribunals and other bodies have either or both types of powers under the existing law.

Existing powers to deal with conduct that apparently constitutes contempt

6.88 At common law, the power of a court, tribunal or other body to deal with contempt depends on whether it is classified as:

(1) a superior court of record, which has the power to deal with any contempt affecting its own proceedings;[138]

(2) an inferior court that is also a court of record, which has the power to deal only with contempt committed in its face;[139] or

(3) an inferior court that is *not* a court of record, which does not have any power to deal with contempt itself.[140]

6.89 In many cases, these powers have been affirmed in statute and/or have been supplemented by additional statutory powers, though the powers may not enable a court to deal with a matter as contempt. For example, some inferior courts that are also courts of record have statutory powers to address a failure to comply with an order, though not to deal with it as contempt.[141]

6.90 Below we outline the powers of superior and inferior courts to deal with contempt themselves. There are no tribunals or other bodies that have such powers under the current law.

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138 *Balogh v St Albans Crown Court* [1975] QB 73 at 92 (Lawton LJ); *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [57]; *Surratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55, [2008] 1 AC 655 at [6].

139 *R v Brompton County Court Judge* [1893] 2 QB 195.

140 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [58] to [60].

141 See, for example, Coroners and Justice Act 2009, sch 6, paras 5(1), 6, and 9(1).

Superior courts of record

6.91 As stated above, superior courts of record have an inherent power to deal with any contempt affecting their own proceedings.[142]

6.92 The High Court additionally has inherent supervisory jurisdiction "to prevent interference with the due course of justice in inferior courts and to assist them so that they may administer justice fully and effectively".[143] This means that, in the exercise of this jurisdiction, the High Court can deal with contempts referred to it by an inferior court that does not have the power to deal with the conduct itself.[144]

6.93 The UT and EAT have additional statutory powers to deal with contempt. Section 25 of the TCEA 2007 and section 29(2) of the Employment Tribunals Act ("ETA") 1996 confer on the UT and EAT, respectively, "the same powers, rights, privileges and authority … as the High Court" in relation to the attendance and examination of witnesses, the production and inspection of documents, and all other matters incidental to their respective jurisdictions.[145] Given that the High Court has inherent powers to deal with contempt itself, the powers of the UT and EAT to do the same are affirmed in these statutory provisions.

6.94 The UT also has statutory powers to deal with prescribed conduct that takes place in the FtT that would be capable of constituting contempt had it taken place in the UT. These powers can be exercised where:

(1) A contempt is referred to the UT by the FtT. Where the FtT refers to the UT a failure by a person to comply with certain requirements imposed by the FtT, the UT may exercise its power under section 25 of the TCEA 2007 in relation to the non-compliance "as if the requirement had been imposed by the [UT]".[146] Given that section 25 of the TCEA 2007 provides that in relation to certain matters the UT has "the same powers, rights, privileges and authority as the High Court", the UT may imprison or fine a person for their non-compliance.[147]

(2) A contempt is certified to the UT by the FtT. For example, under section 61 of the Freedom of Information Act 2009, the FtT (GRC) can certify to the UT that a person's act or omission in relation to proceedings before it would constitute contempt if those proceedings were before a court having power to commit for contempt. Upon certification, the UT has the power to inquire into the matter and deal with the person in any manner in which it could deal with them if the

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142 See, for example, Coroners and Justice Act 2009, sch 6, paras 5(1), 6, and 9(1).

143 *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [120]. See also *R v Parke* [1903] 2 KB 432, 442; *The Law Society of England and Wales v Otobo* [2011] EWHC 2264 (Ch) at [46]. See also *Arlidge, Eady & Smith* (2019) paras 13-87,13-88 and 13-109.

144 See *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [61].

145 TCEA 2007, s 25; ETA 1996, s 29(2).

146 The Tribunal Procedure (Upper Tribunal) Rules 2008, r 7(4).

147 This power does not extend to non-compliance with a substantive decision of the FtT, which was described by the UT as "an omission in the legislative scheme" (see *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 from [86]).

contempt had been committed in relation to the UT.[148] The majority judgment in *Moss v The Royal Borough of Kingston-Upon-Thames* recently clarified that the UT is empowered to determine "whether or not, applying the law of contempt, the conduct is a contempt".[149]

6.95 Unlike the UT, the EAT does not have any powers to deal with conduct committed in the ETs that would be capable of constituting contempt had it been committed in the EAT. There are no referral or certification mechanisms equivalent to those that operate in respect of the FtT and UT.

Inferior courts, tribunals and other bodies

6.96 Most inferior courts are courts of record, thus they have powers at common law to deal with contempt committed in the face of the court.[150]

6.97 Though the county court is an inferior court of record, as a statutory creation, its power to deal with contempt derives from statute and not the common law. Section 118 of the County Courts Act 1984 provides that the county court can commit a person to prison and/or to impose a fine for contempt where the person:

(a) wilfully insults a judge of the county court, or any juror or witness, or any officer of the court during his sitting or attendance in court, or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the county court or otherwise misbehaves in court.

6.98 Magistrates' courts, which are inferior courts, similarly have the power to deal with contempt committed in the face of the court. However, they are *not* courts of record, and thus their power to do so does not derive from the common law, rather, it derives from statute. This statutory power is almost identical to that of the county court under section 118 of the County Courts Act 1984. A magistrates' court has the power under section 12 of the CCA 1981 to commit a person to prison and/or to impose a fine for contempt where the person:

(a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

6.99 Magistrates' courts have other statutory contempt powers. Under section 63(3) of the Magistrates' Courts Act ("MCA") 1980, a magistrates' court exercising its civil jurisdiction may deal with the disobedience of an order other than for payment of

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148 Freedom of Information Act 2009, s 61(5).

149 *Moss v The Royal Borough of Kingston-Upon-Thames* [2023] EWCA Civ 1438 at [39] (Lewis LJ).

150 *R v Brompton County Court Judge* [1893] 2 QB 195 at 198 and 200.

money as contempt.[151] Other provisions which allow the magistrates' courts to deal with contempt include:

(1) section 9 of the CCA 1981, which empowers a magistrates' court to deal with any person who records proceedings or the like;[152]

(2) section 97(4) of the MCA 1980, which empowers a court to deal with a person who has refused to give evidence or produce a document or thing in contravention of an order to do so;[153]

(3) sections 17 and 18 of the Criminal Procedure and Investigations Act 1996, which empower a magistrates' court to deal with unauthorised disclosure of material in criminal proceedings;[154] and

(4) section 6(5) of the Bail Act 1976, where a person on bail has failed to surrender to custody and the matter is punished "as if it were a criminal contempt of court".

Existing powers to refer conduct that apparently constitutes contempt to another court or tribunal

6.100 Superior courts of record do not have the power to refer contempt matters which occur before them to another court. By contrast, in some circumstances, a protected inferior court, tribunal or other body that does not have the power to deal with contempt itself can refer the matter to another court or tribunal.

Inferior courts, tribunals and other bodies

6.101 Some inferior courts, tribunals and other bodies can refer conduct that apparently constitutes contempt to the High Court. This includes, for example, the Parole Board.[155] The High Court then can deal with the conduct in the exercise of its inherent supervisory jurisdiction "to prevent interference with the due course of justice in inferior courts and to assist them so that they may administer justice fully and effectively".[156] As reiterated recently in *R (Bailey and Morris) v Secretary of State for Justice*, if a protected inferior court, tribunal or other body does not have the power to

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151 *Chief Constable of Merseyside v Doyle* [2019] EWHC 2180 (Admin), [2019] ACD 125; MCA 1980, s 63; CCA 1981, s 17, sch 3.

152 CCA 1981, s 9(1); CrimPR r 48.5; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

153 MCA 1980, s 97(4); CrimPR rr 48.5, 48.16; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

154 CPIA 1996, ss 17-18; CrimPR r 48.9; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

155 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564.

156 *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [120]. See also *R v Parke* [1903] 2 KB 432, 442; *The Law Society of England and Wales v Otobo* [2011] EWHC 2264 (Ch) at [46]. See also *Arlidge, Eady & Smith* (2019) paras 13-87, 13-88 and 13-109.

deal with contempt itself or refer it elsewhere, for example, to the UT, then this is "the only way"[157] that conduct that potentially constitutes contempt can be addressed.

First-tier Tribunal and Employment Tribunals (England and Wales)

6.102 While the ETs do not have any powers to refer conduct that apparently constitutes contempt to the EAT, all chambers of the FtT can refer to the UT a failure by a person to comply with certain requirements imposed by the FtT in relation to giving evidence. The UT may exercise its power under section 25 of the TCEA 2007 in relation to the non-compliance "as if the requirement had been imposed by the [UT]".[158] There are also provisions that work to the same effect but use a process of certification. These do not apply to all chambers of the FtT. For example, under section 61 of the Freedom of Information Act 2009, the FtT (GRC)[159] may "certify" to the UT conduct "which by its nature is *capable* of constituting a contempt if it had occurred in proceedings before a court or tribunal with power to commit for contempt".[160] It is then for the UT to "make a final, conclusive and binding determination of whether or not, applying the law of contempt, the conduct is a contempt".[161]

Other tribunals and bodies

6.103 Some other tribunals and bodies have powers to refer contempt matters to another court, tribunal or body. These powers generally mirror the certification mechanism that is available to the FtT (GRC).

6.104 An example of one such tribunal is the CAT, which has the power to certify to the High Court a failure to comply with an injunction granted by the CAT itself. If, upon certification, "the High Court is satisfied that [the defendant] would have been in contempt of court if the injunction had been granted by the High Court, the High Court may deal with [the defendant] as if [they] were in contempt".[162]

The case for reform

Superior courts

6.105 Stakeholders did not express concern about the powers of the superior courts to deal with contempt matters themselves. However, we heard from a senior judge in the EAT that there is a need to empower the EAT to refer such conduct to the High Court or Crown Court because it is not equipped with sufficient resources to exercise its powers to deal with contempt itself. The judge contrasted the EAT and the High Court, noting that in the latter there is greater access to legal representation for defendants and there are security staff. In their view, tribunals as a whole are not set up for

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157 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [61].

158 The Tribunal Procedure (Upper Tribunal) Rules 2008, r 7(4).

159 Similarly, the Parliamentary Commissioner and the Information Commissioner, for example, also have this ability: Parliamentary Commissioner Act 1967, s 9; Freedom of Information Act 2009, s 54. These are neither courts nor tribunals: *Proprietor of Ashdown House School v JKL* [2019] UKUT 259 (AAC), [2019] ELR 530 at [138].

160 *Moss v The Royal Borough of Kingston-Upon-Thames* [2023] EWCA Civ 1438 at [39] (Lewis LJ), emphasis added.

161 Above.

162 Enterprise Act 2002, sch 4(1A).

contempt: they "are set up for their informality of process where people do not need to be represented". This raises an important point about ensuring that the powers of tribunals to address contempt are appropriate for their setting and practices.

6.106 A second issue raised by the judge concerned the power of the EAT to make a civil restraint order ("CRO"). We explain in Chapter 3 on general contempt that such an order can be made to restrain a party from making any further applications in current proceedings, from issuing certain claims or making certain applications in specified courts, or from issuing any claim or making any application in specified courts.[163] The judge told us that whether the EAT has the power to make such an order depends on how one reads section 29(2) of the Employment Tribunals Act 1996. This provision confers on the EAT the same powers as the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents, and all other matters incidental to the EAT's jurisdiction.[164] The judge explained that the EAT does not interpret this section as empowering it to make a CRO.

6.107 The EAT has the power to make a restriction of proceedings order ("RPO"), which is similar to a CRO; however, they can only be made on application by the AG,[165] which the judge considered to be cumbersome. Furthermore, the threshold for making RPOs is higher than for CROs: RPOs can be made where "a person has habitually and persistently and without any reasonable ground" made "vexatious" applications,[166] whereas CROs can be made where applications have been made "two or more times"[167] or "persistently"[168] which are "totally without merit".[169] The judge suggested that the EAT should also have a specific power to make CROs, which the EAT would enforce using its existing contempt powers.[170]

6.108 The power to order a CRO falls outside our Terms of Reference; our review is concerned with the law relating to a *breach* of an order. As such, it is not within our remit to make provisional proposals that the Government reform the law relating to this issue. Nevertheless, the power to make a CRO is highly relevant to contempt of court. An objective of the law of contempt is to ensure that courts have adequate powers to control their own proceedings and to ensure the fair, efficient, and effective administration of justice. The power to make a CRO serves as one tool used by the courts to achieve this objective,[171] and therefore the absence of such a power arguably leaves a gap. Therefore, though we cannot make provisional proposals for

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163 CPR, r 2.3(1); see para 3.150 above.

164 See para 6.93 above.

165 Employment Tribunals Act 1996, s 33.

166 Above.

167 CPR, Practice Direction 3C, 2.1D.

168 Above, 3.1D, 4.1D.

169 Above, 2.1D, 3.1D and 4.1D.

170 CROs are enforced by contempt; this is made clear on the forms for the general, limited and extended civil restraint orders. For example, see the form for the limited CRO: https://www.justice.gov.uk/documents/n19-limited-civil-restraint-order.pdf.

171 The High Court has recognised that CROs "are made to protect the administration of justice generally": *Solicitor General v Ellis* [2023] EWHC 604 (KB) at [27].

reform of the EAT's power to issue CROs, it is open to us to explore whether the Government should consider reviewing the absence of such a power. Consequently, we seek consultees' views on whether such a review is necessary.

Consultation Question 46.

6.109 Is there a need for the Government to consider reviewing the powers of the Employment Appeal Tribunal to make civil restraint orders?

Inferior courts, tribunals and other bodies

First-tier Tribunal and Employment Tribunals (England and Wales)

6.110 Members of the tribunals judiciary expressed to us significant concerns regarding the existing contempt protection and powers of the FtT and ETs. They considered it inappropriate that these tribunals do not have the power to deal themselves with the following examples of conduct that apparently constitutes contempt:

(1) in the FtT, non-compliance with orders and non-compliance with the procedure rules;

(2) in the ETs, non-compliance with orders (particularly civil restraint orders ("CROs") made against litigants by the High Court), unauthorised recording of tribunal hearings, interference with witnesses, fabricating evidence, assaults and threats directed towards the judiciary, and litigants sending abusive messages to judges.

6.111 In the event that the FtT and ETs are protected (as we have provisionally proposed they should be) then the question arises as to what powers they should have to deal with such conduct.

6.112 Though the FtT has the power to refer (or certify in the case of the GRC), there are no equivalent powers of the ETs. These powers of the FtT have significant limitations; the power to refer relates only to non-compliance with rules about giving evidence, and the power to certify (at least in respect of the FtT(GRC)) applies only to appeals. Further, a tribunal judge in the FtT explained that the power to refer is ineffective in practice:

> Anecdotal experience is that judges tend not to make referrals [to the UT] because it is a hassle and it takes a long time so is not terribly effective in securing the desired result. … Referral to another court or tribunal means that the consequences are remote and so dilutes the efficacy of such enforcement action.

In a similar vein, a senior tribunal judge told us that they support empowering tribunals to deal with contempt themselves as such a power is a more useful deterrent than the power to refer.

6.113 This raises questions about whether limiting protected tribunals to a power to refer only, as opposed to empowering them to deal with the matter themselves, leaves them ill-equipped to protect the administration of justice in proceedings. Though we

did not hear views from others about the effectiveness of a power to certify, it is likely that (at least where the matter is certified to the UT) similar problems would arise.

6.114 We heard a related concern regarding a tribunal's ability to ask the AG to consider bringing contempt proceedings in the High Court where that tribunal is protected by the law of contempt as an inferior court, such as the ETs and some chambers of the FtT. We were told that threats to send the matter to the AG "do not necessarily assist the tribunal in managing the hearing before it" and 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".[172] These comments were made with respect to one tribunal but they seem to apply generally to suggest that empowering a tribunal to deal with contempt itself is preferable to leaving it to rely on referrals elsewhere.

The Parole Board

6.115 The Parole Board told us that its lack of contempt powers is a problem because it has various case management powers but no means of enforcing them.[173] The Parole Board indicated that it would be helpful were it empowered to:

(1) compel witnesses and other stakeholders to attend a parole hearing;

(2) enforce compliance with directions to produce documents, in order to reduce delays (for the sake of prisoners and victims) and costs to His Majesty's Prison and Probation Service ("HMPPS") associated with detaining the prisoner for longer;

(3) deal with the disclosure of information about confidential parole proceedings to the media and the publication of correspondence with (and contact details of) members of the Parole Board;

(4) manage public hearings, which were permitted following amendments to the Parole Board Rules 2019 in 2022 arising out of the Government's comprehensive review of the parole system;[174] and

(5) deal with contempt committed in its face. The Parole Board recognised that such a power would be needed rarely but would be useful to have, nevertheless.

6.116 In its review of the parole system in 2020 to 2022, the Government considered whether the Parole Board required additional powers "to effectively manage public

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172 These concerns echoed those expressed by Sedley LJ in *Bennett v Southwark London Borough Council* [2002] EWCA Civ 223 at [36]: "A further look may need to be taken at the power (or impotence as it at present seems to be) of employment tribunals to shut out representatives whose behaviour jeopardises both their own clients' cases and the proper functioning of this important segment of our system of justice. It is not satisfactory that the only sanction is to wait until the representative crosses the high threshold set by [rule 37(1)(b)] of the Employment Tribunals Rules of Procedure and then to penalise not him but his client by striking out the case".

173 See, for example, Parole Board Rules 2019, rr 6, 7, and 24(4).

174 Ministry of Justice, *Root and branch review of the parole system: The future of the parole system in England and Wales* (March 2022).

hearings … and to increase efficiency and compliance with Parole Board directions for evidence".[175] Ultimately, the Government concluded that "the necessary functions are in place" to enable the Parole Board to function effectively and thus it did not need any new powers.[176]

6.117 Such powers would not be without difficulty. Exploring with the Parole Board and other government stakeholders the issue of enforcing compliance with directions made by the Parole Board, two challenges emerged. First, directions generally are made to governmental departments, such as HMPPS, and often require them to provide further information about, for example, a prisoner or an incident relating to a prisoner. Difficulties complying with these directions are often due to the lack of resources and high workload of the department. Consequently, contempt powers may not secure compliance; rather, greater resources are needed to achieve this. Secondly, enforcing costs orders against HMPPS may not be effective in encouraging compliance as it would simply have the effect that money would be moved between governmental departments.

6.118 Regarding public hearings of the Parole Board (and keeping in mind the relatively small number of public hearings), it is not clear that further powers are necessary. It was explained to us that public parole hearings operate by livestreaming to a particular venue (for example, to a courtroom at the Royal Courts of Justice) and observers must attend there – it is not possible to watch remotely from home. Consequently, there is little capacity for observers to commit contempt in the face of the Parole Board from a different location. Further, the livestream is slightly delayed, so it can be turned off if an incident occurs at that end.

Devolved tribunals in Wales

6.119 Members of the Welsh tribunals judiciary supported empowering the devolved tribunals in Wales to address conduct that apparently constitutes contempt, in the event that these tribunals were to be protected by the law of contempt (in line with our provisional proposal above).[177]

6.120 However, these stakeholders told us that the devolved tribunals in Wales should not have the power to deal with contempt themselves. One reservation was that, in a smaller jurisdiction where tribunals may rely heavily on non-legal members with limited or no expertise or experience in contempt, the power to deal with contempt should be approached with caution. This argument applies more strongly if the power of a tribunal to deal with contempt itself is accompanied by the power to impose a sanction, and it would not be practical or helpful to separate those. Instead, they told us that the devolved tribunals in Wales should be limited to a power to refer contempt matters.

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175 Ministry of Justice, *Root and branch review of the parole system: The future of the parole system in England and Wales* (March 2022) para 124.

176 Above, para 126.

177 See paras 6.83 to 6.84 above.

A simpler and uniform framework of powers

6.121 The preceding discussion highlights two overarching problems with the current law relating to the powers of courts, tribunals and other bodies to address conduct that apparently constitutes contempt. First, there is variation in their powers and often a lack of clarity as to what those powers are.[178] This can make for a confusing regime in which it is difficult for judges and users of these courts, tribunals and other bodies to understand how the law of contempt applies to them and what their potential liability might be. Secondly, some courts, tribunals and other bodies do not have sufficient powers to address conduct that apparently constitutes contempt. Consequently, they are ill-equipped to maintain order and ensure the administration of justice in proceedings.

6.122 In light of stakeholders' views, we provisionally propose a new approach to these powers that seeks to promote uniformity and simplicity, while also accommodating the different environments and specific needs of courts, tribunals and other bodies. The new approach aims to achieve this in part by doing away with unhelpful distinctions between types of inferior courts and the nature of their powers. Unlike the current regime, for the purpose of determining powers, the new approach does not distinguish between inferior courts that are courts of record and those that are not. This is because this distinction is only relevant to their powers at common law and thus, where they have additional statutory powers, this label may not reflect the full range of powers.

6.123 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 CCA 1981 deal with contempt in its face.[179] 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. For this reason, we consider it unhelpful to rely on this distinction to understand the powers of a court or tribunal. Instead, our provisionally proposed framework distinguishes between:

(1) superior courts; and

(2) protected inferior courts, tribunals and other bodies (as defined by our provisional proposals above).[180]

6.124 Our provisional view is that just as all superior courts do and should have the same powers as each other, so should all protected inferior courts, tribunals and other bodies (unless there are good reasons for different treatment of a particular court, tribunal or other body). This would make for a simpler, more consistent and more coherent regime.

6.125 We now set out our provisional proposals for reform of the powers of courts, tribunals and other bodies to address conduct that apparently constitutes contempt. These are made in light of our provisionally proposed framework for liability, set out in Chapters 3

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178 See paras 6.96 to 6.104 above.

179 See para 6.98 above.

180 Above.

to 5. Given that our framework for liability would not rely on the categorisation of certain contempts as committed "in the face of the court",[181] empowering courts or tribunals to deal with contempt on the basis of that categorisation would no longer be appropriate. Therefore, we consider the powers of a court, tribunal or other body in the context of our provisionally proposed categories of contempt: general contempt, contempt by breach of court orders or undertakings, and contempt by publication when proceedings are active.

Superior courts

6.126 Our provisional conclusion is that superior courts should retain their powers to deal with any contempt affecting their own proceedings. Similarly, the High Court should retain its powers to deal with contempt that occurs in certain protected lower courts and tribunals. We recognise the importance of these inherent powers and did not hear concern from stakeholders about their scope. Therefore, there does not appear to be a need for reform.

6.127 However, as discussed at paragraph 6.105 above, we heard support from a senior judge in the EAT for the EAT to be empowered to refer contempt matters to the High Court or Crown Court. The judge explained that this is needed because the EAT does not have the resources to deal with contempt itself, citing the lack of familiarity with contempt and the necessarily informal nature of tribunal proceedings. This raises questions about whether the powers of superior courts should be expanded to include a power to refer conduct that apparently constitutes contempt to another superior court. This power would sit alongside the existing power of superior courts to deal with contempt affecting their own proceedings. It would seem most appropriate for such referrals to lie to the High Court, given its expertise in dealing with contempt matters, although it would potentially put an increased burden on the High Court.

6.128 The option to refer matters to the High Court would be particularly useful in circumstances where contempt occurs in an appellate court. For example, as the law stands, a contempt that occurs in the Supreme Court would be dealt with by the Supreme Court in the first instance and an appeal would lie to "an enhanced non-conflicted panel of Justices".[182] However, where the contempt originally occurred before a panel of nine Justices, for example, it would not be possible for an appeal to be heard by an enhanced non-conflicted panel.[183] It is unlikely that these circumstances would arise, but this problem would be resolved if the Supreme Court could refer contempt matters to the High Court to be dealt with in the first instance; it would always be practically possible for an appeal to lie from the High Court to the Court of Appeal.

6.129 In the event that superior courts were to have the option to refer contempt matters to the High Court, it would be necessary to expand the existing powers of the High Court to enable it to deal with such cases. This is because the High Court's inherent powers to deal with contempt affecting proceedings other than its own are limited to

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181 See Chapter 3.

182 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [46].

183 See para 11.36 below.

proceedings in certain inferior courts, tribunals and other bodies.[184] The High Court's lack of power to deal with a contempt that occurred before the House of Lords (the predecessor to the Supreme Court) was considered in *Re Lonrho Plc*. In that case Lord Keith said that "the normal and natural forum for the hearing of contempt relating to proceedings before [the] House is the House itself",[185] which was approved by the Supreme Court in *Attorney General v Crosland*.[186] Lord Keith concluded in *Re Lonrho Plc* that "[t]here is no authority that vests in the Divisional Court of the Queen's Bench Division or any other court jurisdiction to deal with the present matters in dispute".[187] It is thus clear that, to facilitate referrals of contempt matters from the Supreme Court (or any other superior court) to the High Court, the existing powers of the High Court would need to be expanded to enable it to hear such proceedings.

6.130 We are interested in consultees' views on whether there is a need to empower superior courts to refer contempt matters to the High Court. It would follow from such a reform that the High Court would need additional powers to deal with contempts that occur in other superior courts. These would exist alongside its powers to do so in respect of certain inferior courts, tribunals and other bodies.

6.131 This option of referral may extend to contempts which were themselves referred to the UT and the EAT from the FtT and the ETs respectively. This may create some complexity as this option would create the possibility of "double referrals" where the judges in the UT or the EAT feel the matter referred to them would be more effectively dealt with in the High Court. However, the need for the body dealing with contempt to be familiar with contempt proceedings may outweigh concerns relating to the risk of complexity which comes with double referrals.

Consultation Question 47.

6.132 Should superior courts have the power to refer conduct that apparently constitutes contempt to the High Court?

Protected inferior courts, tribunals and other bodies

6.133 In our provisional view, all protected inferior courts, tribunals and other bodies should have the following powers:

(1) 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

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184 See para 6.92 above.

185 *Re Lonrho Plc* [1990] 2 AC 154 at 176.

186 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [40].

187 *Re Lonrho Plc* [1990] 2 AC 154 at 177. Lord Keith also considered that such a matter should not be referred to the AG to bring proceedings in the High Court (176): "There are obvious and insuperable objections in the present case to allowing the matter to be referred to the discretion of the Attorney-General. The suggested contempt relates to proceedings before this House in its judicial capacity and it is not for the Attorney-General to decide whether cognisance should be taken of such possible contempt or not".

(2) 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.

6.134 This reform would broaden the existing powers of inferior courts, tribunals and other bodies.

6.135 With respect to protected inferior courts, it would not have a dramatic impact on their powers. Currently, they can deal with many forms of conduct that would constitute general contempt (albeit limited to conduct committed in the face of the court) and they often have additional statutory powers to deal with contempt by breach of order. The effect of our provisional proposal would be to enable them to continue to deal with general contempt, other than general contempt by publication, and *all* forms of contempt by breach of order, regardless of whether they have a specific statutory power to do so. Moreover, inferior courts would be able to refer all types of contempt to the High Court, including those with which they are empowered to deal themselves.

6.136 With respect to protected tribunals and other bodies, this reform would expand their powers significantly. This would be in line with stakeholders' support for empowering tribunals to deal with disruptive behaviour and breach of orders (or directions), and would respond to concerns that the power to refer conduct to another court is ineffective in protecting the administration of justice in tribunal proceedings. However, alongside the power to deal with certain types of contempt themselves, we consider it necessary for tribunals and other bodies to be empowered also 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. This is because it may be appropriate for a different tribunal or other body to adjudicate a contempt matter in some cases, particularly in light of:

(1) the complexity of contempt proceedings, which may warrant the expertise of the High Court in some circumstances;

(2) the risk of inappropriately heightening the formality of tribunal proceedings if a tribunal judge were to exercise their power to deal with contempt themselves in a particular case; and

(3) concerns about members of a tribunal or other body, who may lack legal qualifications or expertise, exercising the power to deal with contempt themselves.[188]

6.137 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. Instead, they should have the power only to refer such a contempt to the High Court. These matters should be referred to the High Court, as opposed to another superior court of record such as the UT or the EAT, as the High Court has particular expertise in dealing with the ECHR rights that are engaged in contempt by publication matters.

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[188] For this reason, in Chapter 8 on procedure we consider that inferior courts, tribunals and other bodies should be encouraged to exercise their power to refer in most cases; the power to deal with contempt should be exercised only in exceptional circumstances.

6.138 This exclusion of general contempt by publication and contempt by publication when proceedings are active from the powers of inferior courts, tribunals and other bodies is necessary as this form of contempt particularly engages the right to freedom of expression under article 10 of the ECHR. In such circumstances it is appropriate for the matter to be adjudicated by the High Court. Moreover, to extend the powers of protected inferior courts, tribunals and other bodies such that they can deal with this type of contempt would be to broaden them substantially and we have not heard any evidence to suggest that this is needed or wanted.

Consultation Question 48.

6.139 We provisionally propose that all protected inferior courts, tribunals and other bodies should have the following powers:

(1) 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

(2) the power to refer any type of contempt to the High Court, or, in the case of the First-tier Tribunal and the Employment Tribunals (England and Wales), to the Upper Tribunal and the Employment Appeal Tribunal respectively.

Do consultees agree?

6.140 Do consultees consider that any specific protected inferior courts, tribunals or other bodies should be treated differently? If so, why?

Devolved tribunals in Wales

6.141 Our provisional view is that the powers of the devolved tribunals in Wales should be consistent with the powers of protected tribunals in England and protected reserved tribunals, whatever those powers may be.

6.142 We provisionally propose at paragraph 6.139 above that all protected inferior courts, tribunals and other bodies should have the power to deal with general contempt and contempt by breach of order, in addition to a power to refer all types of contempt to another court or tribunal. It follows, therefore, that the devolved tribunals in Wales would have the same powers. Such an outcome would be at odds with the views we heard from the members of the Welsh tribunals judiciary that the devolved tribunals should be empowered *only to refer* conduct that apparently constitutes contempt.

6.143 We recognise that there may be some value in a newly established regime that initially limits the powers of such tribunals to a referral power only, for the purpose of encouraging uniformity in application and standards. We are also alive to reservations about empowering non-legal tribunal members to deal with contempt themselves.[189]

[189] See para 6.136 above.

6.144 However, we consider these factors to be outweighed by the need for a consistent and uniform approach. Officials from the Welsh Government similarly favoured consistency across the devolved and reserved tribunals in Wales and tribunals in England and Scotland. This approach is desirable as it makes for a simpler regime which can be more easily understood and navigated by tribunal judges and users. It would be particularly useful for judges who sit in tribunals across jurisdictions; their powers would not differ depending on whether they are in a devolved or non-devolved tribunal on any given day. It may also be that some concerns can be alleviated through guidance from the PWT about how the powers should be used.

6.145 Therefore, we provisionally propose that all protected devolved tribunals in Wales should have the same powers as protected tribunals in England and protected reserved tribunals.

Consultation Question 49.

6.146 We provisionally propose that all protected devolved tribunals in Wales should have the same powers as protected tribunals in England and protected reserved tribunals.

Do consultees agree?

Chapter 7: The Attorney General's role in contempt proceedings

INTRODUCTION

7.1 The Attorney General ("AG") is a government minister who attends Cabinet and acts as the principal legal adviser to the government. The AG's role has been described as "a complex role which has evolved over centuries and comprises a broad and varied range of functions which are fundamental in upholding the rule of law".[1] The AG is commonly described as the "guardian of the public interest".[2] Representing the public interest is part of the AG's constitutional role.[3] To that end the AG has some independent public interest functions, including bringing proceedings for contempt of court to represent and safeguard the public interest in the administration of justice.[4]

7.2 This chapter addresses the role that the AG plays in bringing contempt proceedings, and consenting to others bringing contempt proceedings.

7.3 The AG is supported in their work by the Solicitor General ("SG"), who is also a member of the government. Together they are known as "the Law Officers". Under the Law Officers Act 1997, "any function of the Attorney General may be exercised by the Solicitor General" and "anything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General".[5] Accordingly, the SG has the power to bring contempt proceedings, exercising the functions of the AG in doing so. Government stakeholders have told us that there is no fixed distinction between the role or work of the AG and the SG in contempt matters. Rather, the division of responsibilities for contempt will vary with the approach and priorities of whoever occupies the roles at any given time. This may result in proceedings being commenced by and in the name of the SG rather than the AG, but (we have been told by government stakeholders) there is no practical difference in the roles for the

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1 *The Governance of Britain: A Consultation on the Role of the Attorney General,* Cm 7192 (2007).

2 Eg *Constitutional Role of the Attorney General*, Fifth report of the Constitutional Affairs Committee (2006-07) HC 306. This is the description currently used by the Attorney General ("AG"): Attorney General's Office ("AGO"), *The Law Officers' approach to contempt of court referrals* (15 September 2021, updated 20 July 2022).

3 *Attorney General v Times Newspapers* [1974] AC 273 at 311 (Lord Diplock); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 481 (Lord Wilberforce).

4 *Attorney General v Times Newspapers* [1974] AC 273 at 311 (Lord Diplock). The various and wide-ranging functions of the AG are set out in *The Governance of Britain A Consultation on the Role of the Attorney General*, Cm 7192 (2007) Annex A. They include the "requirement for Attorney General's consent to certain prosecutions; power to refer unduly lenient sentences to the Court of Appeal; … power to terminate criminal proceedings on indictment by issuing a *nolle prosequi*; power to bring proceedings to restrain vexatious litigants; power to represent the interests of charities in certain proceedings; … power to bring or intervene in legal proceedings in the public interest (e.g. to seek injunctions restraining publication of sensitive material where this is contrary to the public interest); … and general oversight of the other central prosecuting authorities".

5 Law Officers Act 1997, ss 1(1) and 1(2).

purpose of contempt. For convenience and consistency, throughout this chapter we will refer only to the AG (rather than the Law Officers, or the AG and the SG) unless the context requires the use of the collective or separate terms. The Law Officers are assisted by the Attorney General's Office ("AGO"), a ministerial department established to "provide legal advice and support to the [Law Officers]" and "help the Law Officers perform other duties in the public interest".[6] In this chapter we distinguish between the AG and the AGO. We refer to the AG where a decision or power lies with the person who holds the office of AG. We refer to the AGO when discussing the work being done by the office in support of the AG's functions, for example, obtaining information required by the AG to bring contempt proceedings.

7.4 The chapter proceeds in five parts. First it explains the AG's role as "guardian of the public interest" in the contempt context, looking at how the role is exercised, its inherently political nature, and some of the conflicts of interest that arise. Given those conflicts, we consider arguments as to whether the public interest function should be removed and potentially passed to another body, or whether it should be retained by the AG. We provisionally conclude that the AG should retain this role and, with that in mind, the four parts of the chapter that follow examine whether there is a case for law reform in relation to some of the powers and practices of the AG in respect of contempt of court. The four matters addressed in the parts are: conflicts of interest and their mitigation; clarity and predictability as to practice and when proceedings will be instituted; the ability to obtain information; and the publication of transparency data.[7]

THE ATTORNEY GENERAL AS GUARDIAN OF THE PUBLIC INTEREST

The exercise of the public interest function

7.5 The AG plays a role in bringing proceedings for contempt of court in the public interest in the administration of justice.[8]

7.6 The AG plays a proactive as well as a reactive role in protecting the integrity of the justice process by taking action in respect of contempt of court.

7.7 As part of the proactive role, the AG may publish a media advisory notice, which is a statement that reminds publishers to keep contempt laws in mind when reporting on a current matter. This effectively warns that the AG will be minded to commence proceedings if prejudicial information is published. It appears that 16 notices have been published since 2014.

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6 Attorney General's Office, What we do.

7 "Transparency data" is the term generally used to describe data that is published on the government websites pertaining to the work of different government departments. A wide range of information is published for the purposes of enhancing transparency, for example, prison population figures, spending for services for government departments, data about senior civil servants in the Cabinet Office, as well as more specific data such as outcomes of unduly lenient sentence referrals by the AG. See further from para 7.180 below.

8 *Attorney General v Times Newspapers* [1974] AC 273 at 311 (Lord Diplock). Other public interest functions include referring points of law and unduly lenient sentences to the Court of Appeal.

7.8 The wording of a media advisory notice varies but the following from 2021 is an example:

> [The AG] wishes to amplify the importance of the requirement not to publish any material that could create a substantial risk that the course of justice in these proceedings could be seriously impeded or prejudiced. This includes publishing information online. Publishing this information could amount to contempt of court and could affect the fairness of any future trial.
>
> In particular, the Attorney General draws attention to the requirement not to publish material that asserts or assumes the guilt of anyone who has been arrested. That is an issue to be determined by the jury if in due course there is a trial. The Attorney General also wishes to remind journalists and members of the public that it can amount to contempt of court to publish information relating to untested and unconnected allegations against the suspect, and matters adverse to his character, the admissibility of which a Judge in due course may need to determine.[9]

7.9 In the reactive role, the AG may commence contempt proceedings. The procedure for commencing proceedings is explained in Chapter 8.[10] For the purposes of this chapter, the AG may:

(1) receive a referral, from courts or any person or organisation, requesting them to consider bringing contempt proceedings (though it will always be the AG's decision whether or not to institute proceedings);

(2) act with or without having received a referral; or

(3) bring proceedings even if a party to litigation does not wish to do so.[11]

7.10 When instituting contempt proceedings, the AG is not exercising an executive function of government, but instead "acts on behalf of the Crown as 'the fountain of justice'".[12] In doing so the AG is bringing to the court's notice a matter they think the court should be informed of in the interests of the administration of justice.[13]

7.11 There is some variation in the way the public interest is described. Sometimes the case law refers to "the public interest *and* the administration of justice", on other occasions to "the public interest *in* the administration of justice", and on others simply to "the public interest".[14] It may be more to the point, though, that in exercising their constitutional function as guardian of the public interest, the AG is making a decision

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9 AGO, *Media Advisory Notice – Disappearance of Sarah Everard* (12 March 2021).

10 See paras 8.130 to 8.226 below.

11 See *Attorney General v Times Newspapers* [1974] AC 273 at 326-327 (Lord Cross).

12 Above at 311 (Lord Diplock).

13 Above at 326 (Lord Cross); Lord Cross describes this (in inverted commas) as the AG acting as "amicus curiae" (friend of the court), though Lord Diplock at 311 does not use inverted commas.

14 Emphasis added. See for example *Re Jones* [2013] EWHC 2579 (Fam), [2014] 1 FLR 852 at [14]-[15], (Sir James Munby P), where all three occur in a brief discussion of the case law.

about "whether it is in the public interest to institute contempt proceedings".[15] That is, the protection of the public interest in the administration of justice will not require that the AG institutes proceedings for every contempt.[16] We discuss below the approach that the AG takes when making decisions about whether to institute proceedings.[17]

Contempt referrals to the Attorney General

7.12 The AGO receives roughly 100 contempt referrals that require substantive responses per year, and the number of cases has remained fairly constant over the past few years.[18] The AGO also provided us with information about the type and frequency of the matters referred to them. The matters can be broken down into four categories:

(1) Criminal offences that are jury irregularities, which would not ordinarily be dealt with as contempt (for example, offences under the Juries Act 1974): 2-3 times a month.

(2) Criminal offences other than jury irregularities, which would not ordinarily be dealt with as contempt (for example, offences of perverting the course of justice, perjury, assault on a member of court staff or a witness): 4-5 times a month.

(3) Criminal offences other than jury irregularities, and which may also be ordinarily dealt with as contempt (for example, offences under the Contempt of Court Act ("CCA") 1981 such as a party using a recording device in court and/or breaching statutory restrictions and posting material online, or naming a complainant in a rape case): 2-3 times a month.

(4) Contempts that are not criminal offences (for example, publication of prejudicial material in breach of the CCA 1981 strict liability rule, or other conduct that creates a risk of interference with the administration of justice): 2-3 times a month.

7.13 Most referrals come from the courts, generally via a letter from a judge, court staff or registrar. However, approximately 2-3 times a quarter, the AGO will consider whether action should be taken on a referral received from elsewhere. These may come from, for example, legal representatives in a case, a school (that may become aware of a breach of an order made in family proceedings), or a member of the public.

7.14 Where the conduct amounts to a criminal offence (categories (1) and (2) above), the AGO will refer the matter on to the police for consideration, via the Crown Prosecution Service ("CPS"). Where the action could either be a criminal offence or a contempt (category (3) above), the AGO may also send it to the police.

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15 AGO, *Contempt public interest framework* (20 July 2022) ("The Contempt 'Code'").

16 This is long established: *Attorney General v Times Newspapers* [1974] AC 273 at 312 (Lord Diplock).

17 See paras 7.93 to 7.100 below.

18 AGO, *Annual Report and Business Plan 2023-2024*, p 7.

7.15 Sending a matter to the police does not mean the AGO is completely relinquishing it. Where any matter is referred to the police for investigation then under the CPS legal guidance:

> the CPS will submit a report to the AGO within 10 days of receipt of the police report/advice file to CPS at the conclusion of the police investigation if it is determined that criminal charges are insufficient to reflect the seriousness of the offending.[19]

7.16 This may be the case where, for example, a breach of a statutory provision would attract no more than a fine, whereas contempt proceedings could result in committal. In addition, where the CPS decides not to prosecute the conduct as a criminal offence because it reaches the view that there is either insufficient evidence or a prosecution would not be in the public interest, the AG could potentially still bring contempt proceedings. The AG could do so on their own review of the evidence (noting that contempt may require proof of different things than an offence would require) and the public interest (noting that the interference with the administration of justice may be a different mischief than that to which a criminal offence is directed).

The political character of the Attorney General and conflicts of interest

7.17 The AG is the chief legal adviser to government and acts independently of government in that role.[20] However, as the AG is a member of the government and a parliamentarian, the role has an inherently political character.

7.18 In pre-consultation engagement with stakeholders, we heard concerns that there can be acute conflicts of interest when the AG must decide whether to institute proceedings for contempt by publication under the CCA 1981 strict liability rule. The power to institute proceedings for strict liability contempt by publication rests almost solely with the AG. Under the CCA 1981, proceedings must be brought or consented to by the AG,[21] and the AG's decisions cannot be judicially reviewed.[22] The only exception is where a court institutes proceedings of its own motion. However, as Lord

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19 CPS Legal Guidance, *Contempt of Court, Reporting Restrictions and Restrictions on Public Access to Hearings* (4 May 2022, updated 9 September 2022).

20 In House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (Fifth Report of Session 2006-07) (17 July 2007), para 72, the House of Commons Constitutional Affairs Committee recommended reform to the role of the AG on the basis that they saw "no reason why the official exercising the role of legal adviser to the Government should be a political appointee or a member of the governing party. Both in perception and reality, it would improve the independence and public confidence in the impartial nature and authority of the provision of legal advice if it were not the responsibility of someone in political life". The Committee favoured separation of the AG's functions to ensure that the provision of legal advice comes from a lawyer who is not a politician or a member of the Government. However, in *The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General*, Cm 7355 (April 2008), para 37, the Government said it did "not accept the suggestion in the Report that the exercise of "political" functions is somehow inconsistent with the exercise of an independent legal role". The Government maintained the ability of the AG to provide "independent and impartial legal advice" (para 30) and noted that there was a lack of evidence to suggest that the AG had "actually exercised his or her functions in an improper or partisan manner" (para 44).

21 CCA 1981, s 7.

22 *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 213.

Burnett LCJ noted in *Re Yaxley-Lennon*, the "almost invariable course" is referral to the AG.[23]

7.19 Media and academic stakeholders commonly told us that it is inappropriate that the AG – as a politician and a government minister – has responsibility for bringing contempt proceedings. The concerns ran at two levels. First, reflecting a position advanced in the literature, it has been argued that there is a constitutional anomaly in the AG being independent and yet part of government.[24] Secondly, a particular concern was raised where cases involve the media. Across both, the problem is that whether politicisation is actual or perceived, the decisions of the AG will be viewed by the public and by stakeholders as being affected by political considerations. By way of example, an academic saw "quite a strong potential conflict of interest" in the requirement for the AG's consent under section 7 of the CCA 1981. Another academic was concerned that a political appointee should not be making decisions about bringing proceedings against the media as they may be biased towards some media organisations whilst taking a harsher approach towards others. A lawyer told us that it was not constitutionally appropriate for the AG to have responsibility for contempt.

7.20 Similar points are made in the cases and the literature. It is a benchmark principle that not only must justice be done, but it must be seen to be done.[25] It is central to public confidence in the administration of justice that those making decisions must be free from bias and must be seen to be free from bias.[26] And yet, as Cram and Taylor point out, "the AG, a member of the executive and guardian of the public interest, might be (or be perceived to be) affected by political considerations in his or her execution of their role".[27]

7.21 Robertson and Nicol observe that the decision to bring proceedings for strict liability contempt "is not mechanical" but "the exercise of a discretion … and as such can legitimately be the object of comment and criticism" as soon as a decision to bring proceedings is taken.[28] This is because, they explain, "although he is supposed to act in a non-political manner", where a decision has been taken by the AG personally, "his other roles as a party politician and advisor to the cabinet lead many to question whether it is possible for one person to combine these different tasks".[29]

7.22 McGarry draws attention to circumstances where a conflict may be particularly problematic: the position where a publication by a politician may constitute contempt

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23 *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [33].

24 D Woodhouse, "The Attorney General" (1997) 50(1) *Parliamentary Affairs* 97, 97; and J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 1.

25 Eg *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 (Lord Hewart).

26 See for example J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 11; M Elliott and R Thomas, *Public Law* (4th ed 2020) p 521.

27 I Cram and N Taylor, "The Law Commission's Contempt proposals – getting the balance right?" [2013] *Criminal Law Review* 465, 474.

28 G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-017.

29 Above.

of court.[30] He considers situations where senior government politicians published comments on social media during active proceedings, which could potentially have amounted to contempt by publication, yet contempt proceedings were not brought.[31] He argues that these circumstances "raise questions about the AG's independence and accountability" and have "the potential to amount to a conflict of interest and a breach of the principle that justice should be seen to be done".[32] He explains the AG's conflicted position in the following terms:

> … a decision by the Attorney General to initiate proceedings would have been extremely damaging to a senior colleague and political ally … and thus damaging also to the Government of which the Attorney General is a member. This would surely be the case whatever the outcome of any consequent trial: the initiating of proceedings would, in itself, be detrimental. This is very obviously a potential conflict of interest.
>
> …
>
> The Attorney General and Solicitor General are appointed, and may be promoted, demoted or dismissed, by the Prime Minister. This seems to be the very epitome of a conflict of interest: that a decision maker – in this case, the Attorney General – must make a decision which, if taken one way rather than another, will be harmful to the person on whom the decision maker relies for their position.
>
> It is not only with political allies where the Attorney General's power to instigate or not to instigate contempt proceedings may give rise to concerns. A decision to take action against a political opponent may also seem to be politically motivated and so appear to be a conflict of interest. The same may even be true of a decision not to initiate contempt proceedings against a political opponent where, for example, it might appear advantageous to keep a politically weak opposition politician in place rather than take action which may lead to their removal or resignation.[33]

7.23 Concerns of this type have been raised for a long time. As early as 1990, Sir Harry Woolf (later Lord Woolf of Barnes) said:

> I do not believe that it is apt any longer for [the Attorney General] to perform directly this most important traditional role of his office. In controversial cases involving the government it seems virtually impossible for the public or the media to identify when

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30 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 1.

31 Above, J McGarry considers publications made by Jeremy Hunt, Priti Patel and David Cameron during active proceedings. The courts took the approach of ordering the jury to disregard such posts, but they were not dealt with as contempts by publication. McGarry (at 7) also calls into question the ability of the AG to act impartially in respect of such situations.

32 Above, 1-2.

33 Above, 11-12.

he is wearing his guardian of the public interest hat rather than his governmental hat.[34]

…

In addition, there is the problem that the Attorney-General always has arising from the fact that although he is not a member of the Cabinet, he is still a member of the government. In reality it would be extremely difficult if not impossible for any Attorney-General to bring proceedings against a colleague or a department of the very government of which he is a member.[35]

7.24 As noted by Lord Woolf, the conflict could arise with equal force where a potential defendant is a former parliamentarian.

7.25 McGarry draws attention to the way that the potential for conflict is identified and addressed in the prosecution context, where the *Framework Agreement between the Law Officers and the Director of Public Prosecutions* attempts to guard against real or perceived conflicts of interest in respect of the AG's supervisory role over prosecuting authorities.[36] The Framework Agreement states that the Director of Public Prosecutions ("DPP") "may raise any case with the Law Officers for advice or discussion to assist the Law Officers in providing public or parliamentary assurance that a decision has been carefully and properly taken".[37] However, this is subject to a limit.

Unless for any reason a decision is required from the Attorney General by law (such as in a consent case), the Law Officers will never be consulted or otherwise engaged on any case which:

- relates to a Member of Parliament (including Peers) or minister;
- relates to a political party or the conduct of elections; or
- gives rise to any question of personal or professional conflict of interest for the Law Officer.[38]

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34 Sir Harry Woolf (later Lord Woolf of Barnes) in Sir Harry Woolf, *Protection of the Public: A New Challenge* (1990) p 105.

35 Above, p 106.

36 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 14; AGO, *Framework Agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020).

37 AGO, *Framework Agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020) para 65.

38 Above, para 68, as cited in J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 14.

7.26 McGarry rightly says of that constraint that "there does not appear to be any equivalent safeguard with regard to the AG's power over contempt proceedings".[39] We consider below the options for such an equivalent safeguard for contempt.[40]

7.27 While the concerns are clear, our pre-consultation engagement indicated that not all stakeholders were troubled by the political character of the AG's role. A lawyer with experience of the work of the AGO and decision-making by the AG, told us that in exercising the contempt function, the AG does act independently. A media lawyer said that notwithstanding that the AG is a political appointee, that does not inherently mean they cannot discharge their obligations in an impartial manner; the issue "is where the office becomes politicised and the position-holder starts getting involved in those types of issues". The lawyer's view was that it depends on the particular AG and their approach to carrying out their role.

7.28 Similarly, not all views in the literature are critical. Borrie and Lowe state that, despite the political character of the role, "the office is well suited to the task".[41] McGarry's view is that "the Attorney General's ability to act independently of any explicit or implicit political pressure will vary according to the character of the holder of the office", but maintains that the "independence and consequent legitimacy of decisions about commencing legal proceedings should not vary according to the strength of character of the office holder".[42]

Should the Attorney General's contempt functions be removed or passed to another body?

7.29 The concerns we heard during pre-consultation engagement raise the question of whether the AG's functions in relation to contempt should remain with the AG or whether they should be vested in a different, more clearly independent body. Such a move would be a major change to the established constitutional role of the AG. However, we consider four options:

(1) remove the AG's contempt function and do not pass it to another body;

(2) pass the AG's contempt function to the DPP;

(3) pass the AG's contempt function to a new body; or

(4) leave the contempt function with the AG.

7.30 Although there are merits to each of the options, we provisionally propose that the AG retains their contempt function for two reasons. First, none of the alternatives are suitable as will be discussed below. Second, we provisionally conclude that there are other ways to mitigate the concerns over the AG's role in contempt and possible conflicts of interest which do not involve moving the functions to another body. The

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39 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 14.

40 See paras 7.29 to 7.48 below.

41 Borrie and Lowe, *The Law of Contempt* (4th ed 2010) p 542.

42 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 13.

ways we propose that the concerns can be mitigated are discussed in the following section and involve, in short: reform to the requirement for consent by the AG to bring proceedings for contempt by publication while proceedings are active; and reform to the immunity from judicial review that decisions of the AG enjoy. Notwithstanding that we provisionally propose that the AG retains the function, we first dispose of the other options.

Remove the contempt function and do not pass it to another body

7.31 It would be possible to remove the AG's contempt powers but the result would be that public interest proceedings would be instituted by the court on its own motion or perhaps on application by a party.[43]

7.32 One academic told us the power the AG has over contempt should be put in the hands of the courts because the AG is a politicised stakeholder concerned with re-election and other possibly conflicting interests. However, other stakeholders thought it better that the AG (rather than judges) decided whether contempt proceedings should be initiated. For example, a media lawyer told us that they would prefer that the power to make a decision on whether to proceed with contempt proceedings be left with the AG rather than with the judge seized in the case, because, in their experience, the judge may be too close to the matter. Similarly, an academic specialising in journalism said the AG may sometimes be better placed to make an objective assessment of the public interest because, unlike the judge, they are separated from any ongoing proceedings.

7.33 In cases where a journalist refuses to reveal sources, *Arlidge, Eady & Smith* argues that the AG rather than the court should initiate contempt proceedings.[44] Similarly, Robertson and Nicol point to the comments of the judge in *Attorney General v Lundin*[45] that the matter should be referred to the AG "so that it could be dealt with in the calmer arena of the Divisional Court".[46] Invoking article 6 of the European Convention on Human Rights ("ECHR"), which protects fair trial rights, they argue that in such circumstances, it would be "invidious for the judge immediately and personally concerned to double up as contempt prosecutor".[47] They suggest that if a court initiates proceedings against a journalist then lawyers should always request that the matter be referred to the AG.[48]

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43 Where a party seeks to bring proceedings for strict liability contempt then there would either be no consent requirement or an application would include a permission stage. We do not pursue those points in discussion of this alternative because, as we explain below, this alternative does not seem appropriate. However, consent and permission issues are discussed separately below from para 7.52.

44 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") para 9-267, considering the cases of *Attorney General v Mulholland and Foster* [1963] 2 QB 477 and *Attorney General v Lundin* (1982) 75 Cr App R 90. In both cases, the Courts found in favour of the AG in bringing proceedings by rejecting claims for protection from disclosure of matters between journalists and their sources.

45 *Attorney General v Lundin* (1982) 75 Cr App R 90.

46 G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-059.

47 Above; *Kyprianou v Cyprus* App No 73797/01.

48 G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-059.

7.34 In addition to the above, trial judges are only in a position to take action in respect of contempts committed in relation to the trial on which they are sitting, and only if they witness them or are informed of them. If they are not so informed, there is a chance that, for example, publications which may jeopardise the administration of justice may go unnoticed. Alternatively, if there is no trial judge yet assigned to a matter (for example, if the defendant in a criminal prosecution has been arrested but not yet charged), there would be no judge to deal with a contempt were one to occur. In such situations, it is clearly more suitable for the AG to retain its function in bringing contempt proceedings than for that role to lie only with the courts.

7.35 Although there may be reasons to be concerned about the AG's role in contempt, there are both principled and practical reasons why it is inappropriate to leave solely with the courts decisions about whether to initiate proceedings, and why it is appropriate to have a body of some kind that makes that decision. As set out above, courts should not be the victim, prosecutor and judge, and the AG may be better placed to monitor possible contempts. As for whether judges could refer possible contempts to another judge (either of the same court or of the High Court) rather than for the role to sit with the AG, first, this would not be possible where no judge has yet been assigned to a case (as discussed above). Secondly, the AG, as guardian of the public interest, is in a better position to reach a decision on whether contempt proceedings are warranted in the public interest.

Pass the contempt functions to the Director of Public Prosecutions

7.36 The only existing person or body that has been suggested to us as an alternative to the AG is the DPP, who is supported by the CPS.

7.37 McGarry, for example, points to the post of DPP as one that is non-political and at arm's length from government.[49] Another academic suggested the DPP would be more appropriate and impartial than the AG. A lawyer told us there is "no better solution" than "to have someone on the outside dealing with it" and suggested a dedicated unit in the CPS which would develop expertise in dealing with contempt, drawing a parallel with the CPS' role in looking at whether there is a public interest in prosecutions relating to social media.[50]

7.38 Another lawyer who supported shifting the responsibility to the CPS suggested that if a contempt arose in a criminal trial, it would still be possible to avoid any 'cross-contamination' between different CPS units:

> The CPS is quite good at creating Chinese walls between teams. So, the first prosecution team might witness it, and then the investigating team would need to have a Chinese wall between them. I see that as an operational problem, but probably one that is not too difficult to overcome – [it would] just need some sort of separation between teams.

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49 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023),17.

50 The CPS has published detailed guidance on assessing the public interest in cases affecting the media. Crown Prosecution Service ("CPS"), *Legal Guidance, Media: Assessing the public interest in cases affecting the media* (updated 16 February 2022).

7.39 However, we also heard that shifting the responsibility to the DPP would place a significant resourcing burden on the CPS. In addition, we heard that the possibility of a specialist CPS unit taking on contempt might be limited because the reality is that it would be resource-dependent.

7.40 Stakeholders frequently raised concerns that the AG should have commenced proceedings in some instances but did not. However, we also asked whether, if the AG's function were to be moved, the possibility that decisions *not* to bring proceedings against someone who is a whistle-blower, for example, might be lost. To this, a lawyer responded that the CPS also carries out a public interest assessment in deciding whether to bring proceedings, and that should suffice:

> You have to trust the CPS. And the CPS Full Code Test involves a public interest consideration. You could create a system where someone of a certain rank has to sign off on contempt proceedings. But the idea that the AGO necessarily has a better grasp of it than senior people at the CPS who deal with public interest decisions on a daily basis is slightly insulting.

7.41 While we appreciate the arguments for passing the functions to the DPP, our provisional view is that there are overriding conceptual and practical reasons why it would be inappropriate to pass the AG's contempt function to the DPP: contempt is not a criminal offence. In contrast, the AGO has personnel with specialisation across civil and criminal law. There is a risk that public confidence will be diminished if a prosecuting authority is seeking to imprison people for non-criminal conduct. Where conduct is criminal – as some interferences with the administration of justice are – then the decision to commence proceedings should rest with the DPP, but not otherwise.

Pass the contempt function to a new body

7.42 An alternative to passing the AG's contempt functions to the DPP would be to pass those functions to a new body. What form might such a body take?

7.43 One possible model would be the creation of a non-political, arm's length post of "Director of Civil Proceedings". This was suggested in 1990 by the former Lord Chief Justice, Lord Woolf of Barnes (then Sir Harry Woolf), who said that there was "[no] better alternative"[51] because that person "would be outside politics and would hold office independently and irrespective of the government of the day. He would have no responsibilities for advising the government or acting on behalf of the Government".[52] Lord Woolf explained that the role would involve the postholder undertaking the AG's contempt functions, but as part of a broader remit.

> [The Director] would initiate proceedings whenever in his judgment this was required in the public interest ... either on his own initiative or on the instigation of members of the public. … He would be responsible for providing arguments to assist the court not only in cases where at present the Attorney-General would provide an amicus at the request of the court but also in those cases where in his view the issues were

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51 Sir Harry Woolf (later Lord Woolf of Barnes) in Sir Harry Woolf, *Protection of the Public: A New Challenge* (1990) p 109.

52 Above, p 110

such that *inter partes* argument might not adequately draw attention to the broader issues. … He would be responsible for initiating and conducting proceedings for contempt to hear a litigant who is vexatious prevented from bringing proceedings without the leave of the court and proceedings relating to charities and coroners' inquisitions. He could also be responsible for enforcing or seeking the discharge of injunctions when the party in whose favour they were granted is unwilling to do so but the law is being brought into disrepute by the injunction being openly flouted. … He would have general responsibility for the development of the civil law and in particular public law.[53]

7.44 The suggestion being made by Lord Woolf is that all of the AG's functions with respect to civil litigation would be relocated to a Director of Civil Proceedings. We have not heard from stakeholders that this is required and, in any event, such a proposition plainly falls beyond our Terms of Reference. We are interested in views about whether the power to bring contempt proceedings should lie with the AG or rest with an alternative person or body, and are not consulting on any wider remit.

7.45 There could be other options but, whatever the structure, an individual or body would need the power and resources to institute and conduct proceedings.

7.46 Our provisional view is that although the establishment of a new body holds appeal in principle, especially as it might avoid the problem of a DPP prosecuting non-criminal conduct, there is much that goes against the idea. The resource commitment required for the establishment of a new body would be substantial and potentially disproportionate amid many other demands on the justice system, even taking account of the fact that some resources could presumably be relocated from those that currently support the AG. There would be practical issues such as identifying suitable oversight arrangements and the relationship between the independent body and a responsible minister (who would presumably be the AG, though not necessarily). Where consultees are of the view that the powers of the AG in respect of contempt should be passed to a new body then we would welcome additional comments about oversight arrangements, specifically, what the oversight regime should be and to whom the body should report.

Retain the contempt function

7.47 The AG's role inevitably gives rise to conflicts of interests, and stakeholders have expressed legitimate concerns about the way that those conflicts arise in the contempt context. Our provisional conclusion, however, is that the contempt function should not be removed from the AG. To remove the AG's contempt function would constitute a major departure from the constitutional status quo of an office that has been recognised by the courts to be the appropriate body to bring contempt proceedings.[54] Although the benchmark decisions on the constitutional importance of the AG's contempt function are now some fifty years old, and the role may arguably have become more politicised over that time, in our provisional view removing the role would not be appropriate. None of the alternatives is satisfactory and (as we will

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53 Sir Harry Woolf (later Lord Woolf of Barnes) in Sir Harry Woolf, *Protection of the Public: A New Challenge* (1990) pp 110-112.

54 See paras 7.10 to 7.11 above. See *Attorney General v Times Newspapers Ltd* [1973] QB 710, and *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL).

explain in the remaining parts of this chapter) the concerns that have been identified can be addressed in other ways.

Consultation Question 50.

7.48 We provisionally propose that the Attorney General should retain the power to bring contempt proceedings in the public interest.

Do consultees agree?

MITIGATING CONFLICTS OF INTEREST

7.49 As the discussion above indicates, where the AG has a real or perceived conflict of interest between the public interest contempt function and their allegiance to government then that is problematic. In this part of the chapter, we consider two aspects of the law where reforms may serve to mitigate the risks that decision-making is compromised by any conflicts.

7.50 We consider whether there should be reform to:

(1) the current requirement under section 7 of the CCA 1981 that proceedings for strict liability contempt by publication can only be brought by or with consent of the AG (other than where a court institutes proceedings of its own motion),[55] looking at:

(a) removal or modification of the consent requirement; and

(b) circumstances where the potential defendant is a politician, with consideration of a specific exception.

(2) the current position that the AG's decisions in relation to consent are not judicially reviewable.

7.51 While our provisional proposals as to liability (in Chapter 5) would alter the way that contempt liability functions when contempt is committed by publication while proceedings are active, they would not affect the role of the AG in these respects. As such, we discuss the issues in terms of the law as it stands under the CCA 1981. In addition, in Chapter 8 we make provisional proposals that all contempt applications should require permission of the court.[56] The requirement for consent by the AG sits apart from that, but is relevant because if the consent requirement were removed then there would still be a requirement for permission from the court before an application could proceed.

The consent requirement

7.52 It has been the position since 1981 that a person must obtain the consent of the AG if they wish to bring proceedings against a publisher for contempt by publication while

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55 CCA 1981, s 7.

56 See paras 8.204 to 8.212 below.

proceedings are active.[57] This is the effect of section 7 of the CCA 1981; proceedings for strict liability contempt by publication can only be instituted by or with consent of the AG, other than where a court institutes proceedings on its own motion.[58]

7.53 There are occasions where the AG's consent is required to prosecute a criminal offence. For example, it is required in respect of prosecutions of various inchoate offences and some offences which involve ECHR rights, such as the offences of stirring up hatred under the Public Order Act 1986.[59] There are respects in which such consent requirements are problematic. We looked at these in detail in the criminal context in our 1998 report on Consents to Prosecution, noting two criticisms of consent requirements:

(1) consent provisions *per se*, irrespective of whose consent is required, remove the right of private prosecution; [and]

(2) consent provisions involving a decision by a Law Officer risk being politically biased, or having the appearance of political bias.[60]

7.54 We said that the right of private prosecution is widely accepted as fundamental to the criminal legal system as it derives from the "constitutional principle of individual liberty based on the rule of law".[61] It is also an important safeguard against "inertia or partiality on the part of the authority",[62] or wrongful or biased failure by the authorities to act.[63] Therefore, in general, this right should not be restricted by the acts or omissions of an official unless a good reason exists.

7.55 But, as we pointed out, there may be good reasons for consent requirements, including where they:

- prevent proceedings being brought where to do so would be inappropriate;[64]

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57 Before 1981, private individuals could initiate contempt proceedings but the "usual practice" was to refer contempts by publication to the AG. See *Arlidge, Eady & Smith* (2019) para 2-217.

58 See generally *Arlidge, Eady & Smith* (2019) paras 2-217–2-220; *Taylor v Topping* [1990] TLR 110.

59 Public Order Act 1986, ss 27, 29L(1). For discussion of consent requirements in criminal matters see: CPS, *CPS Guidance, Consents to Prosecute* (updated December 2023); CPS, *CPS Guidance, Racist and Religious Hate Crime - Prosecution Guidance* (updated March 2022); AGO, *AGO Guidance, Consent of the Attorney General to Prosecute: How to Apply* (updated June 2021); and Consents to Prosecution (1998) Law Com No 255.

60 Consents to Prosecution (1998) Law Com No 255, para 4.2. For a wider discussion on the two core critiques, see paras 4.1-4.15.

61 Lord Simon of Glaisdale speaking during the Second Reading debate on the Prosecution of Offences Bill in 1984. Hansard (HL) 29 November 1984, vol 457, col 1068, as cited in Consents to Prosecution (1998) Law Com No 255, para 4.4.

62 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 477 (Lord Wilberforce).

63 Above at 498 (Lord Diplock).

64 Consents to Prosecution (1998) Law Com No 255, para 3.29, citing J Rozenberg, *The Case for the Crown: The Inside Story of the Director of Public Prosecutions* (1987) p 169.

- ensure uniformity in the administration of the law;[65]
- prevent vexatious litigation;[66] and
- restrict prosecutions in circumstances where a law is over-inclusive but was not intended to catch those who do not offend the spirit of the legislation.[67]

7.56 There is also a safeguard in the criminal context, noted in the *Framework Agreement between the Law Officers and the Director of Public Prosecutions*, that it is:

> a constitutional principle that when taking a decision whether to consent to a prosecution, the Attorney General acts quasi-judicially and independently of government, applying well established prosecution principles of evidential sufficiency and public interest.[68]

Removal or modification of the consent requirement in contempt

7.57 Removing the consent requirement in section 7 may alleviate some of the concerns about political bias on the part of the AG because proceedings would not depend on their decision-making alone. However, the consent requirement limits the potentially vast number of matters that may otherwise be pursued against the media or against anyone else who publishes potentially contemptuous material while proceedings are active. Without some way of limiting these actions, it is arguable that the exposure to litigation would have a chilling effect on reporting by the media (or bloggers or campaigners) and would strike the wrong balance between the administration of justice and freedom of expression.[69]

7.58 Retaining a consent provision is one way of limiting actions, but there are other ways of addressing the concern that the AG's exclusive power is inappropriate. One option would be a parallel approach, whereby to bring proceedings in the public interest, an applicant would be required either to obtain consent from the AG or to obtain permission from the court. Another would be a sequential approach, whereby an applicant would be required to first seek consent of the AG and if consent is refused then may seek permission from the court.

7.59 There are advantages and disadvantages to both approaches. Both options would have resource implications for the judiciary because both options may require the involvement of the courts in matters of which they are not currently seized. The parallel option allows litigants to choose between obtaining consent from the AG or

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65 Consents to Prosecution (1998) Law Com No 255, para 3.31(a), citing The Attorney General's speech in respect of the Obscene Publications Bill in 1959 in Hansard (HC) 24 April 1959, vol 604, col 841.

66 Above, para 3.31(b), citing Hansard (HC) 24 April 1959, vol 604, col 843.

67 Above, para 3.31(c), citing Hansard (HC) 24 April 1959, vol 604, col 844.

68 AGO, *Framework Agreement between the Law Officers and the Director of Public Prosecutions* (18 December 2020) para 51.

69 In Consents to Prosecution (1998) Law Com No 255, paras 6.35-6.37, we said that prosecutions which posed risks to ECHR rights were one category where consent should be required, although we said that it should be consent of the DPP not the AG. At para 6.37: "We recommended that a consent provision should be used to control the prosecution of those offences where it is very likely that a reasonable defendant would contend that a prosecution for the particular offence would violate his or her Convention rights".

from the courts, which may result in confusion for litigants or inconsistencies in outcomes. It may also result in an unnecessary burden on judicial resources where applicants go straight to court to seek permission for a matter that the AG could have handled swiftly. The sequential route is procedurally clearer, but not without its problems. The sequential route may mean that proceedings take longer, and the subsequent option to seek permission from the court is in effect a right to appeal against the AG's refusal of consent. Still, the subsequent permission application would be less cumbersome than seeking judicial review of the AG's refusal (were judicial review permitted, which we discuss below). We do not see the sequential route operating with the first application to the court and if permission is refused, a subsequent application to the AG.

7.60 What the parallel or sequential route looks like may depend on whether the applicant is a party to active proceedings. For example, it would be possible to require AG consent for contempt applications by a non-party, but not where the contempt application is made by a party. The retention of a consent requirement for non-party applications would reflect the traditional view that the AG is the appropriate body to represent the public interest. The removal of a consent requirement for non-party applications would reflect the concerns of critics that the AG's representation of the public interest is inevitably compromised by conflicts.

7.61 We should be clear though on two points about permission of the court, both of which flow from our provisional proposals on procedure in Chapter 8:[70]

(1) Were the AG's consent not to be required, permission of the court would still be required to institute contempt proceedings.

(2) Were the AG to give consent, then permission of the court would not be required to institute contempt proceedings.

[70] See paras 8.204 to 8.212 below.

Consultation Question 51.

7.62 We have identified three possible options for consent or permission to institute proceedings for strict liability contempt by publication under the Contempt of Court Act 1981 (which, under our provisional proposals in Chapter 5, will become contempt by publication where proceedings are active).

Option 1 (the current approach): The consent of the Attorney General is required before proceedings can be instituted.

Option 2 (the parallel approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. The potential applicant would be able to choose whether to seek Attorney General consent or court permission.

Option 3 (the sequential approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. If the Attorney General refuses consent, the potential applicant would subsequently be able to seek permission from the court.

We seek consultees' views on their preferred option and the reasons for their preference.

7.63 Should the position be different depending on whether the potential applicant is or is not a party to the active proceedings where the alleged contempt has occurred?

Where the potential defendant is a politician

7.64 If the requirement to obtain the consent of the AG remains, the question arises whether there should be a specific exception in cases where the potential defendant is a politician. This warrants consideration because the possibility of a conflict of interest on the part of the AG is particularly acute in these circumstances. We explain these concerns above.[71]

7.65 There are different ways in which these concerns might be addressed. For example, the AG's contempt function in these circumstances could be transferred to another body or person, such that the AG would not have responsibility for making decisions about instituting proceedings in these circumstances. However, we have already considered and rejected the appropriateness of any other body replacing the AG.[72] McGarry provides another suggestion, which is that a practice direction could encourage judges to exercise their powers and institute proceedings of their own motion.[73] However, that approach would not grapple fully with the conflict at hand and risks politicising the judiciary if they are acting on their own motion. There may also be

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71 See paras 7.17 to 7.28 above.

72 See paras 7.29 to 7.46 above.

73 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 15.

a less cohesive approach, if different judges take markedly different views as to whether their powers ought to be exercised.

7.66 The most sensible solution may be to remove the AG consent requirement in circumstances where the potential defendant is a politician. Instead, an applicant would be required to seek the permission of the court, which we provisionally propose in all circumstances in Chapter 8. There is some difficulty when carving out a category which would be exempt from the AG consent requirement. Removing the consent requirement from the AG in all instances where any political office-holder is involved could be overinclusive and thus, disproportionate. It would mean, for example, that the AG's consent power would be removed where a mayor of a major city, whether or not politically opposed to the government but who has never been a Member of Parliament, publishes an article that might amount to contempt. The AG exercises a public interest function so any attempt to remove an aspect of that function should be cast narrowly. There is also a need to bring some certainty to the circumstances that would not require the consent of the AG. Therefore, we provisionally propose that the consent requirement would be removed only where the potential defendant is a current or former member of either House of Parliament.

7.67 It is also arguable that non-parties should be able to bring proceedings in these circumstances. For example, where a publication that may amount to contempt emanates from a political ally, and the AG decides not to bring proceedings, there is a case for allowing a non-party to fill the gap. This would not necessarily preclude the AG from representing the public interest as an intervening party, whether at a permission stage or in proceedings. Indeed, it would be appropriate for the AG to be heard, given the AG's constitutional role representing the public interest. The point is that the independence of the courts and the permission filter would provide a suitable control in the absence of an AG consent requirement. Where critics are concerned that the AG has elected to bring proceedings because the defendant is a political foe, of course it would not be possible for a non-party to fill any gap (proceedings would already be underway). However, in the event that unmeritorious proceedings are brought, they would be subject to the usual judicial scrutiny, and the defendant would be able to make representations to an independent judge or panel of judges as to why the proceedings should not be allowed to continue.

Consultation Question 52.

7.68 Where the potential defendant is a current or former member of either House of Parliament, and the allegation is of contempt by publication when proceedings are active, we seek consultees' views on whether:

(1) the requirement to obtain the Attorney General's consent to bring contempt proceedings should be removed and replaced with a requirement to obtain permission of the court;

(2) if so, the AG should have a right to be joined as an intervener; and

(3) non-parties should be able to institute contempt proceedings.

Judicial review of decisions by the Attorney General

7.69 If the consent requirement in section 7 is retained in complete or modified form, then the question arises whether the AG's decisions to bring or consent to proceedings for contempt by publication should remain immune from judicial review. If judicial review were an option then this would mitigate the risk that decisions are or are perceived to be based on inappropriate considerations.

7.70 It has long been the law that the AG's decisions are immune from judicial review by the courts.[74] In *Gouriet v Union of Post Office Workers*, the House of Lords held that the AG is accountable to the public only through Parliament:[75] "the Attorney-General's discretion is absolute and non-reviewable" by the courts.[76] This, it was held by the House of Lords, is because the courts are ill-equipped to make decisions on the public interest, and that is a function to which the AG is well-suited.[77] In the words of Lord Wilberforce:

> The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.[78]

7.71 This was affirmed in *R v Solicitor General ex parte Taylor*:

> The authorities … which lay down the rules in relation to the Attorney-General, point to his unique constitutional position …. Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so.[79]

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74 See *Gouriet v Union of Post Office Workers* [1977] QB 729 (CA) at 766-768 (Lawton LJ) and 772 (Ormrod LJ); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) (re relator actions); and *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 213, referring to the clear position as laid down by precedent that decisions by the AG cannot be judicially reviewed. In that case, counsel argued that where the law officers refuse to grant consent on the basis that there is insufficient evidence to prosecute, "that decision may be reviewed on application by the victim of the offence on the grounds of Wednesbury unreasonableness, error of law or procedural irregularity or unfairness" (217-218). It was argued that, given developments in public law since *Gouriet*, the exercise of all public power was reviewable by the courts (at 218). However, the Court did not accept that argument given the extent of judicial precedent against the reviewability of decisions of the law officers and the "unique constitutional position" of the office (at 218). The Court said that: "If [the AG's] office was invented by statute tomorrow without the weight of precedent as to his position, there would be great force in [counsel's] submission, but they cannot override the clearly established position" (at 218). See also *Arlidge, Eady & Smith* (2019) paras 2-226–2-233.

75 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 512 (Lord Edmund-Davies) and 524 (Lord Fraser).

76 Above at 512 (Lord Edmund-Davies).

77 Above at 482 (Lord Wilberforce).

78 Above.

79 *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 218-219.

7.72 The AG's immunity from judicial review has been the subject of academic criticism.[80] Cram and Taylor consider whether refusals by the AG to give consent should be amenable to judicial review given the criticisms the AG has faced and the fact that Parliamentary scrutiny of the AG is lacking.[81] Mba has also suggested that judicial review is necessary to uphold the rule of law, enhancing both the perception and reality that the AG's decisions are independent and impartial.[82]

7.73 It has been suggested in the literature that the AG's decisions in respect of section 7 should be susceptible to judicial review because the source of the AG's power to consent is statutory, and statutory powers are reviewable by the courts.[83] This is constitutionally acceptable "because courts are simply enforcing those limits on statutory powers that Parliament intended when it created such powers".[84]

7.74 Judicial review is also available in respect of non-statutory powers. The bodies and powers that are susceptible to judicial review have expanded in recent years with a shift towards increasing oversight over the exercise of Executive power.[85] Following *Council of Civil Service Unions v Minister for the Civil Service*[86] it is clear that decisions taken under prerogative powers are also subject to judicial oversight provided that the issues raised are justiciable.[87] It has been said that:

> the judgment in *Gouriet* is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or the prerogative.[88]

7.75 In *Council of Civil Service Unions,* Lord Diplock could see "no reason why simply because a decision-making power is derived from a common law and not a statutory

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80 See *Arlidge, Eady & Smith* (2019) paras 2-226–2-235.

81 I Cram and N Taylor "The Law Commission's Contempt proposals - getting the balance right?" [2013] *Criminal Law Review* 465, 474-475.

82 O Mba, "Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law" (2010) 2 *Oxford University Comparative Law Forum*.

83 In *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815 at 847, Lloyd LJ stated that "if the source of power is a statute or subordinate legislation under a statute then clearly the body in question will be subject to judicial review". See also, M Elliott and R Thomas, *Public Law* (4th ed 2020) p 571. See also J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) pp 29-30, as cited in *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 at [14]: where "the source of the discretionary power … rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked".

84 M Elliott and R Thomas, *Public Law* (4th ed 2020) p 501.

85 Above, see ch 14 from p 568.

86 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

87 M Elliott and R Thomas, *Public Law* (4th ed 2020) from p 571.

88 O Mba, "Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: an Imperative of the Rule of Law" (2010) 2 *Oxford University Comparative Law Forum*, (citing *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864, [1967] 2 All ER 182, CA; and *Laker Airways Ltd v Department of Trade and Industry* [1977] QB 643, [1977] 2 All ER 182, CA).

source, it should *for that reason only* be immune from judicial review".[89] Although the prerogative powers of the AG were not expressly considered in that case, it could be argued that the implication is that both the statutory and prerogative powers of the AG should be subject to judicial review.

7.76 Regardless of the source of the power to bring proceedings, there is considerable force in the argument that the AG's decisions in respect of bringing contempt proceedings should be subject to judicial review. Susceptibility to judicial review enhances administrative decision-making, ensures good governance by holding the Executive to account, and improves public confidence in Executive power.[90] Decisions of the DPP and other prosecuting authorities are subject to judicial review, albeit that "only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator".[91]

7.77 The immunity from judicial review that the AG currently enjoys exacerbates the constitutional concerns surrounding their contempt role. The decision whether or not to act is a decision made by a government minister and the ability to judicially review such a decision is an important constitutional safeguard. It would operate to mitigate the risk that decision-making is politicised.

7.78 If decisions of the AG are to be susceptible to judicial review, the AG may need to give reasons for their decisions. The AG is not presently required to give reasons and it has been said that "there can be no criticism" of their refusal to give detailed reasons for declining to bring contempt proceedings.[92] However, were decisions by the AG to be amenable to judicial review then reasons would certainly be useful to the courts. There may be reasons why it would be inappropriate for the AG to be required to publish this type of information. In *Gouriet*, for example, the House of Lords said in an industrial relations context that:

> it might be disastrous if the Attorney-General had to give reasons for not prosecuting or applying for injunctive relief in a given set of circumstances. There might be a serious strike impending which is likely to be settled and where the instituting of proceedings would only be inflammatory of the situation.[93]

7.79 In the consultation questions that follow, we invite consultees to offer views about whether all decisions on contempt should be judicially reviewable, as well as those relating specifically to circumstances where the defendant is a current or former member of either House of Parliament, given (as discussed above) the conflict of interest is strongest in those circumstances. We also ask consultees about who should have standing to make an application for judicial review, including whether there is a case for non-parties to be able to do so. Where an AG has declined to

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89 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 (Lord Diplock) (original emphasis).

90 M Elliott and R Thomas, *Public Law* (4th ed 2020) pp 492-494 and 599. See also a general discussion on the effectiveness of judicial review from p 602, in particular, pp 627-628.

91 *R (Corner House Research) v Director of Serious Fraud Office* [2008] UKHL 60, [2009] AC 756 at [30] (Lord Bingham).

92 *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 222.

93 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 471.

institute proceedings against, for example, a political ally or donor, even though it appears there is a strong case for contempt, then it is possible that a non-party should be able to seek judicial review. Although the current "sufficient interest" test may permit non-parties to seek judicial review in those circumstances, it may be desirable that there is some certainty about who would or would not have standing.[94] We are interested in whether this requires reform and whether there should be any exclusions to standing. For the avoidance of doubt, this discussion of judicial review and the scope of the consultation questions below is limited to decisions of the AG in relation to contempt of court. As indicated, the AG exercises a number of unique functions which are not under consideration in our review.

Consultation Question 53.

7.80 We seek consultees' views on whether a refusal by the Attorney General to bring contempt proceedings or consent to contempt proceedings should be judicially reviewable:

(1) in all circumstances; or

(2) where the potential defendant is a member or former member of either House of Parliament.

Consultation Question 54.

7.81 If decisions by the Attorney General were to be judicially reviewable, we seek consultees' views on which of the following should be able to bring an application for judicial review:

(a) a party to the active proceedings;

(b) a person or body who was refused consent to bring proceedings;

(c) a person or body who has requested that the AG bring proceedings; or

(d) any person or body acting in the public interest.

CLARITY AND PREDICTABILITY IN PRACTICE

7.82 In the paragraphs above, we considered concerns about the involvement of the AG in contempt proceedings and we set out provisional proposals which seek to mitigate those concerns. We turn now to the exercise of the AG's function in practice, in respect of which stakeholders have drawn attention to the need for consistency and predictability in AG decision-making.

[94] For an analysis of the interpretation of the sufficient interest test, see J Bell, "The Resurgence of Standing in Judicial Review" (2024) 44 *Oxford Journal of Legal Studies* 313.

7.83 It is commonplace to observe that the approach to the contempt role will vary among AGs, with some more active than others in tackling potential contempts. Sometimes this is put down to strength of character and the ability to resist political pressure.[95] However, the AG's role is to take the actions that are considered to be justified.[96] Discretion is inherent in the role and difference is unavoidable. Uniformity is neither a realistic nor appropriate goal. Nevertheless, this does not preclude consistency and predictability in the approach that is taken to exercising discretion.

7.84 Fidelity to the rule of law demands that laws should be certain and predictable, so that people can know with confidence, before they act, whether their behaviour will be lawful or unlawful. This is particularly important where a breach of the law may result in imprisonment. So, though it is inevitable that different AGs may reach different conclusions about what the public interest may require in any given circumstances, there should be as much transparency and certainty as possible about the process and criteria for decision-making, and the outcomes and reasons for decisions.

Practice

7.85 In our 2012 consultation paper we noted that stakeholders raised concerns that the factors the AG takes into account when considering whether to bring proceedings were not transparent for the media or the wider public.[97] We noted that this created a risk of a lack of consistency in the decisions of different AGs.[98]

7.86 We raised the possibility of the AGO publishing guidance setting out the factors to be taken into account when deciding whether to bring proceedings, similar to the Code used by the CPS.[99] We said that this would:

> provide guidance for the media on the interpretation of the law, transparency for the public, and could encourage consistency of decision-making between different Attorneys General. For example, aside from considering the strength of the evidence, it might also be important for the Attorney to consider various public interest criteria. These could include, for example, the impact of the alleged contempt on the active proceedings (including the cost of any consequences for those proceedings), whether the publication was repeated, the motivation of the publisher, the likely penalty which would follow a contempt finding, whether the publisher has previously been held in contempt, the likelihood of the conduct being repeated, the resources of the publisher, or other public interest criteria.[100]

7.87 We were also of the view that improving the guidance would strengthen compliance with article 10 of the ECHR, which protects freedom of expression:

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95 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 13 citing, J Edwards, *The Attorney General, Politics and the Public Interest* (1984) p 321.

96 *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 311 (Lord Diplock).

97 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.60.

98 Above.

99 Above.

100 Above, para 2.63.

> Compliance with article 10 would be strengthened by understanding the factors that the Attorney considers, since this would remove any disadvantage for the media by ensuring that publishers can regulate their conduct in the knowledge of the circumstances in which the Attorney will exercise the power to bring contempt proceedings.[101]

7.88 Our provisional proposal that the AGO publish a quasi "prosecution policy" was not the subject of any report before the project was suspended, although it received some academic support. Cram and Taylor agreed that our provisional proposal:

> would encourage consistency in decision-making and would provide transparency for the public. It would also provide much needed clarity as to the scope of [the exception for publications made as or as part of a discussion in good faith of public affairs or other matters of general public interest in] s.5 [of the CCA 1981] and the factors relevant to the public interest, providing publishers with greater certainty as to when it would apply. The absence of clarity is likely to produce a chill on comment.[102]

7.89 Two documents have since been published:

(1) "The Law Officers' approach to contempt of court referrals" ("The Law Officers' Approach") was first published on 15 September 2021.[103]

(2) The "contempt public interest framework" (also titled, and referred to here as "The Contempt 'Code'") was first published on 20 July 2022.[104]

7.90 The Law Officers' Approach explains what contempt is and sets out the different ways it might be committed.

7.91 The Contempt Code sets out how the AG makes decisions. It is notable that there are different names ascribed to this document: the government website refers to the document as the "Contempt Public Interest Framework", however the title of the document once opened is "The Contempt 'Code'".

7.92 The Contempt Code is modelled on the approach taken in the CPS Code for Crown Prosecutors, identifying the two limbs of the evidential and public interest tests. The evidential test is whether there is sufficient evidence to prove contempt to the criminal standard. Evidence will be sufficient if "it is more likely than not that the Court hearing the matter, directing itself appropriately in law, will decide that the defendant is in contempt of court".[105] The public interest test is whether it is in the public interest to commence contempt proceedings, which requires that the AG must be satisfied that

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101 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.61.

102 I Cram and N Taylor, "The Law Commission's Contempt proposals—getting the balance right?" [2013] *Criminal Law Review* 465, 474.

103 AGO, *Guidance: The Law Officers' approach to contempt of court referrals* (15 September 2021, updated 20 July 2022).

104 AGO, *Contempt public interest framework* (20 July 2022) ("The Contempt 'Code'") is available as a word document at AGO, *Contempt Public Interest Framework* (20 July 2022).

105 AGO, *Contempt public interest framework* (20 July 2022) ("The Contempt 'Code'") p 1.

"the public interest factors tending against committal proceedings are outweighed by those tending in favour".[106]

7.93 The Contempt Code is reproduced in its entirety below.

[106] AGO, *Contempt public interest framework* (20 July 2022) ("The Contempt 'Code'") p 1.

Contempt Public Interest Framework

As with the decision about whether to commence a criminal prosecution under the Code for Crown Prosecutors, the normal procedure for deciding whether to instigate committal proceedings against a defendant is to consider first whether the evidential test is met and, if it is, to consider whether it is in the public interest to commence proceedings. In reaching a view on these matters the questions set out below are likely to be of assistance.

Whether there is sufficient evidence to prove contempt to the criminal standard.

(a) Can the evidence be used in court? I.e., is there any question over the admissibility of certain evidence?

(b) Is the evidence reliable? I.e., are there any reasons to question the reliability of the evidence, including its accuracy or integrity?

(c) Is the evidence credible?

(d) Is there any other material that might affect the sufficiency of evidence?

The evidence will be "sufficient" where it is more likely than not that the Court hearing the matter, directing itself appropriately in law, will decide that the defendant is in contempt of court.

Whether it is in the public interest to institute contempt proceedings.

The question of public interest should normally only be considered once it has been determined that the evidence is sufficient. However, there may be circumstances where it is appropriate to consider the public interest first, as where it is considered that, even if there is sufficient evidence, proceedings would not be in the public interest.

Proceedings will not be brought unless the Law Officer is satisfied that the public interest factors tending against committal proceedings are outweighed by those tending in favour. In considering the public interest the Law Officer may be assisted by considering the questions below, which are not exhaustive, and may not be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case. It is possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction.

(a) How serious is the conduct (i.e., what was, or could have been, the impact on the administration of justice?)

(i) What was the harm caused: was it actual or potential? How have the courts previously described the effect (or possible effect) of the particular conduct on the administration of justice, if at all?

(ii) Was there endangerment or harassment to participants, or disruption to the proceedings?

(iii) How 'visible' was the contempt (e.g. for publication contempt, (i) the nature of the publisher, (ii) the likely audience, (iii) how likely was it to poison the minds of potential jurors or affect the availability of evidence and (iv) the remoteness of the trial, if any)?

(b) What is the culpability of the alleged contemnor?

(i) What was their level of involvement and knowledge?

(ii) Was the conduct premeditated or planned?

(iii) What was their motivation?

(iv) Have they repeated their conduct or threatened to?

(v) Have they been accused of similar previous conduct or previously been warned?

(vi) What is the likelihood of repetition?

(vii) What is their age and maturity?

(viii) Has the alleged contemnor apologised for their conduct?

(c) Is there another public authority with the power to deal with the conduct?

(i) If so, has the conduct already been dealt with?

(ii) If the authority has not dealt with the conduct, what is the reason for them not doing so, and does the case nonetheless require some action from the perspective of protecting the administration of justice?

(iii) if the conduct is also a criminal offence, what is the status of any police investigation and might parallel contempt proceedings prejudice that investigation?

(d) Are contempt proceedings a proportionate response?

(i) Consideration should be given to whether the bringing of proceedings in front of a court and in public also has intrinsic merit – sometimes the court will take the view that a finding of contempt does not require the imposition of any sanction over and above the "public humiliation" perceived as attaching to a public judgment identifying the contemnor's reprehensible behaviour.

(ii) What is the likely resource commitment by the AGO and the wider justice system, especially where to issue proceedings could be regarded as excessive when weighed against any likely penalty? Law officers should not decide the public interest on the basis of this factor alone. It is essential that regard is also given to the other identified public interest factors, but resource commitment might, exceptionally, be a relevant factor when making an overall assessment of whether proceedings would be in the public interest.

7.94 This is a significant step forward in transparency and should increase consistency in decision-making.

7.95 However, there is no requirement for the AG to provide or publish reasons for decisions,[107] so there is no visibility about how a decision is made against those criteria, unless proceedings are commenced and the analysis is apparent from submissions or a judgment. As such, the Code does not assist as much as it might in adding certainty and predictability as to when proceedings are likely to be brought.

7.96 It is also noteworthy that the Contempt Code does not make express reference to previous findings of contempt against a potential defendant. These may be caught by factor (b)(v) ("Have they been accused of similar previous conduct or previously been warned?") or go towards a judgement about the likelihood of repetition under (b)(vi) ("What is the likelihood of repetition?"). We have been told by the AGO that knowledge of previous contempts will in some instances be a relevant factor.[108] It is an interesting omission, especially in its contrast with the Code for Crown Prosecutors where the public interest limb requires consideration of "whether the suspect has previous criminal convictions and/or out-of-court disposals and any offending whilst on bail or whilst subject to a court order".[109] However, information in relation to criminal offences will be more easily ascertained than information about previous contempts.[110]

7.97 It is not clear to us that the Contempt Code is well-known to stakeholders, since it was rarely referred to in meetings; we were often told that it is not clear what criteria are used and how the process works in practice.[111] Regardless of the Contempt Code, a range of media stakeholders including academics and lawyers told us they saw inconsistencies in AG decision-making. Multiple stakeholders told us that when one looks at the practices of different AGs it is clear that who the AG is at the time

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107 We discuss whether the AG should publish reasons for decisions in para 7.187 below.

108 See para 7.113 below.

109 CPS, Code for Crown Prosecutors, para 4.14(b)(iv).

110 On criminal records, see paras 10.215 to 10.237 below.

111 McGarry argues that the factors considered when deciding whether to commence contempt proceedings are not transparent and this means that "full accountability is not attainable". However, the Contempt Code may have been published after McGarry's work was completed. J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 13.

influences whether contempt proceedings are brought, and that practice has been inconsistent over the years. We were told that the inconsistency and uncertainty is particularly concerning to journalists, who find it unclear as to when proceedings will be brought and yet may be at the front line should a contempt application be made. We were told by one academic stakeholder that the fact that different approaches are taken compromises consistency in the administration of justice and the rule of law, and ultimately, a more uniform approach is needed.

7.98 On the other hand, some stakeholders did not consider the exercise of discretion to be a material issue. A criminal barrister told us there does not seem to be an issue of inconsistency, and AGs are "usually fair and sensible". A media legal adviser said that the fact that different AGs take different approaches, should be of no moment because journalists must simply avoid contempt and the advice they receive is the same no matter who the AG happens to be.

7.99 Despite the concerns about the criteria used, the current published guidance sets out clear and fairly detailed criteria for the making of decisions. Our provisional view is that problems do not lie with the guidance itself. Rather, the problems are that the guidance is not widely known, and it is not clear how the guidance is interpreted and applied in practice. We consider that greater clarity about when proceedings will be brought can be achieved if the AGO publishes a statement of practice setting out how decisions are made against the Contempt Code criteria and what weight is given to the different criteria. Wider publication of the Contempt Code would increase awareness of the factors the AG takes into account.

Consultation Question 55.

7.100 We provisionally propose that the Attorney General's Office should publish a statement of practice setting out the process used for decision-making under the "The Contempt Code", including the information that is typically gathered and relied upon, and indicative timescales.

Do consultees agree?

Pre-action letters

7.101 It is common practice for the AG to write a pre-action letter where contempt proceedings are being considered. *Arlidge, Eady & Smith* explains this process in relation to the media:

> In deciding whether or not to initiate proceedings against a newspaper proprietor or its editor, the Attorney General makes a practice of writing to the editor responsible for what he considers to be the offending publication, and asking whether there is any reason why contempt proceedings should not be brought, but pointing out that the editor is under no obligation to respond.[112]

[112] *Arlidge, Eady & Smith* (2019) para 15-2; see also G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-060.

7.102 Robertson and Nicol point out that this "usual practice" is a "useful opportunity and has often led to representations which have successfully persuaded the Attorney to take no further action".[113] In this way, it is a useful step towards ascertaining whether, on balance, it would be in the public interest to bring proceedings.

7.103 We have been told by the AGO that letters may be either to the effect of a caution in relation to a potential contempt or, if the AG is minded to bring contempt proceedings, then there will be a formal and detailed letter stating that. Both letters will include a statement that any response may be used in evidence.

7.104 We have not heard from stakeholders that there are any issues associated with this practice. On the contrary, we heard from media stakeholders who have experienced receiving letters from the AG, that this enables them to enter into a dialogue with the AG which affords them the opportunity to justify the publication and put forward explanations as to why contempt proceedings should not be launched. This, we heard, is useful because it provides a procedural safeguard where article 10 issues are involved. It also allows the parties to avoid litigation. For example, we were told that as a result of dialogue with the AG, one media organisation agreed to carry out training on contempt of court. One media stakeholder told us that although there was always uncertainty about the circumstances in which the AG might institute contempt proceedings, that uncertainty was acceptable because the opportunity for discussion and representations provided a safeguard. We heard that this sort of dialogue is not available where the CPS is involved in bringing proceedings.

7.105 We agree that this practice of sending pre-action letters is a useful one and should be continued. We would commend including, and explaining, this common practice in the Contempt Code, although we recognise that letters may not always be necessary.

7.106 Where a pre-action letter is sent to an editor, there is a question of whether it should be a requirement that the recipient be informed that any response explaining why proceedings should not be brought can be used in evidence if proceedings are brought.[114] Given that proceedings for contempt may result in imprisonment, there may be an argument for this. In criminal investigations the police caution tells a suspect that anything they say may be used in evidence. It would be beneficial for a potential defendant in the context of contempt to have the same information. This would be especially significant in cases where a defendant is not from a media organisation that has in-house lawyers.

7.107 The Civil Procedure Rules contempt application form (N600) includes a list of points about rights and cautions so it would not be out of place to expect it in a letter from the AG that presents an opportunity to respond.[115] Given that it is the AGO's practice to include in its letters a statement that any response may be used in evidence, we

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113 G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-060. A letter from the AG is considered in *R v Solicitor General ex parte Taylor* [1996] Admin LR 206 at 210-212.

114 G Robertson QC and A Nicol QC, *Robertson and Nicol on Media Law* (5th ed 2007) para 7-060 confirm that submissions made can be used by the AG in evidence.

115 See Contempt Application N600. The Family PR F600 form contains the same points. The application form under the CrimPR to punish for contempt of court by failure to comply with a court order is different, not setting out rights in the same way.

would commend the inclusion of this caution in the Contempt Code for purposes of transparency.

OBTAINING INFORMATION FOR DECISION-MAKING

7.108 This part of the chapter looks at the information the AG needs for decision-making and at how that is obtained. On the basis that the AG retains the constitutional role of bringing contempt proceedings, it is important to ensure that the AG has the information necessary for effective decision-making. To obtain the relevant information, certain powers may be needed. We refer to these as the powers of the AG and many functions would in practice be carried out by the AGO in its role of supporting the AG.

7.109 There are four sections in this part of the chapter. The first looks at the information that the AGO may require or that would be useful for decision-making. It also considers the existing methods for obtaining information and the case for and against expanding the AGO's powers to obtain information. The second section looks at how it may obtain information that is accessible to the public, the third at obtaining information held by police, and the fourth at obtaining information about social media use.

Information and the powers to obtain it

7.110 To support the AG's decision-making about whether to bring contempt proceedings and then to proceed effectively, we were told by the AGO that the information that informs decision-making can be split into two categories: information that is essential to decision-making, and information which better enables the AGO to advise the Law Officers.

(1) Information that is essential includes:

(a) the defendant's identity;

(b) the defendant's address (for the purposes of service);

(c) material relevant to proving the alleged contempt, such as publications made by the defendant, including posts to social media or other communications and (where applicable) when publications were deleted.

(2) Information that better enables the AGO to advise the Law Officers in the exercise of their functions includes:

(a) the defendant's previous contempts (if any);

(b) the defendant's previous committals for contempt (if any);

(c) the defendant's previous convictions for relevant criminal offences (if any).

7.111 For simplicity, we will refer to these categories as "essential information" and "helpful information".

7.112 To obtain information, the AGO must presently rely on material that is accessible to the public, or which has otherwise been shared with it (for example by the courts, police, CPS or any other person who has alerted the AGO to a potential contempt), or which is provided by witnesses such as court staff. Often, this will be sufficient, and the information will be obtained without difficulty. However, that is not always the case.

7.113 There will be occasions where the AGO will not be able to obtain the essential information; for instance, material may be posted on a social media account under a pseudonym, and police have no power to investigate as the posting does not constitute a crime. There will also be occasions where the AGO will not be able to ascertain whether the defendant has any previous findings of contempts or convictions because it lacks the power to obtain information from databases that may hold the information. (There is a separate problem of whether, how and where such records are kept; that is addressed in the chapter on sanctions.[116] Here, we are concerned with the power to access records that are kept.)

7.114 These gaps raise the question of whether the AGO should be afforded powers to obtain essential or helpful information so that the AG can carry out to best effect their constitutional role as guardian of the public interest and, if so, what those powers should be.

7.115 Before proceeding to discuss substantive powers in the remaining sections of the chapter, we outline some factors that might inform judgements about the need and desirability of additional or alternative avenues for obtaining information. We do so at this point to aid scrutiny of both the existing position and the possibility of expansion.

Considerations: the case for an expansion of powers to obtain information

7.116 The nature of contempt has changed over time. In particular, the rise of social media has almost infinitely expanded the range of people who might publish statements that constitute contempt of court. The identity and location of a defendant can be difficult or impossible to obtain and much online evidence can easily be deleted. The lack of information available to the AGO about, for example, previous contempts or previous convictions related to interferences with the administration of justice, means that it is more difficult to make an accurate assessment of the public interest in whether or not to bring proceedings.

7.117 The use of remote hearings has opened up another avenue by which contempt may be committed. Disruption to remote proceedings may result in a contempt in respect of which a court is unable to initiate proceedings because, for instance, the disrupter's identity is unknown and they have been excluded from the hearing.

7.118 The AG has a constitutional function of protecting the public interest and, as we heard from government and other stakeholders, the judiciary and the public expect the AG to discharge that function. The realities of much of modern contempt have made the job of safeguarding the public interest much more complicated. Accordingly, there is a case to ensure the AGO can obtain information that will enable the AG to discharge these constitutional obligations effectively.

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[116] See paras 10.243 to 10.244 and 10.247 to 10.248 below.

Considerations: the case against expansion of powers to obtain information

7.119 There are several arguments which suggest that investigatory powers for the AGO are neither necessary nor proportionate.

7.120 Further avenues for obtaining information will not be needed for all categories of contempt, nor for all contempts within any given category. For instance, where contempt has been committed by a breach of order or undertaking, or where there has been a contempt in the face of the court, then the courts, the AGO or the parties will often have sufficient information to bring contempt proceedings.

7.121 Where it does not receive information in a referral then there are challenges, but the AGO nonetheless gathers evidence in order to fulfil its function. It can and does currently rely on information that is publicly accessible, can be shared by police, or is provided in voluntary witness statements.

7.122 There will be circumstances where the AGO needs to obtain more information and it will be unlikely or impossible it can do so. But this is sometimes inevitable. Just as not every inquiry into criminal behaviour will locate the information needed to support a prosecution, not every inquiry into contemptuous conduct will locate the information needed to support proceedings.

7.123 Finally, contempt is not a criminal offence and so granting intrusive evidence-gathering powers to the AGO may be more difficult to justify. This concern may be alleviated to some extent by reforms to procedure that would ensure better safeguards for defendants facing contempt proceedings.[117]

7.124 With these considerations for and against in mind, we turn to three issues in relation to the power to obtain information.

Obtaining information that is accessible to the public

7.125 There is nothing limiting the AGO from gathering information that can be accessed by the public. This may include information that is "in the public domain", in the sense that it is realistically (and not merely theoretically) generally accessible to members of the public.[118] However, there is no reason to think the AGO's searching should be limited to that. Information may be said not to be in the public domain and yet is still accessible to the public even where it requires some persistence, specialist skills, knowledge or background information to know where to look and how to interpret the source of information.[119] The Information Commissioner provides a useful indicative list of sources that hold information available and accessible to the public:

- websites,
- social networking sites,

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117 See Chapter 8.

118 *Attorney General v Greater Manchester Newspapers* [2001] EWHC QB 451 at [26]-[33].

119 Above at [32].

- press releases,
- newspapers and magazines,
- books and academic journals,
- government publications, including local government,
- parliamentary reports (for example, Hansard),
- court and tribunal judgments,
- other official reports (for example, reports published by regulatory agencies and bodies or civil society organisations),
- TV or radio programmes,
- executive agencies' reports, records and registers (for example, Companies House records), and
- certificates (for example, birth, marriage and death certificates) or other archived material available in public archives.[120]

7.126 If faced with a social media post made under a pseudonym then the AGO might search for that pseudonym, and find it used by an account on another platform but with a name associated, thus identifying the potential defendant. Then, subsequent searches of other publicly accessible information may enable the AGO to determine an address. However, these sources may not reveal either the identity or address of the defendant.

7.127 It may be more difficult to obtain material relating to the conduct. For example, on X (formerly Twitter) it may be that other users have re-posted the material (thus themselves becoming potential contemnors). Other users may have posted to say they took screenshots of a potentially contemptuous post. However, the original post itself may not be available, particularly as the defendant may well have deleted the post (or even the account) after realising, probably from other users, that the post may have exposed them to contempt proceedings.

7.128 Accessing information about prior convictions or contempts will be difficult. Searches of publicly accessible material may reveal some, but if a search returns no results then it does not mean that there have been none. However, the AGO is not without the ability to search and, in particular, has the skills, knowledge and resources to access open source and subscription databases that contain legal materials that may record prior convictions or contempts.

7.129 With respect to information about previous convictions or contempts, the problem may to some extent be resolved by better keeping of contempt records (as discussed in

[120] Information Commissioner's Office ("ICO"), *Information in the public domain* (undated).

Chapter 10). However, unless material is publicly accessible, the AGO will not be able to access it.

7.130 Our provisional view is that the AGO's legal powers in respect of publicly accessible information are sufficiently clear, but they are not stated in a way that is clear and publicly accessible.[121] That is, whereas the law itself is clear that the AGO is entitled to access such information, it may not be obvious to the layperson, including to any potential defendant. A person who has published material that potentially amounts to contempt would not be able to ascertain easily or with certainty what steps the AGO may take to access information that is publicly accessible or how they would use it in practice. We provisionally propose that the AGO should publish a statement of its powers and practice in relation to publicly accessible information.

Consultation Question 56.

7.131 We provisionally propose that the Attorney General's Office should publish a statement of its powers and practice in relation to searching and using publicly accessible information.

Do consultees agree?

Obtaining information that is held by police

7.132 There will be circumstances where a contempt has been committed but publicly accessible information will not be sufficient for the AGO to obtain either or both essential and helpful information. If the AGO does not have the information that it needs then it may sometimes seek information that is held by the police. This information might be provided to the AGO by the CPS, if the CPS have received it from the police. Alternatively, it may be obtained directly from police. The AGO told us that the only information they seek from police is the current address for a defendant, which the police may hold if, for example, the defendant is facing current charges or has recent convictions. Here, we consider the existing legal powers in relation to that information. We then look at the powers to share information about criminal convictions.

7.133 The essence of the legal framework for sharing data is that police must have a power to share information that they hold. If they have a power to share then that power may be limited by the Data Protection Act ("DPA") 2018, which sets out the purposes for which data can be shared. The DPA will not provide a power to share what is not otherwise shareable. Lawfulness also requires that any data sharing must also be compliant with the Human Rights Act ("HRA") 1998.

The power to obtain and share data

7.134 There is no statutory power for the police to share information with the AGO. There may, however, be a common law power to share some information where police have investigated a suspected offence. In the event that the CPS take the view that criminal

[121] The law is stated with sufficient clarity in *Attorney General v Greater Manchester Newspapers* [2001] EWHC QB 451 at [26]-[32].

charges would be insufficient to reflect the seriousness of the conduct, or where the CPS are declining to proceed with charges, then it seems that there is a power to pass information to the AGO via the CPS. Sharing information in both those circumstances is plainly contemplated by the CPS guidance about referrals to the AG (discussed above).[122]

7.135 The strongest argument for the existence of a common law power is the decision in *Attorney General v Harkins and Liddle*, which concerned publications that claimed to show pictures of two men who, when they were ten years old, had abducted and murdered a two-year-old boy. The AG became aware of a social media post that published (under a pseudonym) photographs that claimed to show Jon Venables and Robert Thompson as adults. The judgment notes without any controversy that the AG "asked the Metropolitan Police to make inquiries as to who operated the account".[123] The police made inquiries and clearly informed the AG of the person's identity and, presumably, address, as the Treasury Solicitor then wrote to the defendant.[124] Although the court does not provide any reasoning in relation to police powers to obtain or share information, two observations can be made based on the unquestioned acceptance of the conduct of the AG and the police.

7.136 First, the decision is consistent with the existence of a common law power to share with the AG information that is necessary to enable the AG to discharge their constitutional obligation.

7.137 Second, the decision is also consistent with the existence of a common law power to obtain or collect such information, at least where doing so is consistent with a policing purpose (such as protection of life). However, it would not seem to support or suggest the existence of a common law power to obtain or collect information necessary to enable the AG to discharge their constitutional obligation in the absence of a policing purpose. The point is that there must be a policing purpose for the police to obtain information.

7.138 Thus, while police could arguably share with the AGO information that they already hold, the police could not obtain information at the request of the AGO unless there is a policing purpose.

The purposes for which data may be lawfully obtained or shared

7.139 The legal basis on which data held by the police may be shared to support the AG's contempt function is not explicitly set out anywhere. However, it must comply with the DPA 2018 and the UK General Data Protection Regulation ("UK GDPR").[125] Part 2 of the DPA 2018 governs the general processing of personal data. Part 3 governs the processing of personal data for law enforcement purposes. The legislative terminology is data "processing", which includes collection and recording of data, as well as

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122 See paras 7.15 to 7.16 above.

123 *Attorney General v Harkins, Attorney General v Liddle* [2013] EWHC 1455 (Admin) at [16].

124 Above at [17].

125 DPA 2018, s 3(10): "the UK GDPR means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)".

disclosing, disseminating or otherwise making personal data available.[126] For simplicity, in our discussion and analysis of the law, we will refer to obtaining and sharing information, these being the relevant matters at hand. In the terminology of the legislation, obtaining and sharing information are both forms of "data processing".

7.140 Part 3 of the DPA 2018 governs data processing for law enforcement purposes. Law enforcement purposes are "the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security".[127] The Information Commissioner's Office ("ICO") explains that police "should also take into account the relevant policing purposes. In the absence of a clear policing purpose, it may be that the Part 3 DPA 2018 personal data/police information should not be disclosed".[128]

7.141 The College of Policing states that:

> policing purposes provide the legal basis for the collection, recording, evaluation, sharing and retention of information and may include one, or a combination, of the following:
>
> Protecting life and property
>
> Preserving order
>
> Preventing the commission of offences
>
> Bringing offenders to justice
>
> Any duty or responsibility arising from common or statute law.[129]

7.142 The upshot of this is that Part 3 will not provide a basis on which police can share personal data processed for law enforcement purposes with the AGO; because contempt is not a criminal offence, the sharing of data cannot be said to be for policing purposes and the AGO cannot be said to be operating in a "law enforcement" capacity

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126 DPA 2018, s 3(4)(a), (d). The s 3(4) definition of processing also encompasses numerous other ways of handling, organising, managing and destroying personal data.

127 DPA 2018, s 31.

128 ICO, *Lawful data processing* ("We are a competent authority. How do we share data with a controller that is not a competent authority?") (undated).

129 College of Policing, *Authorised Professional Practice: Intelligence collection, development and dissemination* (updated 16 March 2015); see also College of Policing, *Authorised Professional Practice: Collection and recording* (updated 7 September 2023); College of Policing, *Authorised Professional Practice: Information Sharing* (updated 5 February 2020). The National Police Chiefs' Council ("NPCC") identifies "protecting life, preventing crime and detecting crime" as "Core Police Duties under the Common Law": NPCC, *Advice to Police Forces on Police Duties and Powers to Return a Missing Person Home when Found* (16 December 2022). The House of Commons Library states that "The core duty of the police service is to protect the public by detecting and preventing crime. This duty is established in common law … and the police have both common law and legislative powers to execute it": HC Library, *Police powers: an introduction* (HC 8637, 20 October 2021) p 5 (citing Halsbury's Laws of England, Vol 84 paras 1, 40; *Rice v Connolly* [1966] 2 QB 414).

when investigating contempt. As we explain above (at paragraph 7.140), "law enforcement purposes" are narrowly defined.

7.143 If sharing is not permissible under Part 3 then the alternative is to identify a relevant processing condition under Part 2 of the DPA 2018 (which governs the general processing of data). Part 2 permits the processing (sharing) of data for purposes that are not law enforcement purposes if the processing is authorised by law.[130]

7.144 The question is therefore, whether there is a relevant processing condition under Part 2 of the DPA. Part 2 incorporates the UK GDPR. The UK GDPR article 6(1)(e) provides that processing will be lawful if it is "necessary for the performance of a task carried out in the public interest". Section 8 of the DPA 2018 states that article 6(1)(e) includes processing of personal data that is "necessary for the administration of justice".

7.145 On this basis, it appears that it is permissible for the police to share with the AGO personal data they hold that is necessary for the AGO to have in order to institute contempt proceedings. It appears it would be impermissible to share information that would help the AG but which is not essential information.

7.146 This sharing is likely to be compatible with the HRA and, specifically, article 8 of the ECHR, which protects the right to respect for private life. Given that it is limited to sharing what is necessary for the administration of justice, it is directed to a legitimate aim (noting that contempt laws aim to protect fair trial rights that are enshrined in article 6) and appears proportionate.

Provisional conclusions and proposals

7.147 The current legal position appears to us to be as follows:

(1) The existing law permits police to share with the AGO information held by police that the AGO requires in order to make decisions about whether to institute proceedings and to institute proceedings effectively. As we explain above, that required information includes: the defendant's identity; the defendant's address (for the purposes of service); and material relevant to proving the alleged contempt, such as publications made by the defendant, including posts to social media or other communications and (where applicable) when publications were deleted.

(2) The existing law does not permit sharing of information that is not essential to the AG, even if that information would be helpful to the AG.

(3) The existing law permits the police to obtain information if there is a policing purpose for doing so, but if there is no policing purpose then it cannot lawfully

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130 ICO, *Lawful data processing* ("We are a competent authority. How do we share data with a controller that is not a competent authority?) (undated); DPA 2018 s 36(4). "Authorised by law" is not defined but "in the context of s 36(4) it can be taken to mean that the competent authority has the power or is under an obligation to share or reuse personal data": ICO, *Data sharing and reuse of data by competent authorities for non-law enforcement purposes* (undated). The common law power to share information would be the power that means sharing is authorised by law.

collect information, even if that information is necessary to enable the AG to discharge their constitutional obligation.

7.148 That said, the position is neither clearly stated in the law nor clearly set out for the public. Our provisional view is that the law in this area should be clear and put on a statutory footing.

7.149 Regarding the substance of the existing law, our provisional view is that it is satisfactory.

7.150 Police do not have the power to share information about a defendant's previous contempts, including committals for contempt. However, it would be helpful to the AG in deciding whether to bring proceedings to know whether a potential defendant has a record of contempts, and especially if a contempt warranted committal to prison. We do not provisionally propose that police should have a power to share this information. At present, there is no database that contains records of contempts or committals. In Chapter 10 we consider the recording of data in relation to contempt proceedings and outcomes.[131] We are of the view that this would suffice in providing the AGO with information that would be helpful for the discharge of its duties.

7.151 Our provisional proposals do not extend to empowering the police to share any other information with the AGO, nor to empowering the police to make investigations to pursue information for the AG. Even where the law current law permits the obtaining or sharing of information, there should be certainty and clarity in the law.

Consultation Question 57.

7.152 We provisionally propose that police should continue to have the power to share with the Attorney General information it holds that is essential for the Attorney General to have to discharge their contempt function.

Do consultees agree?

Consultation Question 58.

7.153 We provisionally propose that police should continue to have the power to obtain information in relation to contempt only where there is a policing purpose for obtaining that information.

Do consultees agree?

[131] See paras 10.243 to 10.245 and 10.247 below.

Consultation Question 59.

7.154 We provisionally propose that the powers of police to obtain information in relation to contempt and to share information with the Attorney General should be expressly stated in statute.

Do consultees agree?

Obtaining information about social media use

7.155 While the AGO may obtain some information through the above existing avenues, there will be circumstances where one clear gap remains: the need to obtain information about a defendant's social media use.

7.156 To commence proceedings, the AGO will need to know the identity of a person who has, under a pseudonym, posted something (including potentially text, images, audio, video) which appears to constitute contempt. Unless it has received this information in a referral from the CPS,[132] or unless it has been obtained and lawfully shared by police,[133] then the AGO is presently unable to obtain that information. In particular, the AGO has no power to compel a social media platform to provide the information, and no power to seek a court order compelling a platform to provide the information. It also does not have power to make a request of a platform to provide the information under the Investigatory Powers Act 2016 ("IPA 2016") (which provides the legislative regime under which public authorities may seek communications data).

7.157 Platforms may hold further information that would assist the AG, such as posts that have since been deleted. On occasion these may be necessary in order that the AG can prove the case against the defendant. However, the post in question may have been provided to the AGO by a member of the public, a lawyer, a party, or another interested person as, given it is serious enough to warrant consideration of contempt proceedings, it will probably have been seen quite widely. The AGO may also need a defendant's address, though once an identity is established it may be possible that other avenues can be used to obtain an address. However, powers to request or obtain information will not necessarily be a panacea; accounts may be set up without real names or addresses and so platforms may not have the identity or address of their users.

7.158 We consider whether the law should provide an avenue by which the AGO will be able to obtain the information it needs and, if so, how that might best be done. It is not unusual for government departments to have investigatory powers in the exercise of their statutory functions, but throughout the discussion we are mindful that the AG's contempt role is constitutional and is not a statutory power, and contempt is not a criminal offence. We do not provisionally propose that the AGO should have powers to

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132 Where the defendant has posted under a pseudonym and the posting constitutes a criminal offence then police may have ascertained the defendant's identity when investigating that offence. It may be passed back to the AG if, for instance, the CPS determine that criminal charges would not be sufficient to address the seriousness of the matter: see paras 7.15 to 7.16 above.

133 See paras 7.132 to 7.154 above.

request and require communications data. However, we are aware that some consultees may be in favour of the AGO having such powers. Therefore, we set out the law and various possible options below, and would welcome views on the extent to which avenues for obtaining information from social media platforms are necessary and proportionate. In particular, we would welcome views that engage with justifications for or against the expansion of powers to enable the AGO to obtain communications data.

Obtaining communications data: the Investigatory Powers Act 2016

7.159 The IPA 2016 provides the legislative framework that governs the powers and processes for public authorities to obtain communications data. Under the IPA 2016, public authorities may request or require telecommunications operators to provide data about users. The authority makes an application to the Investigatory Powers Commissioner ("IPC"), seeking authorisation to request or require communications data from a telecommunications operator.[134] A telecommunications operator is broadly defined; it includes social media platforms and any website owner.[135] The IPC may only provide authorisation where access to the data is:

- necessary for a purpose in section 60A(7), and
- necessary for a specific investigation, and
- proportionate to what is sought to be achieved,[136]
- and proportionate for specific purposes, which are set out in the Act.[137]

7.160 The section 60A(7) purposes include the following:

(a) in the interests of national security;

(b) for the applicable crime purpose (the specifics of which will depend on the nature of the data sought but will relate to preventing or detecting serious crime, or preventing or detecting crime or preventing disorder);[138]

(c) in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security;

(d) in the interests of public safety;

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134 IPA 2016, s 60A(1)-(2).

135 Above, s 261(10); Home Office, *Additional guidance to the communications data codes of practice: definition of communications data* (24 November 2021, updated 11 August 2023).

136 IPA 2016, s 60A(1). Section 60A(1)(b)(ii) also provides for circumstances relating to system and capability testing but these are not relevant here.

137 Above, s 61(1).

138 Above, s 60A(7)(b), (8).

(e) for the purpose of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health;

(f) to assist investigations into alleged miscarriages of justice.[139]

7.161 The Act lists the bodies that are public authorities and specifies, in relation to each, the section 60A purposes for which the authority may seek data.[140] For example, the Ministry of Justice may seek data for relevant crime purposes or in the interests of public safety, but not for any other section 60A purpose.[141] The Criminal Cases Review Commission may seek data for the section 60A purpose of assisting investigations into alleged miscarriages of justice, but not for any other section 60A purpose.[142]

7.162 The application to the IPC, and the IPC's authorisation, will empower the public authority to engage in specified conduct. That could be, for example, to request data from a platform (and the request may be limited to certain types of data) or possibly to "require by notice" that the platform provide the data.[143] Section 66 places a duty on the platform to comply with the notice and a failure to comply with that duty "is enforceable by civil proceedings by the Secretary of State for an injunction".[144]

7.163 Although the regime provides for requesting and requiring communications data, it may have limited effect. The CPS explain the position in practice:

> There are a variety of different social media platforms but the platforms that investigators and prosecutors commonly encounter include: Facebook/Messenger; WhatsApp; Twitter; Snapchat; Instagram; Tik Tok; YouTube. …
>
> It is important to remember that most social media providers are based outside of UK legal jurisdiction, for example all of the platforms detailed above are based in the United States. They are therefore not bound by the same legal requirements as the UK based mobile networks. …
>
> The principal categories of information that investigators and prosecutors seek to obtain from social media platforms are:
>
> > Details of the subscriber to a particular account;
> >
> > Content of any messages/photos/social media posts etc.
> >
> > IP Login history and geolocation (the geographical location of an object, such as a mobile phone) …

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139 The Criminal Cases Review Commission is identified as a public body under the Act.

140 IPA 2016, s 70 and sch 4 column 1.

141 Above, sch 4, columns 1-2.

142 Above.

143 Above, s 60A(4).

144 Above, s 66(5).

To obtain subscriber details, or information that may lead to the identification of the account holder, from any social media provider requires a request directly to the provider.

This request must be made by the police in the first instance. Before a request can be made to a social media platform, the investigating officer will need to obtain authority under Part 3 of the Investigatory Powers Act 2016 (IPA). These requests are always handled by an individual force's 'accredited communication data investigator unit' (SPOC (Single Point of Contact) Unit)). These units can also be referred to as CAB (Central Authorities Bureau) or CIU (Communications Intelligence Unit).

Once the request has been made to the relevant social media provider, it is a matter for that provider as to whether they supply the requested information. Their response will be based on that individual company's privacy policy, not UK legislation.

The information able to be obtained varies from provider to provider and is subject to change at any time, depending on any changes to a provider's policy. It is always worth double-checking with the investigating officer, through the relevant SPOC Unit, what is available at any particular time. Information about what will be disclosed is available to the SPOC Units through a knowledge database on a Home Office maintained platform known as CDS.

Information that is generally always obtainable is the information entered by an individual when setting up their account such as:

Name

Email address

Phone number

Address

Linked financial details e.g. Apple Pay[145]

7.164 The CPS guidance is stated in terms of requests, rather than any requirement by notice. It does not explain what is the legal basis on which the platform may use its discretion. It appears, however, that it is likely the platform would be relying on section 85, under which the question of whether it is reasonably practicable for a telecommunications operator outside the UK to comply with the duty must take into account the requirements or restrictions of the law in that operator's jurisdiction.[146]

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145 CPS Guidance, *Social Media: Reasonable Lines of Enquiry* (23 November 2020, updated 3 August 2022).

146 IPA 2016, s 85(4).

Whether the Attorney General's Office should be empowered to request or require communications data

7.165 As set out above, the IPA 2016 is the established framework for public authorities to obtain communications data. In the contempt context, the question is whether the AGO should have the power to obtain communications data. We consider whether the AGO should have the power to request information and whether it should have a more extensive power to require information to be produced.

7.166 There may be a good reason to empower the AGO to request communications data because this would bring it within the legislative framework, clarify what is lawful, and enable it to benefit from arrangements that have been established with single points of contact and shared knowledge about platform policies. We would welcome consultees' views on whether the AGO should have the power to request data from telecommunications operators.

7.167 We are also interested in consultees' views on whether there should be a stronger power to "require" that information be produced. On the one hand, there may be good reason to exclude the AGO from applying for an authorisation to require by notice the production of communications data. This would see a clear distinction between the powers granted to law enforcement authorities in relation to investigation of criminal offences, and those granted to the AGO in relation to contempt.

7.168 On the other hand, a power to request but not require may be a power that lacks teeth. If there is a power to request but not require then it will remain with the platform to determine what is appropriate to release. The AG represents the public interest. A notice to require would signal the strength of public interest in obtaining the data, though a power to require data would likely be of the same limited effect as described above (in paragraph 7.163) in relation to the power of the CPS. Proportionality will be considered by the IPC in light of the fact that the information is sought for contempt rather than criminal proceedings.

Whether there should be limits to the data the Attorney General's Office may obtain

7.169 Affording the AGO powers with either the broad or narrow form of purpose would not necessarily mean that identity and address data will be able to be obtained, even if it is held by the platforms. In particular, while the CPS guidance indicates that platforms will typically provide that data to police, it may well be that platform policies would see that data not provided to the AGO because contempt is not a criminal offence. There is a question whether the data the AGO should be able to seek should expressly include identity and address data. A further question is whether it should be limited to identity and address data.

7.170 There may be other information that is needed to bring contempt proceedings, for example, the date of the offending post, other evidence of the relevant conduct, or evidence that suggests the conduct was deliberate. The possibility that such information would be needed suggests the AGO should not be limited to obtaining only identity and address data. However, that might carry a risk of overreach; there is potential that the AGO would be provided with data that goes beyond what is necessary for it to institute contempt proceedings.

7.171 There is also a risk that an AG could seek to use the power to identify journalists' sources. For example, if a publication includes material that could only have been obtained as a result of a contempt,[147] an AG may seek the communications data of the person they suspect disclosed the documents. While the contempt application is warranted, the motivation is two-fold. In addition, limiting the type of data the AGO can seek has the benefit of affording some protection for online users, and preventing overreach into the sphere of personal online accounts.

7.172 While authorisations are made by the IPC, which provides a safeguard against overreach, these are matters that require consideration.

Consultation Question 60.

7.173 We invite consultees' views on whether the Attorney General's Office should be empowered to request and require communications data that is essential for the Attorney General to carry out their contempt function.

7.174 If consultees are of the view that the Attorney General's Office should be empowered to request and/or require data, we invite consultees' views on whether that power should be explicitly limited to seeking the identity and address data of potential defendants.

Urgent authorisations and data retention notices

7.175 The IPA 2016 provides for a "Designated Senior Officer" ("DSO") within a public authority – except in local authorities – to make authorisations in urgent cases.[148] It is not apparent to us that there would be any circumstances in which an authorisation for contempt purposes would be urgent. The prejudicial effects of any contempt can, where necessary, be dealt with urgently in a court and by criminal proceedings (under the Juries Act 1974 for example).

7.176 The IPA 2016 provides for the Secretary of State to issue a notice requiring a telecommunications operator to retain (and not destroy) data for purposes akin to those in section 60A, provided that a Judicial Commissioner approves the notice.[149] It is not apparent to us that there are circumstances where a data retention notice would be required for contempt purposes.

7.177 We have not heard from stakeholders on these issues and welcome comments on both.

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147 For example, passing on documents disclosed to the defence in a criminal case, or a whistle-blower disclosing government information that is also part of current proceedings.

148 IPA 2016, s 61A and sch 4, columns 1, 2-6.

149 Above, s 87(1).

Consultation Question 61.

7.178 If the Attorney General's Office is empowered to request and/or require data, do consultees have evidence of a need to provide for urgent authorisations by a Designated Senior Officer within the Attorney General's Office?

Consultation Question 62.

7.179 If the Attorney General's Office is empowered to request and/or require data, do consultees have evidence of a need to provide for data retention orders?

PUBLICATION OF DATA

7.180 The AGO publishes fairly detailed data on the exercise of the AG's power to refer unduly lenient sentences ("ULS") and on the outcomes of the applications.[150] During each calendar year a published spreadsheet is updated weekly. It contains raw data and a tool to enable disaggregation by offence category, the Crown Court where the sentence was passed, and the decision made by the AG on whether to refer it to the Court of Appeal. The data on outcomes of matters referred to the Court of Appeal is published annually as a spreadsheet. It appears that there is no obligation on the AGO to publish this data.

7.181 No data is published in relation to contempt.

7.182 We heard from one stakeholder, a media lawyer, that there is a need to improve transparency surrounding contempt decisions and that this would involve the AG publishing, for example, the outcome of each contempt case, the reasons it was brought, and any sanction attached. That kind of publication, they suggested, may help alert the public to the consequences of the behaviour in order to increase awareness of the law of contempt. Concerns over the lack of transparency also arise in the literature. For example, McGarry argues that the AG is not under an obligation to make public whether they have been consulted in respect of a possible contempt, and this is particularly concerning from an accountability and transparency perspective in cases involving a government minister.[151] Publishing of transparency data could be valuable in assisting Parliament to hold the AGO to account on the exercise of the contempt function, whether through (for example) appearances before select committees or parliamentary questions.[152] In 2007, the House of Commons

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150 AGO, *Unduly lenient sentence annual case outcomes* (updated 17 October 2023); AGO, *Outcome of unduly lenient sentence referrals* (updated 18 June 2024).

151 J McGarry, "The Attorney General and contempt of court – some political and constitutional concerns" (2023) *Legal Studies* (First View, 7 September 2023), 13.

152 On accountability of the AG to Parliament, see *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192 (2007), paras 1.36 and 3.20. See also *Gouriet v Union of Post Office Workers* [1977] 1 QB 729, see majority of Ormerod and Lawton LJJ; J Hand, "The Attorney-General, politics and logistics – a fork in the road?" (2022) 42 *Legal Studies* 425, 434; M Elliott and R Thomas, *Public Law* (4th ed 2020) from p 418 (on ministerial accountability and Parliamentary scrutiny of Government); AGO,

Constitutional Affairs Committee published its report on the constitutional role of the AG and recommended that the operation of the office of the AG be made more transparent.[153] The Government, in its response to the report, said:

> The Government does accept that steps can and should be taken to clarify the basis on which the Attorney General exercises his/her functions. The Government also considers that the manner in which the Attorney General exercises his/her functions should be made more transparent.[154]

7.183 The Government stated that some of the proposed measures in the White Paper titled "The Governance of Britain: Constitutional Renewal"[155] would go some way to achieving this.[156] For example, the White Paper contained an obligation to prepare a protocol on the relationship between the AG and the prosecuting authorities that the AG superintends. That protocol was published in 2009,[157] and reformed various aspects of the AG's constitutional functions. It improved relationships between the AG and prosecuting authorities, enhancing accountability while guaranteeing prosecutorial independence.[158] The protocol included an obligation to prepare an annual report on the exercise of the AG's functions. It also:

> restricted the Attorney's role in decisions whether to prosecute to those instances required by law and set out certain cases (involving parliamentarians, political parties and where the Law Officers had a conflict of interest) in which the Attorney would not be consulted. It also restricted the Attorney's power to issue directions in respect of individual cases to those where there was a national security consideration.[159]

Framework Agreement between the Law Officers and the Director of Public Prosecutions (18 December 2020) para 19. Cram and Taylor have argued that parliamentary oversight of the AG is insufficient with regard to contempt, which prompts them to argue that the AG's decisions should be judicially reviewable: I Cram and N Taylor "The Law Commission's Contempt proposals – getting the balance right?" [2013] *Criminal Law Review* 465, 474-475.

153 House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (Fifth Report of Session 2006-07) (17 July 2007), see for example, paras 22-24.

154 *The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General*, Cm 7355 (April 2008), para 39.

155 Ministry of Justice, *The Governance of Britain: Constitutional Renewal* (2008).

156 *The Government's response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General*, Cm 7355 (April 2008), para 40.

157 The *"Protocol between the Attorney General and the Prosecuting Departments"* was published in 2009. It addressed the relationship between the AG and the CPS and SFO. It was withdrawn in 2019 and replaced by two separate protocols, including a protocol *titled "Framework agreement between the Law Officers and the Director of Public Prosecutions (CPS)"* (2019, updated in 2022).

158 *Hansard* (HC), 20 July 2009, vol 496, col 106WS, as cited in Select Committee on the Constitution, *The Roles of the Lord Chancellor and the Law Officers* (2023) HL 118, para 26.

159 Select Committee on the Constitution, *The Roles of the Lord Chancellor and the Law Officers* (2023) HL 118, para 27.

7.184 The protocol was withdrawn in 2019 but was replaced in 2019 by the Law Officers Framework agreements, which have expanded on several of these obligations.[160]

7.185 There appears no practical reason why transparency data could not be published. We have been told by the AGO that they already maintain a spreadsheet on contempt matters. While it might be expected that a published document would require some resources, there is no reason to think that the burden would be great.

7.186 Publishing data on some issues in particular could be straightforward. For example:

- Referrals: date received; who from (for example, court, public, CPS, MP, or AG own motion (where, for example, the AG becomes aware of a matter in the media)); type of contempt (for example, breach of order, contempt by publication), jurisdiction (for example, civil, criminal, family);
- Requests made for consent of the AG to bring proceedings under section 7 of the CCA 1981, including the same data as that for referrals;
- AG Decision: for example, refer to police as offence; pre-action letter; advisory notice; contempt application; no action;
- Outcome of proceedings if applicable: for example, court, finding, sanction (if applicable), case citation or link to decision.

7.187 Other data might also be considered. Where the AG institutes or declines to institute proceedings then the data might include a brief indicator of the reason. For example, whether the defendant could not be identified, whether evidence was insufficient, or whether the public interest did not require proceedings. There will be reasons for the decisions that have been made and those reasons will be recorded. So, again, the burden of publishing a high level indication of reasons in transparency data should not be too great.[161]

7.188 Our provisional view is that publication of information about how the AG contempt function operates would improve transparency and accountability of decision-making and contribute to public confidence in the administration of justice. In the following consultation questions we provisionally propose that data should be published and, if it is to be published, we seek consultees' views on what data might be included. However, we do not provisionally propose that there should be any statutory requirement for the AG to publish data. ULS data is published as a matter of practice rather than requirement and we are of the view that the same approach of practice rather than requirement would be appropriate for contempt data.

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160 AGO, *Framework agreement between the Law Officers and the Director of Public Prosecutions (CPS)* (December 2020).

161 This may also align with the giving of reasons in relation to judicial review (see paras 7.69 to 7.82 above), but the provision of this data need not be dependent on whether the decisions of the AG may be judicially reviewed.

Consultation Question 63.

7.189 We provisionally propose that the Attorney General should publish data relating to the exercise of their contempt of court functions.

Do consultees agree?

Consultation Question 64.

7.190 If the Attorney General is to publish category-based data, we seek consultees' views on what data should be included. Possible examples include:

(1) Referrals to the Attorney General, including: date received; who from (for example, court, public, CPS, MP, or AG own motion); type of contempt (for example, breach of order, contempt by publication), jurisdiction (for example, civil, criminal, family);

(2) Requests made for consent of the Attorney General to bring proceedings under section 7 of the CCA 1981, including the same data as that for referrals;

(3) Decisions made by the Attorney General, including: for example, refer to police as offence; pre-action letter; advisory notice; contempt application; no action;

(4) Outcome of proceedings (if applicable): for example, court, finding, sanction (if applicable), case citation or link to decision.

Chapter 8: Procedure

INTRODUCTION

8.1 In this chapter we consider the procedure in contempt proceedings and whether there is scope for harmonisation and reform of the relevant procedure rules.[1] We explore the procedure both in superior courts and in inferior courts, tribunals and other bodies.[2] The aim of this chapter is to consider how best to develop clear, comprehensive and, where possible, uniform procedures that enable the higher courts to deal fairly, efficiently, effectively, and consistently with conduct that may constitute contempt of court. Here we are concerned only with the procedure in contempt proceedings heard in the first instance (including alleged contempt committed in an appellate court). We deal with the procedure for appeals against a decision or order made in contempt proceedings in Chapter 11.

8.2 This chapter comprises seven parts. The first part provides an overview of the general procedures adopted in contempt proceedings. The second and third parts outline the specific procedures followed in various courts, tribunals and other bodies where they deal with apparently contemptuous conduct themselves and where they refer such conduct to another court or tribunal. Next, the chapter considers the inconsistencies in these procedures and the need for harmonisation across settings. The fifth part explores the extent to which the existing procedures protect the right to a fair trial and whether additional safeguards should be incorporated. Sixthly, the chapter considers various stages of the procedure in contempt proceedings in courts, tribunals and other bodies, and how these should operate. The final part addresses how these stages of procedure should apply in the devolved tribunals in Wales.

8.3 In addressing the procedures in contempt proceedings, we are mindful of the remit of the procedure rule committees, which is to make rules of court governing the practice and procedure in courts, tribunals and other bodies.[3] For good reason, most matters of procedure are best handled by the rule committees. At the same time, there are some aspects of procedure – particularly those that concern fair trial safeguards – that may more appropriately be the subject of primary legislation.

OVERVIEW OF PROCEDURES

8.4 Different procedures are followed by courts, tribunals and other bodies depending on the particular power they are exercising to address the apparently contemptuous conduct, the type of conduct in question, and the court, tribunal or other body in which

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1 This reflects our Terms of Reference, para 1.2(7).

2 In Chapter 6 we explain the categorisation of and distinctions between the protection and powers of superior courts of record (on the one hand) and inferior courts, tribunals and other bodies (on the other). We also explain which courts, tribunals and other bodies fall into each of the two categories.

3 See, for example, Civil Procedure Rule Committee, About us (19 February 2024); Criminal Procedure Rule Committee, About us; Family Procedure Rule Committee, About us (16 February 2024).

the conduct arises. In this part we introduce these various procedures, and in the following parts we address them in greater detail.

8.5 In Chapter 6 we consider the contempt protection of courts, tribunals and other bodies. We explain that the protection will vary by which of two groups a body falls into: first, superior courts of record; and secondly, inferior courts, tribunals and other bodies. In that chapter we then consider the powers that the bodies in each of these groups have to deal with contempt. The superior courts have the power to deal with any contempt affecting their proceedings; the inferior courts generally have the power to deal only with contempt committed in their face; and tribunals and other bodies do not have any powers to deal with contempt themselves. In some circumstances, inferior courts, tribunals and other bodies have a power to refer apparently contemptuous conduct to another court or tribunal. Below, we outline the procedures available to a court, tribunal or other body in terms of these powers.

8.6 Where a court, tribunal or other body has the power to deal with contempt itself, it may exercise this power by instituting contempt proceedings either of its own motion or pursuant to an application. The general practice is that a court, tribunal or other body should institute proceedings of its own motion only where a "clear contempt" has been committed in its face.[4] It may also be exercised in respect of constructive contempt, which refers to behaviour that the courts may treat "as if it were a criminal contempt of court committed in the face of the court" – for example, failing to attend court in compliance with a jury summons.[5]

8.7 Where a court, tribunal or other body has the power to refer apparently contemptuous conduct to the High Court or the Upper Tribunal ("UT"), the procedure for doing so will vary. This will depend on whether a referral is made to the High Court in the exercise of its inherent supervisory jurisdiction over some inferior courts, or to the UT in accordance with an existing statutory mechanism.

8.8 Alongside the power to deal with apparently contemptuous conduct or to refer it to another court or tribunal, any protected court, tribunal or other body may refer such conduct to the Attorney General ("AG"), requesting that the AG consider instituting contempt proceedings.[6] If the AG decides to commence proceedings, they will make a contempt application to the High Court.[7] This is generally done where a contempt has been committed by publication.[8] Where a protected court or tribunal has neither dealt with a matter itself nor referred it elsewhere, it remains open to the AG to decide to make an application to the High Court. Where the alleged contempt relates to breach

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4 See, for example, CrimPR, Practice Direction 8.7.24D.

5 Juries Act 1974, ss 20(1)(a) and (2).

6 See Chapter 7.

7 Attorney General's Office ("AGO"), Contempt Public Interest Framework ("The Contempt Code") (20 July 2022). A referral to the AG is made simply by contacting the office by phone or email: see, for example, CrimPR, Practice Direction 8.7.26D.

8 See Chapter 7.

of an order, the application should be made to the court by the aggrieved party, rather than by the AG.[9]

8.9 Where the conduct potentially amounts to a criminal offence, any court, tribunal or other body may refer the matter to the police with a view to it being investigated and prosecuted as a specific criminal offence (so it will be dealt with as a criminal offence *instead* of contempt). This path is only open where the behaviour would constitute a criminal offence (such as assault or intimidating a witness). Crown Prosecution Service ("CPS") guidance advises that this is normally appropriate where the conduct may amount to a distinct criminal offence, particularly where the defendant would have the right to jury trial.[10] Where so empowered, the courts tend to prefer dealing with the matter themselves summarily (rather than referring it to the police) where it "needs either swifter or more condign [suitable] action by the court to uphold the due administration of justice".[11]

8.10 Below, we outline the procedures followed in contempt proceedings in the various courts and tribunals that have the power to address apparently contemptuous conduct. These procedures are largely governed by the following rules:

- In the Supreme Court: Supreme Court Rules 2009.
- In the Crown Court and in the Court of Appeal (Criminal Division): Part 48 of the Criminal Procedure Rules 2020 and the Criminal Practice Directions 2023.[12]
- In the High Court and in the Court of Appeal (Civil Division): Part 81 of the Civil Procedure Rules 1998.[13] The procedure for contempt proceedings in the Family Division of the High Court is governed by Part 37 of the Family Procedure Rules 2010 and Practice Direction 37A,[14] and it is the same in substance as the procedure in Part 81 of the Civil Procedure Rules.
- In the Court of Protection: Part 21 of the Court of Protection Rules 2017 2017, which differs slightly from the procedure in Part 81 of the Civil Procedure Rules.

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9 *Bedfordshire Police v RU* [2013] EWHC 2350 (Fam), [2014] 1 All ER 1068; *Clarke v Chadburn* [1985] 1 WLR 78; *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400.

10 Crown Prosecution Service ("CPS"), *Contempt of Court, Reporting Restrictions and Restrictions on Public Access to Hearings* (4 May 2022, updated 9 September 2022, 5 December 2023).

11 *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [31]. See also *Solicitor General v Holmes* [2019] EWHC 1483 (Admin), [2019] 1 WLR 5253 at [12]; *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB), [2020] 3 All ER 477 at [85]. Where the CPS receive a matter and decide that the available penalties for the criminal offence would not properly reflect the nature of the conduct (eg the offence may be punishable only by a fine) then the CPS may refer the matter on to the AG with a request that the AG consider instituting contempt proceedings: see further paras 7.15 to 7.16 above.

12 CrimPR, r 2.1(1).

13 CPR, r 2.1(1).

14 FPR, r 2.1(a).

- In the Upper Tribunal ("UT"): Tribunal Procedure (Upper Tribunal) Rules 2008.[15]

- In the First-tier Tribunal ("FtT"): the applicable set of procedure rules will depend on the particular chamber. For example, where apparently contemptuous conduct arises in the General Regulatory Chamber of the FtT, the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 will apply.[16]

- In addition, the Practice Direction on committal applies to all proceedings for committal for contempt in all courts in England and Wales, other than proceedings to which Part 81 of the Civil Procedure Rules applies.[17]

8.11 Though the Employment Appeal Tribunal ("EAT") has the power to address apparently contemptuous conduct, the Employment Tribunal Rules 1993 (which generally govern the procedure in the EAT) do not prescribe a procedure for exercising this power.

EXISTING PROCEDURES FOR DEALING WITH APPARENTLY CONTEMPTUOUS CONDUCT

8.12 This part of the chapter provides an overview of the various procedures that apply where a court or tribunal exercises its power to deal with apparently contemptuous conduct itself.

Superior courts of record

Crown Court and Court of Appeal (Criminal Division)

Procedure for contempt by obstruction or disruption

8.13 Rules 48.5 to 48.8 of the Criminal Procedure Rules set out the procedure to be used where the Crown Court or Court of Appeal Criminal Division observes, or someone reports to the court, any of the following behaviour:

- obstructive, disruptive, insulting or intimidating conduct, in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings;

- in the Crown Court, a contravention of section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (disobeying a witness summons), or section 20 of the Juries Act 1974 (disobeying a jury summons);

- a contravention of section 9 of the Contempt of Court Act ("CCA") 1981 (without the court's permission, recording the proceedings); or

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15 Tribunal Procedure (Upper Tribunal) Rules 2008, rr 1(2), 26A(2)(a). However, these rules do not apply in the Lands Chamber of the UT; instead, the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 apply (see r 1(2)).

16 Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 7A. Given the limited powers of the FtT to address apparently contemptuous conduct (as we discuss at para 6.102 above), the procedure rules that apply in each chamber are generally silent on the procedure where such conduct arises.

17 Courts and Tribunals Judiciary, Practice Direction: Committal for Contempt of Court – Open Court (updated August 2020) para 1.

- any other conduct with which the court can deal as, or as if it were, a criminal contempt of court, except failure to surrender to bail under section 6 of the Bail Act 1976.[18]

8.14 The initial procedure where such a matter arises is provided at rule 48.5, which requires that the court:

- must explain to the defendant the allegation, the court's powers to imprison and/or fine them for the conduct, the court's power to order their immediate temporary detention, that they can explain and apologise for their conduct, and that they may seek legal advice.

- must allow the defendant a reasonable opportunity to reflect, take advice, explain, and apologise.

- may then take no further action, enquire into the conduct immediately, or postpone the enquiry.

8.15 If the court exercises its inherent power to detain the defendant temporarily, rule 48.6 requires that the court must review the case no later than the next business day.[19] On review, the court:

- must repeat the explanations required by rule 48.5, unless the defendant is absent.

- must allow the defendant a reasonable opportunity to reflect, take advice, explain, and apologise.

- may take no further action, enquire into the conduct immediately, or postpone the enquiry and order the defendant's release from detention in the meantime.[20]

8.16 If the court postpones the enquiry (under either rule 48.5 or rule 48.6), rule 48.7 requires that it must arrange for the preparation of a written statement containing details of the conduct in question. The court officer must serve on the defendant:

- that written statement;

- notice of where and when the postponed enquiry will take place; and

- a notice that reiterates the court's powers to imprison/fine the defendant for contempt; and warns them that the court may hear the postponed enquiry in the defendant's absence if they do not attend.

8.17 The procedure on enquiry, whether held immediately or postponed, is set out at rule 48.8:

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18 CrimPR, r 48.5(1). Failure to surrender to bail is addressed from para 8.49 below.

19 CrimPR, r 48.6(2)(b).

20 Above, r 48.6(4)(c)(ii).

- The court must ensure that the defendant understands what is alleged (if the enquiry has been postponed); explain what the procedure at the enquiry will be; and ask whether the defendant admits the conduct in question.

- If the defendant admits the conduct, the court need not hear evidence. If the defendant does not admit the conduct, the court must consider any statement served under rule 48.7; any other evidence of the conduct; any evidence introduced by the defendant; and any representations by the defendant about the conduct.

- Where the defendant admits the conduct or the court finds it proved, the court must give the defendant an opportunity to make representations relevant to punishment and a final opportunity to apologise. In deciding how to deal with the defendant, the court must consider the gravity of the contempt, any admission of the conduct, any apology, and any period during which the defendant was detained pending the enquiry. If the court imposes imprisonment, it must impose the shortest period that is commensurate with the preservation of good order in the administration of justice. Finally, the court must explain the reasons for its decision and the punishment it imposes.

- It is made clear at rule 48.8(5) that the court that conducts the enquiry need not include the same member/s as the court that observed the conduct; but may do so, unless that would be unfair to the defendant.

8.18 This procedure (rules 48.5 to 48.8 of the Criminal Procedure Rules) applies to the types of "criminal" contempt listed at paragraph 8.13 above. However, as mentioned at paragraph 8.8 above, the court also has the option of referring the matter to the AG (who will consider whether to make an application to the High Court to bring proceedings).

Procedure for contempt by failure to comply with court order

8.19 Rule 48.9 of the Criminal Procedure Rules addresses the position where a party (or other person directly affected) alleges:

- in the Crown Court, a failure to comply with an order to which applies one of the following rules:

    - rule 33.70 (compliance order, restraint order or ancillary order);

    - rule 47.9 (certain investigation orders under the Police and Criminal Evidence Act 1984, the Terrorism Act 2000, the Proceeds of Crime Act 2002, the Proceeds of Crime Act 2002 (External Investigations) Order 2014 and the Extradition Act 2003);

    - rule 47.41 (order for retention or return of property under section 59 of the Criminal Justice and Police Act 2001); or

    - rule 47.58 (order for access under section 18A of the Criminal Appeal Act 1995);

- in the Court of Appeal (Criminal Division) or the Crown Court, any other conduct with which that court can deal as a civil contempt of court; or

- in the Crown Court, unauthorised use of disclosed prosecution material under section 17 of the Criminal Procedure and Investigations Act 1996.[21]

8.20 The initial procedure where such a matter arises is found at rule 48.9 of the Criminal Procedure Rules:

- Where the allegation is made by a party or other person directly affected, they must apply in writing and serve the application on the court officer; and serve the application on the defendant, with notice of where and when the court will consider the allegation (not less than 10 business days after service).

- Where the Crown Court or Court of Appeal (Criminal Division) acts on its own initiative, it must arrange for the preparation of a written statement containing the same information as an application; and for that statement and notice of the contempt hearing (not less than 10 business days after service) to be served on the defendant.

- The application/statement must identify the defendant; explain that it is an application for the defendant to be dealt with for contempt of court; contain details of the conduct in question; and a notice warning the defendant that the court can imprison and/or fine them for contempt, and that it may deal with the application in the defendant's absence if they do not attend the hearing.

8.21 The procedure for the hearing is set out at rule 48.10 and is almost identical to the procedure at rule 48.8, described at paragraph 8.17 above. The main difference is that rule 48.10 is silent on whether the court that conducts the hearing should or should not include the same members as the court before which the contempt arose.

High Court and Court of Appeal (Civil Division)

8.22 The High Court may deal with contempt by initiating proceedings of its own motion under rule 81.6 of the Civil Procedure Rules or by application under rule 81.3. A contempt application made in existing High Court proceedings is made under Part 23 of the Civil Procedure Rules in those proceedings, whether or not the application is made against a party to those proceedings. The application is determined by a High Court judge of the Division in which the case is proceeding.[22]

8.23 The procedure for the service of a contempt application on a defendant is set out in rule 81.5. It must be served on the defendant personally (or their legal representative) unless the court directs otherwise. Where the High Court proceeds of its own motion it must issue a summons to the defendant which includes the same information as required in an application. The summons must be served on the defendant personally and on any other party. This procedure is set out in rule 81.6.

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21 CrimPR, r 48.9(1)(a).

22 CPR, rr 81.3(1) and (2).

8.24 The requirements of an application or summons are contained in rule 81.4. An application or summons must explain, among other things, details of the alleged contempt, that the defendant has the right to be legally represented and is entitled to a reasonable opportunity to obtain legal representation, the court's powers to punish the defendant, and that the defendant can admit and apologise for the conduct which is likely to reduce the seriousness of any punishment by the court.

8.25 Permission to make an application is needed where it relates to an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.[23] The question of permission is determined by a single judge of the Division in which the case is proceeding, and, if granted, the contempt application is determined by a single judge or Divisional Court of that Division.[24]

8.26 The hearing of proceedings is governed by rule 81.7. Unlike Part 48 of the Criminal Procedure Rules, the Civil Procedure Rules is largely silent on the procedure for the hearing. It provides that the court may give any directions it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence. It may issue a bench warrant to secure the attendance of the defendant at the hearing but may not give any direction compelling them to give evidence.

8.27 All contempt proceedings must be listed and heard in public unless the court directs otherwise, in accordance with rule 81.8. Before deciding to sit in private for all or part of the hearing, the court must notify the national print and broadcast media via the Press Association. It must also consider any submissions from the parties or media organisations before deciding whether and if so, to what extent, the hearing should be in private. If the court decides to sit in private, it must first sit in public to give a reasoned public judgment setting out why it is doing so. At the conclusion of the hearing, whether or not held in private, the court must sit in public to give a reasoned public judgment stating its findings and any punishment. The court is responsible for ensuring that "where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings under Part 81 of the Civil Procedure Rules, that judgment is transcribed and published on the website of the judiciary of England and Wales".[25]

Procedure where the High Court deals with contempt committed in a protected court or tribunal

8.28 The High Court may deal with apparently contemptuous conduct that occurs in:

(1) the Crown Court or Court of Appeal (Criminal Division) where it is not dealt with by that court (for example, because the court decided not to deal with it of its own motion and no other party made an application);

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23 CPR, r 81.3(5)(b).

24 Above, rr 81.3(7) and (8).

25 Above, r 81.8(8).

(2) some protected inferior courts and tribunals where they do not have the power to deal with the matter themselves.[26]

8.29 In both cases, the AG can make an application to bring contempt proceedings in the High Court, whether or not the Court has referred the matter to the AG. This procedure is governed by Part 81 of the Civil Procedure Rules, and applies to contempt applications relating to "alleged interference with the due administration of justice, otherwise than in existing High Court or county court proceedings".[27] Rule 81.3(3) requires that such an application must be made to the High Court under Part 8 of the Civil Procedure Rules. Permission to make an application is required in these cases, and also where it relates to an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.[28] The question of permission is determined by a single judge of the King's Bench Division and, if granted, the contempt application is determined by a single judge of the King's Bench Division or a Divisional Court.[29]

8.30 In the case of apparently contemptuous conduct that occurs before certain protected inferior courts and tribunals that cannot deal with the matter themselves, the High Court can deal with it by initiating proceedings of its own motion under rule 81.6 of the Civil Procedure Rules. This may be done on referral from the inferior court or tribunal before which the conduct occurred or in accordance with the High Court's obligation under that rule (as recognised by the court in *Bailey and Morris*) to consider whether to initiate proceedings "in any case where it considers that a contempt may have been committed".[30]

8.31 The procedure governing such proceedings in the High Court, whether initiated by application or by the court of its own motion, is identical to the procedure discussed at paragraphs 8.25 to 8.26 above.

Court of Protection

8.32 The procedure for contempt proceedings in the Court of Protection, governed by Part 21 of the Court of Protection Rules 2017, is similar to the procedure in the High Court under Part 81 of the Civil Procedure Rules. The main difference relates to the rules regarding permission to make an application. As in the High Court, permission is required to make an application in the Court of Protection where it relates to an allegation of knowingly making a false statement or disclosure. However, unlike in the High Court, permission is also required to make an application in the Court of Protection where it relates to:

> interference with the due administration of justice in connection with proceedings in the Court of Protection, except where the contempt is committed in the face of the

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26 See para 6.101 above.

27 CPR, r 81.3(3).

28 Above, r 81.3(5).

29 Above, rr 81.3(5) and (8).

30 *R (Bailey and Morris) v Secretary of State for Justice* [2023] EWHC 821 (Admin), [2023] 1 WLR 2564 at [61].

> court or consists of disobedience to an order of the court or a breach of an undertaking to the court … .[31]

All applications for permission to bring a contempt application in the Court of Protection must be made to a Tier 3 Judge.[32] Tier 3 judges are the President of the Court of Protection, the Vice-President of the Court of Protection, and any other judges nominated to act as a judge of the Court of Protection under section 46 of the Mental Capacity Act 2005.[33]

Upper Tribunal and Employment Appeal Tribunal

8.33 The procedure in the UT (other than in the Lands Chamber) is governed generally by the Tribunal Procedure (Upper Tribunal) Rules 2008,[34] and the procedure in the EAT is governed by the Employment Tribunal Rules 1993 and the ETA 1996. None of these specifically addresses the procedure for dealing with apparently contemptuous conduct where it occurs before the UT or EAT.

8.34 However, where the UT exercises its powers under section 25 of the Tribunals, Courts and Enforcement Act ("TCEA") 2007 to deal with such conduct on referral from the FtT,[35] the procedure is addressed in rule 26A(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, albeit very narrowly. This rule requires that in such cases the UT "must give directions as to the procedure to be followed in the consideration and disposal of the proceedings".

8.35 Given that section 25 of the TCEA 2007 confers powers on the UT "within the context of their possession by the High Court",[36] the UT has held that in such cases it should adopt the procedure of the High Court as far as possible:

> Although the powers of the High Court in contempt matters are in principle unlimited, they are in practice and in reality governed by certain procedural requirements, particularly as set out in Part 81 CPR. Clearly the Civil Procedure Rules do not apply directly to proceedings in the Upper Tribunal; and CPR 81.1(2) does not alter "the scope and extent of the jurisdiction of courts determining contempt proceedings". Nevertheless, it would, in our judgment, be unrealistic to treat s 25(1) as conferring on the Tribunal the jurisdiction of the High Court unaffected by that Court's practice and procedure. To that extent it seems to us that, where the Tribunal's power derives from s 25, its procedures should be closely modelled on those operating in the relevant court in the relevant part of the United Kingdom, save where Tribunal Procedure Rules provide otherwise. The High Court has, by practice and within the CPR (which is a Statutory Instrument) developed and operated rules which promote the efficiency of contempt of court proceedings, as well as providing certain protections for those accused of contempt. In our judgment it is inconceivable that

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31 Court of Protection Rules 2017 ("CoPR"), r 21.3(2).

32 Above, r 21.3.

33 Above, r 2.1.

34 Tribunal Procedure (Upper Tribunal) Rules 2008, r 1(2).

35 See paras 6.93 to 6.94 above for further discussion of this provision.

36 *YSA v Secretary of State for the Home Department* [2023] UKUT 00075 (IAC) at [25].

the parallel and derivative jurisdiction of the Upper Tribunal was not intended to be operated in essentially the same way.[37]

Therefore, in these circumstances, the procedure will be largely identical to the procedure in the High Court, discussed from paragraphs 8.21 to 8.26 above.

8.36 Where the FtT (GRC) certifies an "offence" of contempt to the UT under section 61(4) of the Freedom of Information Act 2009, rule 26A(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 requires that the UT "must give directions as to the procedure to be followed in the consideration and disposal of the proceedings". Section 61(5) and (6) of the Freedom of Information Act 2009 provides that the UT may inquire into the matter and must hear any witnesses and any statement offered in defence. As per the majority judgment in *Moss*, this is "the means by which the final determination is made as to whether or not the act or omission … would constitute contempt if it had occurred before a court or tribunal having the power to commit for contempt".[38] The UT may then deal with the defendant in any manner in which it could deal with them if the contempt had been committed in relation to the UT.[39]

Supreme Court

8.37 There is no specific procedure for making a contempt application in the Supreme Court. The procedure for making a procedural application under rule 30 of the Supreme Court Rules 2009 presumably applies.[40]

8.38 The application must set out the reasons for making the application and, where necessary, be supported by written evidence.[41] The rules do not specify the circumstances in which it is necessary for the application to be supported by written evidence, but Practice Direction 7 suggests that evidence should be provided in all cases because "as a practical matter, the Court will often need to be satisfied by evidence of the facts that are relied on in support of or for opposing the application".[42]

8.39 The application must be served on all parties.[43] A party may oppose the application by filing a notice of objection within seven days of service of the application. The notice must be served on the applicant and all other parties.[44]

8.40 The application will be dealt with by the court without an oral hearing unless it is contested, in which case it must be referred to a panel of three Justices for an oral hearing.[45] The oral hearing must take place in a court to which the public are admitted,

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37 *YSA v Secretary of State for the Home Department* [2023] UKUT 00075 (IAC) at [25].

38 *Moss v The Royal Borough of Kingston-Upon-Thames* [2023] EWCA Civ 1438 at [45] (Lewis LJ).

39 Freedom of Information Act 2009, s 61(5)(b).

40 Rule 9 of the Supreme Court Rules 2009 deals with "procedural decisions", and rule 9(2) addresses contempt specifically. Rule 30 deals with "procedural applications".

41 Supreme Court Rules 2009, r 30(2).

42 Above, Practice Direction 7, para 7.1.3.

43 Supreme Court Rules 2009, r 30(3).

44 Above, r 30(4).

45 Above, r 9(2); Practice Direction 7, para 7.1.6.

unless it is necessary in the interests of justice or in the public interest to sit in private for part of the hearing.[46] The hearing must be conducted in accordance with relevant practice directions and "any directions given by the [Supreme Court]".[47]

Inferior courts, tribunals and other bodies

County court

8.41 The procedure for dealing with contempt in the county court is governed by Part 81 of the Civil Procedure Rules and is largely the same as the procedure in the High Court and Court of Appeal (Civil Division), discussed at paragraphs 8.22 to 8.27 above.

Magistrates' courts

Procedure for contempt by obstruction or disruption

8.42 Rules 48.5 to 48.8 of the Criminal Procedure Rules set out the procedure to be used where a magistrates' court observes, or someone reports to the court, any of the following behaviour:

- a contravention of:
    - section 97 of the Magistrates' Courts Act ("MCA") 1980 (refusing to give evidence);
    - section 12 of the CCA 1981 (insulting or interrupting the court, etc.);
    - section 9 of the CCA 1981 (without the court's permission, recording the proceedings, etc.); or
- any other conduct with which the court can deal as, or as if it were, a criminal contempt of court, except failure to surrender to bail under section 6 of the Bail Act 1976.[48]

8.43 This procedure is almost identical to the procedure in the Crown Court and Court of Appeal (Criminal Division), discussed at paragraphs 8.13 to 8.18 above. However, the procedure differs with respect to the length of time for which a magistrates' court can temporarily detain a defendant and for which it can postpone proceedings. Unlike the Crown Court and Court of Appeal (Criminal Division), a magistrates' court does not have an inherent power to detain temporarily a defendant. Consequently, it may only detain temporarily a defendant where the power to do so has been conferred by statute. Section 12(2) of the CCA 1981 empowers a magistrates' court to detain temporarily a defendant until later the same day on a contravention of that section. If the court exercises its statutory power to detain temporarily a defendant, rule 48.6 of the Criminal Procedure Rules requires that it must review the case later the same day.[49] The procedure on review is the same as described at paragraph 8.15 above.

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46 Supreme Court Rules 2009, rr 9(6) and 27(1).

47 Above, r 27(4).

48 CrimPR, r 48.5(1)(c) to (e).

49 Above, r 48.6(2)(a).

Similarly, where a magistrates' court postpones proceedings, it may do so only until later that same day.[50]

8.44 This procedure (rules 48.5 to 48.8 of the Criminal Procedure Rules) applies to contempt by obstruction or disruption, but where such conduct arises the court also has the option of referring the matter to the AG. The AG then may consider bringing a contempt application in the High Court. The procedure in that case is discussed at paragraphs 8.22 to 8.27 above.

Procedure for contempt by failure to comply with court order

8.45 Rules 48.9 to 48.10 of the Criminal Procedure Rules address the procedure in a magistrates' court where a party (or other person directly affected) alleges, or the court deals of its own motion with, an unauthorised use of disclosed prosecution material under section 17 of the Criminal Procedure and Investigations Act 1996.[51] This procedure is identical to the procedure in the Crown Court and Court of Appeal (Criminal Division) at paragraphs 8.20 to 8.21 above.

Procedure for contempt by disobedience to an order other than for the payment of money: section 63(3) of the MCA 1980

8.46 Some types of contempt dealt with by the magistrates' courts may fall within their civil jurisdiction. This includes the power under section 63(3) of the Magistrates' Courts Act ("MCA") 1980 to punish a person who disobeys an order other than for payment of money (eg a child contact order[52] or contingent dog destruction order[53]). In these cases, the procedure is not governed by the Criminal Procedure Rules (nor is it governed by the Civil Procedure Rules).[54] Instead, the relevant procedure is predominantly set out in the CCA 1981 and Part 2 of the MCA 1980.

8.47 Section 17(1) of the CCA 1981 provides that a magistrates' court may exercise its powers under section 63(3) of the MCA 1980 either of its own motion or by order on complaint, and subsection (2) provides that where these powers are exercised the provisions of the MCA 1980 apply subject to schedule 3 to the CCA 1981. Schedule 3 to the CCA 1981 provides for various modifications to provisions in the MCA 1980 when applied to contempt proceedings under section 63(3) of that Act. This is largely to accommodate circumstances in which proceedings are initiated by the court itself, rather than a complaining party.[55]

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50 CrimPR, r 48.5(3)(c).

51 Above, rr 48.9(1)(a)(iii) and (b).

52 *Re H (A Minor) (Contact: Enforcement)* [1996] 1 FLR 614.

53 *Chief Constable of Merseyside v Doyle* [2019] EWHC 2180 (Admin).

54 In the magistrates' courts, the CrimPR apply only to criminal cases: CrimPR, r 2.1(1)(a). The CPR do not apply to the magistrates' courts in any case: CPR, r 2.1(1).

55 See CCA 1981, Sch 3, para 1, which provides that where the court initiates proceedings of its own motion under section 63(3), the following provisions of the MCA 1980 apply "as if a complaint had been made against the person against whom the proceedings are taken" and subject to sub-paragraphs (2) and (3): ss 51 (issue of summons), 53(1) and (2) (procedure on hearing), 54 (adjournment), 55 (non-appearance of defendant), 97(1) (summons to witness), 101 (onus of proving exceptions etc.), 121(1) and (3)(a) (constitution and place of sitting of court), and 123 (defect in process).

8.48 Taking into account these modifications, the procedure where a magistrates' court exercises its powers under section 63(3) of the MCA 1980 is as follows:

- Whether it initiates proceedings of its own motion or by order on complaint,[56] the magistrates' court may issue a summons to the person alleged to have disobeyed a relevant order requiring them to appear before a magistrates' court to answer to the complaint.[57] On hearing the complaint, the court will state to the defendant (if they appear) the substance of the complaint. Where the defendant relies for their defence on any exception, exemption, proviso, excuse or qualification, the burden of proof lies on them.[58]

- The magistrates' court may adjourn the hearing at any time, whether before or after beginning to hear the complaint. When adjourning, the court may set a time and place at which the hearing is to be resumed or, unless it remands the defendant under section 55, leave the time and place to be determined later by the court. However, the hearing must not be resumed at that time and place unless the court is satisfied that the parties have had adequate notice.[59]

- Where the court initiates proceedings itself and the defendant does not appear at the hearing (whether adjourned or not), or where the proceedings were initiated by complaint and the complainant appears but the defendant does not, the court may proceed in the defendant's absence or adjourn the hearing.[60] Where it adjourns, the court may issue a warrant under section 55 of the MCA 1980 for the defendant's arrest.[61] The court must neither begin to hear the complaint in the defendant's absence nor issue a warrant for their arrest unless satisfied that:

    - the summons was served on the defendant within a reasonable time before the hearing,[62]

    - the defendant has appeared on a previous occasion to answer to the complaint, or

    - having been arrested under section 47 of the Family Law Act 1996 in connection with the matter of the complaint, the defendant is at large after being remanded under section 47(7)(b) or (10) of that Act.[63]

- Where the defendant is arrested under a warrant issued under section 55 of the MCA 1980, the court may remand them on any subsequent adjournment of the

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56 A complaint need not be made in writing: Magistrates' Courts Rules 1981, r 4(2).

57 MCA 1980, s 51. For rules relating to service of a summons, see Magistrates' Courts Rules 1981, rr 67 and 99.

58 MCA 1980, s 101.

59 Above, s 54.

60 Above, ss 55(1) and (2).

61 Above, s 55(2).

62 For rules relating to service of a summons, see Magistrates' Courts Rules 1981, r 67.

63 MCA 1980, s 55(3), as amended by CCA 1981, sch 3, para 3.

hearing.[64] However, the court must not issue a warrant or remand a defendant under section 55 or further remand them under section 128(3) after they have given evidence in the proceedings.[65]

- Where the court is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at the hearing of the complaint and it is in the interests of justice to issue a summons to secure their attendance to give evidence, the court must issue a summons under section 97(1) of the MCA 1980 requiring that person to appear before the court at a specified time for that purpose.[66] On the failure of that person to attend court in compliance with the summons, the court may issue a warrant for their arrest if particular criteria are satisfied.[67] The refusal of such a person without just excuse to be sworn or give evidence, or to produce the relevant material, is punishable as a contempt of court.[68] Such a contempt does not fall within the magistrates' courts' civil jurisdiction, and thus the procedure in that case is governed by rule 48.5(1)(c)(i) of the Criminal Procedure Rules (as discussed at paragraphs 8.14 to 8.18 above).

- After hearing the evidence and representations from the parties, the court will either grant the order sought (an order either to pay a sum or to be committed to custody) or dismiss the complaint.[69]

Procedure for contempt by failing to surrender to custody: section 6(5) of the Bail Act 1976

8.49 Where a person fails to surrender to custody in contravention of section 6(1) and (2) of the Bail Act 1976, they may be proceeded against for a summary offence or criminal contempt.[70] The procedure for dealing with contempt by obstruction or disruption in rules 48.5 to 48.8 of the Criminal Procedure Rules (discussed at paragraphs 8.13 to 8.18 above) does not apply to this particular type of contempt.[71]

8.50 The procedure in these cases is unclear – the boundary between the procedure for a summary offence and the procedure for contempt appear to have been blurred. The Criminal Practice Directions state:

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64 MCA 1980, s 55(5).

65 Above, s 55(6).

66 Above, s 97(1). For rules relating to an application for summons to witness or warrant for arrest, see Magistrates' Courts Rules 1981, r 107.

67 MCA 1980, s 97(3). The criteria are met where: (a) the court is satisfied by evidence on oath that the person is likely to be able to give material evidence or produce any document or thing likely to be material evidence in the proceedings; and (b) it is proved on oath, or in such other manner as may be prescribed, that the person has been duly served with the summons, and that a reasonable sum has been paid or tendered to them for costs and expenses; and (c) it appears to the court that there is no just excuse for the failure. For rules relating to service of a summons, see Magistrates' Courts Rules 1981, r 67.

68 MCA 1980, ss 97(4) and (5).

69 Above, ss 53(1) and (2).

70 Bail Act 1976, s 6(5).

71 CrimPR, r 48.5(1)(e).

> Where it appears that an accused has committed an offence under the Bail Act 1976, proceedings should be initiated either:
>
> (a) by the court of its own motion;
>
> (b) on application by the prosecutor.
>
> The charge should be put to the accused, and they should be asked to enter a plea.
>
> …
>
> Proceedings under s.6 Bail Act 1976 may be conducted either as a summary offence or as a criminal contempt of court. Where commenced by the police or prosecutor, the proceedings will be conducted by the prosecutor who, if the matter is contested, will call evidence. Where the court initiates proceedings, with or without a prosecutor's invitation, it may expect the prosecutor's assistance e.g. in cross-examining the accused, if required.[72]

8.51 It would seem that where the court initiates proceedings of its own motion it is taken as dealing with the matter as a contempt (rather than as a summary offence, for which proceedings would be initiated by the CPS). This is consistent with the following comment in Blackstone's:

> The s. 6 offences are procedurally unusual in that proceedings may be initiated by the court itself. This clearly runs the risk of the court acting as both prosecutor and judge. It is for this reason that, where the allegation is contested, the prosecutor should be invited to cross-examine the accused.[73]

8.52 Ultimately, the procedure for dealing with failure to surrender to custody as a contempt appears to be far less comprehensive and prescriptive than the procedure for dealing with other types of criminal contempt under Part 48 of the Criminal Procedure Rules.

EXISTING PROCEDURES FOR REFERRING APPARENTLY CONTEMPTUOUS CONDUCT TO ANOTHER COURT OR TRIBUNAL

8.53 The chapter now turns to the procedures that apply where a court or tribunal exercises its power to refer conduct that may constitute contempt to another court or tribunal.

Inferior courts, tribunals and other bodies

8.54 In some cases, a protected inferior court or tribunal can refer apparently contemptuous conduct to the High Court where it cannot deal with the matter itself.[74] The procedure rules do not prescribe a procedure for making such a referral. The

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72 CrimPR, Practice Direction 4.2.1D to 4.2.2D, and 4.2.5D.

73 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* ("*Blackstone's Criminal Practice*") (2024) D7.114.

74 See Chapter 6.

procedure in the High Court upon receiving such a referral is discussed from paragraphs 8.27 to 8.30 above.

First-tier Tribunal and Employment Tribunals

8.55 The FtT may either refer or certify a matter to the UT, depending on the conduct in question. The ETs do not have any equivalent powers to refer apparently contemptuous conduct to the EAT.

8.56 The procedure rules do not set out the procedure to be followed by the FtT where it refers to the UT a failure by a person to comply with certain requirements imposed by the FtT in relation to giving evidence.

8.57 The initial procedure where an application is made to the FtT (GRC) to certify a contempt to the UT is set out in rule 7A of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. The application must include, among other things: details of the proceedings giving rise to the application; details of the relevant act or omission; and the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.[75] The FtT must send a copy of the application and any accompanying documents to the defendant, and must give directions as to the procedure to be followed in the consideration and disposal of the application.[76] A decision disposing of the application will be treated by the FtT as a decision which finally disposes of all issues in the proceedings comprising the certification case.[77]

8.58 The procedures in the UT, once a matter has been referred or certified to it, are discussed from paragraphs 8.32 to 8.35 above.

HARMONISATION AND CLARIFICATION

8.59 The above overview of the procedures followed in contempt proceedings in courts, tribunals and other bodies illustrates the different approaches of the various sets of procedure rules. Having set out that procedural framework, this part of the chapter now turns to consider the problems that arise from such variation. It explores the inconsistencies and lack of clarity and detail in these contempt procedures, which can make for a confusing and inaccessible system. This discussion seeks to highlight the need for clarification and harmonisation and, ultimately, to make the case for a uniform procedure in contempt proceedings.

8.60 The following analysis of the problems with contempt procedures focuses on procedures in courts; it does not address tribunals and other bodies. This is because tribunals and other bodies generally do not have powers to address apparently contemptuous conduct (other than some limited referral powers) and thus do not have corresponding procedures. However, given that we provisionally propose in Chapter 6 that protected inferior courts, tribunals and other bodies should have powers to

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75 Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r 7A(3).

76 Above, r 7A(5).

77 Above, r 7A(6).

address such conduct, our provisional proposals for a uniform procedure apply to all courts, tribunals and other bodies (unless otherwise stated).

Varying and inconsistent procedures

8.61 In the courts there is variation and inconsistency in the procedures used in contempt proceedings.

8.62 Procedures vary depending on the particular court, jurisdiction, or type of contempt. For example, Part 48 of the Criminal Procedure Rules provides two different procedures for different types of contempt in the magistrates' courts, Crown Court, and Court of Appeal (Criminal Division): one for "[c]ontempt of court by obstruction, disruption, etc"[78] and another for "[c]ontempt of court by failure to comply with court order, etc".[79] The key difference between these two procedures is that a court may use an immediate or postponed enquiry into an allegation of criminal contempt (including after temporarily detaining the defendant),[80] whereas a court may only make a postponed inquiry into a civil contempt.

8.63 By contrast to the approach of the Criminal Procedure Rules, there is only one procedure that applies in most contempt proceedings in the county court, High Court, Court of Appeal (Civil Division), and Court of Protection. This is set out in Part 81 of the Civil Procedure Rules, Part 37 of the Family Procedure Rules, and Part 21 of the Court of Protection Rules 2017, respectively. The substance of this general procedure differs from Part 48 of the Criminal Procedure Rules most significantly in that a contempt application made under the Civil Procedure Rules, Family Procedure Rules, or Court of Protection Rules 2017 requires far more detail about the nature of the allegation and the defendant's procedural protections.[81]

8.64 Within and across the different sets of procedure rules there is also variation in the permission requirements for making a contempt application. On the one hand, permission to make a contempt application to the court is never required where proceedings are governed by Part 48 of the Criminal Procedure Rules (regardless of the type of contempt). On the other hand, permission is required in some circumstances where proceedings are governed by Part 81 of the Civil Procedure Rules, Part 37 of the Family Procedure Rules, or Part 21 of the Court of Protection Rules 2017. However, whether permission is required will depend on the type of contempt in question. In our pre-consultation engagement a legal stakeholder suggested that this creates confusion, commenting that "each different pocket of contempt is dealt with differently and no one can really grasp it". A senior judge considered that in some cases contempt applications are brought for vindictive purposes and there is no permission stage to filter them out, concluding that "[i]t seems like a misfit that there is a set of controls for one area but not another".

8.65 A final example is the lack of coherence across the various procedure rules and practice directions regarding the procedure for issuing draft judgments to parties and

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78 CrimPR, r 48.5.

79 Above, r 48.9.

80 Above, r 48.5.

81 Above, r 48.9(3); CPR, r 81.4; FPR, r 37.4; CoPR, r 21.4.

dealing with the unauthorised publication of such judgments as contempt. In the King's Bench Division of the High Court, the digital judicial judgment generator produces by default a draft judgment with a rubric that explains the applicable rules under Practice Direction 40E to the Civil Procedure Rules and that breach may be treated as contempt. By contrast, in the Family Division of the High Court there is no equivalent practice direction, and the default rubric does not mention contempt of court. However, liability for contempt may be inferred from the prohibition on communication of the contents of the draft judgment other than by lawyers to their clients. In the Crown Court there is no rule or practice direction which regulates the use of draft judgments, and if they are distributed it is without any warning rubric. Recently, in *Gohil v Gohil*, Mostyn J described this "confusion" as "completely unacceptable".[82] He directed that a copy of his judgment be sent to the Civil Procedure Rule Committee, the Family Procedure Rule Committee, and the Criminal Procedure Rule Committee "with a request that they seek to harmonise the rules on embargoed draft judgments".[83]

Inconsistent and unclear language

8.66 The first issue that arises with respect to the language used in contempt proceedings is that it can be inconsistent across different courts. Examples include the following:

(1) The alleged contemnor is referred to as the "respondent"[84] in the magistrates' courts, the Crown Court, and Court of Appeal (Criminal Division), but as the "defendant"[85] in the county court, High Court, Court of Appeal (Civil Division), and Court of Protection.

(2) Where a magistrates' court, the Crown Court, or Court of Appeal (Criminal Division) initiates proceedings for contempt by obstruction or disruption, the court conducts an "enquiry"[86] into the alleged conduct. However, the court conducts a "hearing"[87] of an allegation of contempt by breach of order, just as the county court, High Court, Court of Appeal (Civil Division), and Court of Protection conduct a "hearing"[88] of contempt proceedings.

(3) Where a magistrates' court, the Crown Court, or Court of Appeal (Criminal Division) initiate contempt proceedings of their own motion they must prepare a "statement"[89] with details of the allegation to be served on the defendant. By contrast, in the county court, High Court, Court of Appeal (Civil Division), and

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82 *Gohil v Gohil* [2023] EWHC 1567 (Fam), [2023] 3 FCR 299 at [24].

83 Above at [25].

84 CrimPR, r 48.1(2).

85 CPR, r 81.2; FPR, r 37.2; CoPR, r 21.2.

86 CrimPR, r 48.8(1).

87 Above, r 48.10(1).

88 CPR, rr 81.7 and 81.8; FPR, rr 37.7 and 37.8; CoPR, rr 21.7 and 21.8.

89 CrimPR, r 48.7(2).

Court of Protection the judge must issue a "summons"[90] with the relevant information.

(4) Upon making a finding of contempt, the magistrates' courts, Crown Court, and Court of Appeal (Criminal Division) may "impose imprisonment",[91] whereas the county court, High Court, Court of Appeal (Civil Division), and Court of Protection may make "an order of committal".[92]

8.67 The second issue is that the terminology used in contempt proceedings can be vague and unclear. This is illustrated by the Civil Procedure Rules and Family Procedure Rules, which both state that permission is required to make a contempt application in respect of an alleged "interference with the due administration of justice" other than in relation to existing proceedings in the High Court (or county or family courts).[93] Given that an "interference with the due administration of justice" can refer to a wide range of behaviour,[94] arguably it is unclear what type of contempt application requires permission under this rule.

8.68 The corresponding rule in the Court of Protection Rules 2017 requires permission to make an application in relation to interference with the due administration of justice in connection with Court of Protection proceedings in the Court of Protection "except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court".[95] This phrasing suggests that "interference with the due administration of justice" would ordinarily encompass contempt by breach of an order or undertaking if it were not explicitly excluded.

8.69 However, this appears to be at odds with the Divisional Court's application of the former version of the Civil Procedure Rules – which mirrored the current version of the Court of Protection Rules 2017 in this respect – in *Attorney General v Yaxley-Lennon*.[96] The court confirmed that permission was required to make a contempt application for breach of a reporting restriction order made under section 4(2) of the CCA 1981,[97] indicating that breach of such an order constitutes an interference with the administration of justice, rather than disobedience to a court order. This illustrates

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90 CPR, r 81.6(3); FPR, r 37.6(3); CoPR, r 21.6(3).

91 CrimPR, r 48.7(3)(c)(i).

92 CPR, r 81.9(1); FPR, r 37.9(1); CoPR, r 21.9(1).

93 CPR, r 81.3(5)(a); FPR, r 37.3(5)(a).

94 See Chapter 3.

95 CoPR, 21.3(2)(a).

96 *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB), [2020] 3 All ER 477; former CPR, rr 81.12(1) and (3).

97 Section 4(1) of the CCA 1981 states that subject to that section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith. Under subsection (2), in any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

how the language used to distinguish between different types of contempt and the relevant procedures can seem illogical, unclear, and confusing.

Lack of detail, specificity, and completeness

8.70 A third area of concern for stakeholders was the lack of detail, specificity, and completeness in the procedure rules and accompanying guidance for contempt proceedings.

Part 81 of the Civil Procedure Rules

8.71 Several judges told us that Part 81 of the Civil Procedure Rules is not sufficiently prescriptive, often leaving them uncertain as to the appropriate procedure to adopt in any given circumstance. Two examples were provided.

8.72 First, 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. Though provision for issuing draft judgments is made under Practice Direction 40E to the Civil Procedure Rules, the process to be taken by the court upon breach of those provisions is not set out. A member of the senior judiciary told us that there had been attempts to draft guidance for Court of Appeal judges dealing with contempt in the face of the court to enable them to deal with it quickly and efficiently within Part 81 of the Civil Procedure Rules. It was concluded that it was "completely impossible to draft guidance [within Part 81] that gave judges a simple route through". This gave rise to practical concerns: "judges are not experts in contempt and they need to know what to do. They should be able to do something". However this guidance might be achieved, the judge was clear in the conclusion that the courts "need a simple and fair contempt process" to deal with contempt by breach of an embargo on a draft judgment.

8.73 Secondly, there is a lack of specificity in the procedure for hearing a contempt allegation. A senior judge told us that "there would be merit" in reviewing this process, and particularly raised the issues of whether the allegation should be put to the defendant to admit or deny, and how and by whom allegations and evidence should be adduced. This judge described some of these processes as "left up in the air" due to the lack of provision in the Civil Procedure Rules.

8.74 Though rule 81.4(2)(g) requires that a contempt application must state that "if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court", Part 81 does not set out the procedure for enabling the defendant to do so. It provides little guidance, stating that the court "shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate".[98] Consequently, in a recent case this senior judge devised their own process "where the associate read out each allegation and the defendants would say whether or not they admitted to it". The result, the judge concluded, was that "there was no clear process to ensure that all the things we wanted [alleged] contemnors to know were actually told to them".

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98 CPR, r 81.7(1).

8.75 Similar concerns about the lack of clarity and detail in the contempt procedure were raised by judges in the Family Division of the High Court in respect of Part 37 of the Family Procedure Rules, which is identical in substance to Part 81 of the Civil Procedure Rules.

8.76 Our engagement with judges suggests that there is a need for more specific rules that address the procedure for various types of contempt, in addition to a need for them to be set out clearly. One member of the senior judiciary argued that it would be helpful to have a set of rules. Another senior member of the judiciary favoured clarification through a statement of the "essential steps" that the judge should take. These comments suggest that none of the existing sets of procedure rules provide a model that could be applied generally (though the Criminal Procedure Rules has some coverage that would be welcome in other rules); rather, that what is needed is clarity, specificity, and the filling of gaps.

Part 48 of the Criminal Procedure Rules

8.77 We were told by criminal judges that the procedure for dealing with contempt under Part 48 of the Criminal Procedure Rules is "complicated" and "quite convoluted", and that there is a "general difficulty in understanding what [judges] are supposed to do and when".

8.78 Members of the Criminal Procedure Rule Committee specifically raised concerns about the lack of clarity and guidance regarding:

(1) when it is appropriate for the court to deal with the contempt itself (and whether it should do so immediately or not), and when should it be referred to another judge or the AG;

(2) who is to participate in contempt hearings and who is to assist the court (eg whether the prosecution has that responsibility or not);

(3) who is to produce or write the statement required under rule 48.9(4) where the court initiates contempt proceedings of its own volition for "civil" contempt, and how that statement is to be served on the defendant;

(4) the court's powers to order that a defendant in contempt proceedings return for the hearing (where it is postponed and the defendant is not detained).

A judge explained that judges look to the Criminal Procedure Rules for answers to these questions, but they are either not there or are hard to find.

8.79 We heard that these issues have led to a reluctance among criminal judges to initiate contempt proceedings, other than in particularly serious cases, because they "are worried they'll do the wrong thing inadvertently". One member of the Criminal Procedure Rule Committee said that judges "now avoid [the contempt procedure] like the plague" following the decision of the Court of Appeal in *Re Yaxley-Lennon*.[99] This

[99] *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400.

is particularly problematic, given that the law of contempt is intended to provide judges with a tool to maintain order and control in court.

8.80 A member of the Criminal Procedure Rule Committee considered that the broad approach to contempt procedure should be the same across all jurisdictions. Generally, however, the feedback we received from criminal judges indicated that the substance of the procedure is largely satisfactory but that it needs to be set out more clearly. One judge told us that "[t]he law is in place, it just needs to be made clearer"; another said that it needs to be "set out step-by-step, so [judges] aren't afraid of the process". More specifically, a Crown Court judge suggested that the procedure should be divided into categories of contemnor (for example, witness, defendant, family, the press) as this "would help judges to use contempt powers properly and more frequently. This judge also considered that the procedure should be contained in the Crown Court Compendium because the Criminal Procedure Rules are not consulted by judges as much as they should be.

Imprecision of the concept of a summary procedure

8.81 It is beyond question that courts have the power deal with contempt "summarily". The Court of Appeal (Criminal Division) set this out in *Re Yaxley-Lennon*:

> It has long been the case [that] a judge may, but not must, deal with a contempt committed in the face of the court summarily, albeit after ensuring a fair hearing. So too may a judge deal summarily with a contempt which amounts to an interference in the course of the proceedings he or she is conducting. The power to punish such contempt arises under the common law in addition to statute. Its purpose is to equip the court with the means to protect its processes and penalise those who seek to impede or subvert them. Common examples include noisy and intemperate interruptions from the public gallery and witnesses improperly refusing to answer questions during the course of giving oral evidence. Because of the need to respond quickly and decisively in such cases, the court is empowered to act summarily and, if necessary, impose a term of immediate imprisonment. However, this jurisdiction should be exercised sparingly. As Lawton LJ observed in *Balogh v St Albans Crown Court* [1975] Q.B. 73 at page 93: "In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment".
>
> Even in cases where a court considers it necessary to proceed summarily to deal with a contempt it is often wise, having sorted out the immediate concern, to adjourn the contempt hearing to a later date and sometimes before a different judge. That avoids any question of the judge being judge in his own cause.[100]

8.82 However, it is not clear what is meant by a summary procedure or dealing with a matter summarily in the context of contempt proceedings; neither of these terms, nor anything similar, are used to describe any of the procedures in any of the rules. This is not to say that the courts are hampered by the procedure rules; it was stated in *R v AS*, for example, that the courts (including the Crown Court) have "the inherent

[100] *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [27]-[28]; see also *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716 at [17], citing *Santiago v R* [2005] EWCA Crim 556, (2005) 2 Cr App R 24.

jurisdiction … to punish summarily" and have not been restricted by the provisions of the procedure rules.[101] However, as stakeholders have highlighted the need for clarity and specificity in the procedures that courts should follow, it is helpful to examine how the procedural rules accommodate those powers.

8.83 With regard to the Criminal Procedure Rules, it seems to be accepted that where the court deals summarily with a contempt committed in its face then the court should follow the procedure set out in rules 48.5 to 48.8.[102] However, the procedure under these rules can vary: the court can either enquire into the contempt immediately or postpone the enquiry.[103] For proceedings in the Crown Court and Court of Appeal (Criminal Division), the Criminal Procedure Rules do not specify a minimum or maximum period of time for which the enquiry can be postponed (though where the defendant has been detained the court must review the detention no later than the next business day).[104] On the one hand, postponement could be for weeks,[105] but on the other, it could be for as little as a few hours.[106] This arguably gives rise to the questions of whether a court that postpones the enquiry can, and should, still be described as adopting a summary procedure, and whether that description depends on the length of time for which an enquiry is postponed.

8.84 The Criminal Procedure Rules set out procedural requirements where the court postpones an enquiry into a criminal contempt or where it initiates proceedings of its own motion for contempt by breach of an order.[107] For the former, the court must serve on the defendant "a written statement containing such particulars of the conduct in question as to make clear what the [defendant] appears to have done", and stating where and when the postponed enquiry will take place.[108] For the latter, it must serve a similar statement and include a notice warning the defendant that the court can impose imprisonment, a fine or both, and that the matter can be dealt with in the defendant's absence if they do not attend the hearing.[109] In addition, a hearing for contempt by breach of an order requires ten days' notice.[110]

8.85 With regard to civil procedure, Part 81 of the Civil Procedure Rules commences with the statement in rule 81.1(1) that "[t]his Part sets out the procedure to be followed in proceedings for contempt of court ('contempt proceedings')". However, the procedure under Part 81 does not appear to lend itself to a court being able to deal with a contempt immediately. Where the court initiates proceedings of its own motion where it considers "that a contempt of court (including a contempt in the face of the court)

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101 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716 at [17], citing *Balogh v St Albans Crown Court* [1975] QB 73.

102 See, for example, CrimPR, Practice Direction 8.7.24D.

103 CrimPR, r 48.5(3)(b) and (c).

104 Above, r 48.6(2)(b).

105 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716.

106 *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400.

107 CrimPR, r 48.9(1)(b).

108 Above, rr 48.7(2)-(3).

109 Above, r 48.9(3).

110 Above, r 48.9(2).

may have been committed",[111] the court must issue a summons to the defendant, and the summons must contain the same information as an application.[112] It seems likely that where the court seeks to act summarily under this rule it would be necessary to postpone the contempt proceedings to allow sufficient time for the summons to be drafted and served. Again, this seems to defeat the main benefit of the court being empowered to act summarily, which is that the contempt can be addressed speedily. Consequently, it is not clear whether a court that initiates proceedings and deals with the contempt itself (particularly where the proceedings are not heard for some time) is, in reality, adopting a summary procedure.

8.86 Like the Civil Procedure Rules, the Family Procedure Rules contain a statement that the rules set out the procedure to be followed in contempt proceedings.[113] The Court of Protection Rules 2017 make a similar statement, though framed in terms of specific ways that a contempt may have been committed.[114] The procedures then similarly provide for the serving of a summons – with different (and unclear) notice requirements[115] – with the consequence that, again, it is not clear whether a court proceeding in this way can be said to be dealing with a contempt "summarily".

8.87 Although the procedure rules are silent on what constitutes summary procedure, the courts have recognised that there are two types of summary procedure: a "truly summary"[116] procedure and a "formal"[117] summary procedure. The "special features"[118] of a truly summary procedure were described by Mustill LJ in *R v Griffin*:

> there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as a committal [for trial]. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of

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111 CPR, r 81.6(1); FPR, r 37.6(1); CoPR, r 21.6(1).

112 CPR, r 81.6(3); FPR, r 37.6(3); CoPR, r 21.6(3).

113 FPR, r 37.1.

114 CoPR, r 21.1.

115 Part 81 of the CPR, Part 37 of the FPR, and Part 21 of the CoPR do not specify the amount of notice required where the court initiates contempt proceedings by summons: CPR, r 81.6(4); FPR, r 37.6(4); CoPR, r 21.6(4). If a summons issued by the court in this context is to be treated similarly to an application, then in the High Court and Court of Appeal Civil Division it must be served at least 3 days before the court is to deal with the application (CPR, r 23.7(1)); in the Family Division of the High Court it must be served at least 7 days before the court is to deal with the application (FPR, r 18.8(1)); or in the CoP it must be served within 14 days of the date on which it was issued (CoPR, r 10.4(1)). However, if the summons is to be treated as a witness summons, then the general rule is that it must be served at least 7 days before the date on which the witness is required to attend before the court: CPR, r 35.4(1); FPR, r 24.4(1); CoPR, r 14.13(3).

116 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716 at [17].

117 Above.

118 Above.

> complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence.[119]

8.88 Where the court deals with the contempt immediately, then it appears appropriate to describe the court as applying a truly summary procedure. In contrast, the formal summary procedure – which was described by the Court of Appeal in *R v AS* as "very different" to the truly summary procedure, but still "properly classified as a summary process"[120] – involves:

> the calling of witnesses …, the opportunity of examining them, the opportunity of the defendant to give evidence and call his own evidence and the provision of a reasoned judgment of the court against which an appeal to [the Court of Appeal] lies as of right. Such a procedure is these days very little different from a hearing in a Magistrates' Court, save that in the Magistrates' Courts the charge will be set out in a formal document and normally the defendant will have been interviewed by the police.[121]

8.89 Though this was identified in *R v AS* as a procedure associated with cases where an alleged contempt was not dealt with until a trial had concluded,[122] it is appropriate to describe any contempt proceedings as being dealt with summarily whether dealt with immediately or whether it has been postponed or has been subject to a period of notice. It is not stated in *R v AS* what gives the proceedings their summary character. However, it is sufficient to observe that contempt proceedings, which in all cases are dealt with by a judge deciding guilt and penalty, rather than a judge and jury, should be characterised as summary proceedings (whether those proceedings were initiated by the court itself or on application). There may be other features that are peculiar to contempt – including notably that proceedings may be initiated by the court itself – but they are not what enables the proceedings to be characterised as summary proceedings.

8.90 In this light, the procedures for dealing with an alleged contempt under the Criminal Procedure Rules, Civil Procedure Rules, Family Procedure Rules and Court of Protection Rules 2017 are all summary procedures. While distinctions can be drawn between "truly" summary procedure and "formal" summary procedure, it is not clear that these are helpful. This is because, first, they do not provide any further clarity or specificity to the procedures and, secondly, because they do not shed light on whether any given procedure is appropriate. In our view, it is simpler and more helpful to distinguish between (on the one hand) immediate contempt proceedings and (on the other) contempt proceedings that are deferred, postponed, or heard with notice. However, the problem remains that there must be clear, specific, and complete procedures when the courts exercise their contempt powers – and those needs are not met by classifying procedures as either summary or not.

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119 *R v Griffin* (1989) 88 Cr App R 63, 67.

120 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716 at [17].

121 Above. The passage states that this procedure involves "the calling of witnesses by a prosecutor"; we have omitted "by a prosecutor" as in most matters that does not appear to accord with practice or procedure.

122 Above.

Provisional proposals: a uniform contempt procedure

8.91 As the preceding discussion indicates, the variation, inconsistency, gaps, and lack of detail in contempt procedures present substantial problems for the courts and court users. During our pre-consultation engagement we heard many views from stakeholders suggesting that harmonising the procedures adopted in contempt proceedings would be a step towards greater clarity. Such an approach would promote a more coherent system, making it more accessible and less confusing for the courts, practitioners, and laypeople. For these reasons, we provisionally propose that there should be a uniform, general procedure in contempt proceedings in all courts, tribunals and other bodies. This procedure should not rely on distinctions between "criminal" and "civil" contempt; just as we consider such distinctions to be unhelpful in the context of the contempt liability framework, we also consider them unhelpful for the procedural framework.

8.92 However, harmonisation does not mean rigidity. In certain circumstances it is appropriate to have some variation in procedure based on the facilities and needs of particular courts, tribunals and other bodies. For example, some do not have security staff or cells, so the contempt procedure for dealing with a person who disrupts proceedings may need to set out alternative procedures that are available depending on whether or not there facilities to detain the defendant. Alternative procedures may also be warranted to preserve the necessarily informal nature of proceedings in tribunals. Therefore, our provisional view is that a uniform procedure across the courts, tribunals and other bodies should be able to accommodate variations that are needed to address potential contempts in different settings.

8.93 As explained above, our pre-consultation engagement and research has revealed that none of the existing sets of procedure rules are appropriate to adopt as a single model that could be applied consistently across courts, tribunals and other bodies in contempt proceedings. Consequently, our provisional view is that a new general procedure should draw on the strengths of the existing procedures and set out step-by-step processes for each stage of a contempt matter. The substance of this new procedure will be considered in the following parts of this chapter. At this point, however, we first seek consultees' views on whether there should be a uniform, general procedure for all courts, tribunals and other bodies.

Consultation Question 65.

8.94 We provisionally propose that there should be a uniform, general procedure in contempt proceedings in all courts, tribunals and other bodies, with that procedure allowing for variations that are needed to address potential contempts in different settings.

Do consultees agree?

8.95 To facilitate the harmonisation of the procedure in contempt proceedings, in our provisional view some joint working between the various procedure rule committees should be considered – for example, a joint working group or a dedicated contempt procedure rule committee. A contempt procedure rule committee could operate

similarly to the new Online Procedure Rule Committee, which is responsible for the development of rules for online proceedings across the civil, family, and tribunals jurisdictions.

8.96 On the basis of this provisional proposal, throughout the chapter we direct provisional proposals towards a new contempt procedure rule committee where relevant.

Consultation Question 66.

8.97 We provisionally propose that the various procedure rule committees should consider collaborating to develop a uniform, general procedure (for example, by establishing a joint working group of rule committees or a new contempt procedure rule committee).

Do consultees agree?

PROCEDURAL SAFEGUARDS AND COMPLIANCE WITH ARTICLE 6 OF THE ECHR

8.98 The procedure in contempt proceedings must comply with human rights requirements under the European Convention on Human Rights ("ECHR"), as implemented by the Human Rights Act 1998 and under the common law. In Chapters 3, 4, and 5 we consider the compliance of the law of contempt with the right to freedom of expression and the right to freedom of association, protected under articles 10 and 11 of the ECHR respectively. Here we consider compliance with the right to a fair trial under article 6, which is engaged particularly by issues of procedure.

8.99 In our pre-consultation engagement, stakeholders expressed concerns about the inadequacy of the procedural safeguards in contempt proceedings. The contempt jurisdiction "is sui generis so far as English law is concerned",[123] fitting into neither the civil nor criminal jurisdiction. However, the contempt procedure has been described as having "an essentially criminal law complexion"[124] because, for example, the standard of proof is always the criminal standard and custodial sanctions are available.[125] Many stakeholders argued that, if they are not already, the procedural safeguards that ordinarily apply in criminal proceedings should be incorporated into the contempt procedure.

8.100 In this part of the chapter, we thus consider the following issues:

(1) whether the fair trial requirements under article 6 of the ECHR apply to contempt proceedings; and, if so,

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123 *R v Griffin* (1989) 88 Cr App R 63, 67. See also *Morris v Crown Office* [1970] 2 QB 114.

124 *Re Whiting* [2013] EWCOP B27, [2014] COPLR 107 at [12] (Hayden J).

125 The criminal standard of proof is an important protection of the presumption of innocence in art 6(2) of the ECHR. The criminal standard applies to all contempt proceedings, regardless of the type of contempt and nature of the penalty (ie, even where the penalty is likely to be non-custodial): *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23, [2014] AC 1246; *Sarayiah v Williams and another* [2018] EWHC 342 (QB).

(2) the extent to which the procedure in contempt proceedings complies with those requirements.

8.101 These issues were explored to an extent in our earlier consultation paper on contempt of court, published in 2012.[126] However, the relevant aspects of that work relate only to the procedure in the Criminal Procedure Rules where the court deals with contempt by obstruction or disruption. Moreover, we did not publish a final report on those particular issues. Therefore, given that the scope of our current review is broader and that we did not make recommendations on these points previously, we consider it appropriate to revisit some of these issues here. We draw on the analysis and provisional conclusions in our 2012 consultation paper where appropriate in the discussion below.

The text of article 6

8.102 Article 6 of the ECHR sets out the following requirements:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[127]

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126 Contempt of Court (2012) Law Commission Consultation Paper No 209. See also Appendix B: Contempt of Court and the European Convention on Human Rights (2012) Law Commission Consultation Paper No 209.

127 ECHR, art 6.

Contempt as a criminal offence for article 6 purposes

8.103 While paragraph 1 of article 6 applies in proceedings concerned with the determination of a person's "civil rights and obligations or of any criminal charge" against them, paragraphs 2 and 3 apply only when a person is charged with a "criminal offence". Whether these paragraphs apply to contempt proceedings thus depends on whether contempt is a criminal offence for these purposes.[128]

8.104 Contempt is not a criminal offence under the law of England and Wales, but this is not determinative of whether it is a criminal offence for article 6 purposes. Whether the ECtHR considers contempt to be criminal for these purposes depends on the following three criteria, which it laid down originally in *Engel v The Netherlands*:[129]

(1) The starting point is "whether the provisions defining the offence in issue belong, according to the legal system of the respondent State, to criminal law".[130] If so, this will be decisive and article 6 will apply in full;[131] otherwise the ECtHR will consider the second and third criteria, which are "alternative and not necessarily cumulative".[132]

(2) The second criterion, which is of "greater import" than the first,[133] is whether the offence is of a criminal nature. The ECtHR has held that a matter may be criminal for these purposes where the relevant provision "potentially affects the whole population", in contrast to a merely disciplinary rule which is "designed to ensure that the members of particular groups comply with the specific rules governing their conduct".[134]

(3) Thirdly, the nature and degree of severity of the penalty that may be incurred.[135] This is to be judged "by reference to the maximum potential penalty for which the relevant law provides".[136] Penalties that "belong to the 'criminal' sphere" generally include "deprivations of liberty liable to be imposed as a punishment,

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128 We considered this issue in detail Appendix B: Contempt of Court and the European Convention on Human Rights (2012) Law Commission Consultation Paper No 209.

129 *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71). See also *Campbell and Fell v The United Kingdom* (1985) 7 EHRR 165 (App No 7819/77, 7878/77); *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84).

130 *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84) at [31]. See also *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71) at [82].

131 Council of Europe, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb) (undated) at [24].

132 *Lewandowski v Poland* (2012) App No 66484/09 at [27]. The nature of the offence is the "weightier" criterion compared to the domestic classification: *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84) at [32].

133 *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71) at [82].

134 *Weber v Switzerland* (1990) 12 EHRR 508 (App No 11034/84) at [33].

135 *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71) at [82].

136 *Lewandowski v Poland* (2012) App No 66484/09 at [30].

except those which by their nature, duration or manner of execution cannot be appreciably detrimental".[137]

8.105 The first criterion would not be satisfied because, as discussed, liability for contempt does not form part of the criminal law in England and Wales. The second criterion is likely fulfilled,[138] at least with respect to the exercise of contempt powers by the courts,[139] but we do not analyse it in detail here because the analysis of the third criterion is straightforward: given that imprisonment is a possible sanction in contempt proceedings in England and Wales, they should be considered criminal for the purposes of article 6. This conclusion is consistent with the decision of the Court of Appeal in *Daltel Europe v Makki* that "committal proceedings [for contempt] are to be categorised as criminal proceedings for the purposes of article 6, whether the contempt involved is classified as civil or as criminal".[140] Therefore, contempt proceedings should be treated as subject to the full requirements of article 6. On this basis, we now turn to consider the extent to which the current procedure in contempt proceedings is compliant with those requirements.

"Independent and impartial tribunal"

8.106 A person's right to be heard by "an independent and impartial tribunal" under article 6(1) may be at risk of interference where the court that observed an alleged contempt is the same court that then conducts the enquiry into the allegation. Such a procedure is available under the Criminal Procedure Rules where the court enquires into a contempt by obstruction or disruption, whether it does so "there and then" or postpones the enquiry.[141] In either case, the court conducting the enquiry "need not include the same member or members as the court that observed the conduct" but it "may do so, unless that would be unfair to the [defendant]".[142] Neither the procedure rules nor practice directions provide further guidance on when it may be "unfair" to do so, which has been recognised as an issue by judges in the criminal courts. There is no corresponding rule in the Civil Procedure Rules, Family Procedure Rules, or Court of Protection Rules 2017.

8.107 Where the enquiry is conducted by the same court that observed the alleged contempt, the result is that "the court is the victim; the court is the witness; the court is the prosecutor, and the court is the judge".[143] The ECtHR has said that this "confusion of roles" may give rise to "objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or

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137 *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71) at [82]. See also *Gestur Jónsson and Ragnar Halldór Hall v Iceland* (2018) App No 68271/14 and 68273/14 at [94]; HHJ Mark Lucraft KC, *Archbold Criminal Pleading, Evidence and Practice* (2024 ed) (*"Archbold"*) para 16-76.

138 The ECtHR case law on this criterion is highly fact specific.

139 It is less clear, however, that this criterion is fulfilled where such powers are exercised by tribunals. If that is the case, and thus it may not be necessary for the procedure in tribunals to be compliant with article 6, we are not aware of any reason that it should not be compliant where possible.

140 *Daltel Europe v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

141 CrimPR, r 48.5(3)(b) and (c).

142 Above, r 48.8(5).

143 *R v Powell* (1994) 98 Cr App R 224 at 226.

her own cause and, consequently, as to the impartiality of the bench".[144] This may be the case whether the defendant's conduct was directed towards the judges personally, such as criticisms of the manner in which they had been conducting proceedings;[145] or the court as an institution, such as criticisms of the course of a criminal trial generally.[146] There may be less risk of a lack of impartiality where the court postpones the enquiry, under rule 48.5(3)(c) of the Criminal Procedure Rules, than if it enquires into the conduct "there and then", under rule 48.5(3)(b). This is based on the assumption that the postponement provides time for a "cooling off" period.

8.108 The courts are alive to the potential for unfairness when dealing with a contempt that occurred before them. Indeed, a wealth of case law has warned against judges doing so.[147] Although there is a lack of guidance in the rules on the type of circumstances that might constitute "unfairness" in this context, there is guidance in the cases. For example, Lord Goff in *R v Gough* took the view that:[148]

> The court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.[149]

8.109 Further, when deciding whether the matter should be referred to another judge, the courts have also relied on the test for bias laid out in *Porter v Magill*: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[150]

8.110 In December 2023, guidance was issued to judges in the Crown Court on how to deal with contempt in the face of the court. This guidance recognises the risks that may arise where a court deals with contempt itself, particularly if it is the same court that observed the conduct:

> Even if the Court has the power to institute proceedings, judges should avoid dealing with the matter themselves unless absolutely necessary, and should instead refer the matter to the relevant Presiding Judge, President or Chamber President. Summary committal proceedings are often undesirable because they require a judge to act as a prosecutor, judge and jury, and in certain circumstances, they will also be the victim. Moreover, the summary procedure lacks some of the fundamental

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144 *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) (Grand Chamber decision) at [127].

145 Above. See also *Lewandowski v Poland* (2012) App No 66484/09.

146 *Slomka v Poland* (2020) 70 EHRR 7 (App No 68924/12).

147 See, for example, *Balogh v St Albans Crown Court* [1975] 1 QB 73 at 90; *DPP v Channel Four Television* [1993] 2 All ER 517 at 521; and *R v Schot and Barclay* [1997] 2 Cr App R 383.

148 *R v Gough* [1993] AC 646.

149 Above at [70].

150 *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103]. This test was used in *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254.

safeguards available to a defendant in criminal proceedings or in proceedings instituted by the Attorney General.[151]

"Informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation"

8.111 Under article 6(3)(a), a person is entitled "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This requires that the defendant be made aware of "the material facts alleged against him which are at the basis of the accusation" (that is, the cause of the accusation) and "the legal qualification of these material facts" (that is, the nature of the accusation).[152] The requisite level of detail depends on the particular circumstances of each case, but in any case the defendant must "be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence".[153] The ECtHR has held this requirement will be fulfilled where the relevant communication notifies the defendant of the institution of proceedings against them, sufficiently lists the offences of which they were accused (and relevant statutory provisions), states the place and the date of the alleged offences, and mentions the name of the victim.[154]

8.112 This right may be at risk of interference by the contempt procedure in some cases. On the one hand, the Criminal Procedure Rules require that an application or statement of the court (where it initiates proceedings itself) in respect of contempt by breach of an order must "explain that it is an application for the [defendant] to be dealt with for contempt of court" and "contain such particulars of the conduct in question as to make clear what is alleged against the [defendant]".[155] However, in respect of a contempt by obstruction or disruption, the court is merely required to "explain, in terms the [defendant] can understand (with help, if necessary) … the conduct that is in question".[156] Only where the court then chooses to postpone the enquiry must it prepare "a written statement containing such particulars of the conduct in question as to make clear what the [defendant] appears to have done".[157] Arguably, it would be preferable for the courts to provide a written statement for the purposes of clarity and certainty. This seems particularly necessary given that contempt proceedings are notoriously complicated and difficult for laypeople to understand, as we have heard from stakeholders.

8.113 On the other hand, the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 require that a contempt application or summons (where the

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151 Judiciary of England and Wales, *Contempt in the Face of the Court: Guidance* (15 December 2023), para 11.

152 *Mattoccia v Italy* (2003) 36 EHRR 47 (App No 23969/94) at [59].

153 Above at [60].

154 *Brozicek v Italy* (1990) 12 EHRR 371 (App No 10964/84) at [42].

155 CrimPR, rr 48.9(3)(b) and (c), and (4)(a).

156 Above, r 48.5(2)(a)(i).

157 Above, r 48.7(2).

court initiates proceedings itself) must include statements of the following (among other things):

(1) the nature of the alleged contempt;

(2) the date and terms of any order allegedly breached or disobeyed; and

(3) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order.[158]

8.114 In *Deutsche Bank AG v Sebastian Holdings Inc*, the court considered the compatibility of the article 6(3)(a) requirement that a defendant be informed "in detail" of the nature and cause of the accusation with the requirement in the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 to include a "brief summary of the facts" in a contempt application or summons.[159] Cockerill J held that the question is: "would such a person, having regard to the background against which the committal application is launched, be in any doubt as to the substance of the breaches alleged?".[160] It was held that this "properly reflects … article 6 considerations".[161]

"Adequate time and facilities" to prepare a defence

8.115 A person's right to have "adequate time and facilities for the preparation of his defence" under article 6(3)(b) may be at risk of interference where the court enquires into a contempt by obstruction or disruption in accordance with the Criminal Procedure Rules. This right has been interpreted by the ECtHR as meaning that the defendant "must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings".[162] This right is violated "only if this is made impossible".[163]

8.116 In determining whether the defendant had "adequate time", particular regard must be had to the nature of the proceedings and the complexity of the case.[164] "Facilities" includes allowing the defendant to concentrate and apply mental dexterity in defending their position,[165] as well as having access to all the relevant documents and evidence which apply to their case.[166] Given the speed with which contempt proceedings can be initiated and the fact that they can be notoriously complicated, concerns arise here about compliance with this right.

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158 CPR, rr 81.4(2)(a), (b), and (h); FPR, rr 37.4(2)(a), (b), and (h); CoPR, rr 21.4(2)(a), (b), and (h).

159 *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm).

160 Above at [77].

161 Above at [77].

162 *Can v Austria* (1985) 7 EHRR CD421 (App No 9300/81) at [53]; *Gregačević v Croatia* (2012) App No 58331/09 at [51]; *Mayzit v Russia* (2006) 43 EHRR 38 (App No 63378/00) at [78].

163 *Can v Austria* (1985) 7 EHRR CD421 (App No 9300/81) at [53].

164 *Gregačević v Croatia* (2012) App No 58331/09 at [51].

165 *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia* (2019) App No 75734/12 at [252].

166 *Rasmussen v Poland* (2009) App No 38886/05 at [48]-[49].

8.117 This is particularly the case where an alleged contempt by obstruction or disruption arises in the Crown Court or Court of Appeal (Criminal Division). In these circumstances, the initial procedure set out in the Criminal Procedure Rules requires that the court must first "allow the [defendant] a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise".[167] The court then may choose to take no further action, enquire into the conduct "there and then", or postpone the enquiry.[168] However, generally the courts warn against dealing with the contempt immediately; such a procedure should be used "sparingly",[169] "only when it is urgent and imperative to act immediately".[170] Otherwise, the courts consider it wise to postpone the enquiry. For example, in *R v Santiago*, a defendant pushed and swore at a dock officer while the jury were deliberating (and thus were not in court).[171] Here, there was little risk to the administration of justice as the trial had concluded and thus it was unnecessary to deal with the contempt immediately. The court postponed the contempt proceedings for eight days, which allowed adequate time for preparation of the defence.[172]

8.118 While, in theory, the enquiry should be postponed until arrangements have been made to ensure that adequate safeguards are in place, this does not always happen in practice. For example, in *Re Yaxley-Lennon* the defendant had allegedly committed a contempt in the morning and, by the afternoon of that same day, had received an immediate sentence totalling 13 months' imprisonment.[173] The Court of Appeal held that a number of errors had been made by the trial judge. These included the haste with which the defendant was imprisoned, the judge's failure to look at the evidence in full, particularise the conduct that formed the contempt charge, make clear which type of contempt was in question, and the inability of the defendant's counsel to provide proper legal advice as a result. The Court of Appeal (Criminal Division) commented that the defendant:

> … was commencing a term of imprisonment of thirteen months within five hours of the conduct complained of. Such haste gave rise to a real risk that procedural safeguards would be overlooked, the nature of the contempt alleged would remain inadequately scrutinised and that points of significant mitigation would be missed. Those risks materialised.[174]

Consequently, the Court of Appeal set aside the finding of contempt on the basis that the procedural defects had resulted in prejudice.

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167 CrimPR, r 48.5(2)(b).

168 Above, r 48.5(3).

169 *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [27]. See also *Balogh v St Albans Crown Court* [1975] QB 73, 85; and Report of the Committee on Contempt of Court (1974) Cmnd 5794, para 45.

170 *Balogh v St Albans Crown Court* [1975] QB 73, 85.

171 *R v Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

172 See also *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716; *Griffin* (1989) 88 Cr App R 63, 70.

173 *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400.

174 Above at [60].

8.119 There has been a steady move away from procedures that enable the court to deal with a contempt immediately or soon after the alleged conduct. Under the Criminal Procedure Rules, proceedings for contempt by breach of order or other form of civil contempt can be initiated only by application by a party or person, or by statement of the court. In both cases, the court must wait at least ten business days after the application or statement is served on the defendant.[175] Similarly, the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 require that contempt proceedings can be initiated only by application or by court summons in all cases (including where the court considers that there has been a contempt in the face of the court).[176]

"To defend himself"

8.120 Article 6(3)(c) protects a person's right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". In this section we are concerned only with the right to defend oneself generally, and not the right to legal assistance. The availability and accessibility of legal aid in contempt proceedings is discussed in Chapter 9.

8.121 On the one hand, the Criminal Procedure Rules seek to protect a person's right to defend themselves in a number of ways. For example, where the court initially enquires into a contempt by obstruction or disruption, it must "allow the [defendant] a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise".[177] Moreover, the procedure on enquiry into a contempt by obstruction or disruption or by breach of order requires the court to consider any evidence introduced by the defendant and any representations made by the defendant about the conduct. The court must also provide an opportunity for the defendant to make representations relevant to punishment and a final opportunity to apologise, before imposing a sanction.[178] It is clear that the procedure in the Criminal Procedure Rules enables a defendant to be heard regarding their liability and penalty.

8.122 By contrast, the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 do not explicitly provide an opportunity for the defendant to address the court and make representations as to liability or penalty. Previously, the Civil Procedure Rules stated that "[i]f on the hearing of the application the [defendant] expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so";[179] however, this rule was removed in 2012.[180] Now, the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 merely require that a contempt application made to the court must include a statement "that the defendant is entitled but not obliged to give written and oral evidence in their defence".[181] It also

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175 CrimPR, r 48.8(2)(b)(ii) and (4)(b)(ii).

176 CPR, rr 81.3 and 81.6; FPR, rr 37.3 and 37.6; CoPR, rr 21.3 and 21.6.

177 CrimPR, rr 48.5(2)(b) and 48.6(3)(b).

178 Above, rr 48.8(3)(d) and (4)(a), and 48.10(3)(d) and (4)(a).

179 CPR, sch 1, Ord 52.6(4).

180 Civil Procedure (Amendment No.2) Rules 2012/2208, r 18(c).

181 CPR, r 81.4(2)(m); FPR, r 37.4(2)(m); CoPR, r 21.4(2)(m).

states that a defendant to a contempt application is not a compellable witness: "The court may not give any direction compelling the defendant to give evidence either orally or in writing".[182] These rules do not make it clear that a defendant must be given a chance to make representations or apologise to the court.

"To examine or have examined witnesses against him"

8.123 Under article 6(3)(d), a person has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This involves giving the defendant "an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings[183] This is not an absolute right, but any limitations must not breach the principle of equality of arms between the parties.[184]

8.124 The ECtHR has held that this right, in combination with article 6(1), entails a presumption against the use of hearsay evidence.[185] Hearsay evidence refers to "any representation of fact or opinion made by a person otherwise than in oral evidence in the proceedings in question when tendered as evidence of any matter stated therein".[186] An example of hearsay evidence that may be relevant in contempt proceedings might be an affidavit giving an account of the incident in question as witnessed by a member of court staff.

8.125 The presumption against the use of hearsay evidence is historically based and of long standing in criminal proceedings. It is now found also in domestic law in respect of criminal proceedings: section 114(1) of the Criminal Justice Act ("CJA") 2003 provides that in criminal proceedings hearsay is inadmissible unless it complies with strict rules.[187] This presumption can be rebutted. For example, in *Al-Khawaja and Tahery v the United Kingdom*, the ECtHR held that the admission of hearsay in line with the rules in the CJA 2003 did not violate article 6 because the primary concern of the court was to ensure the overall procedure was fair, and it held that it was.[188] However, there is no such presumption in civil proceedings under domestic law: section 1(1) of the Civil Evidence Act 1995 states that in civil proceedings "evidence shall not be excluded on the ground that it is hearsay".

8.126 In respect of contempt proceedings under the Civil Procedure Rules, the procedure reflects section 1(1) of the Civil Evidence Act 1995 in that evidence is not excluded because it is (or may be) hearsay. In respect of contempt proceedings under the

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182 CPR, r 81.7(3); FPR, r 37.7(3); CoPR, r 21.7(3).

183 Council of Europe, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb) (undated) at [302]. See, for example, *Lucà v Italy* (2003) 36 EHRR 46 (App No 33354/96) at [39].

184 *Engel v The Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71) at [91]; *Brandstetter v Austria* (1993) 15 EHRR 378 (App Nos 11170/84, 12876/87 and 13468/87) at [45].

185 For example, *Thomas v UK* (2005) App No 19354/02.

186 *Archbold* (2024) para 11-1. See CJA 2003, ss 114(1) and 115.

187 See CrimPR, r 20.

188 *Al-Khawaja and Tahery v the United Kingdom* (2011) App Nos 26766/05 and 22228/06 at [118]. See also *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [53].

Criminal Procedure Rules, Part 48 permits "any … evidence of the conduct" to be adduced at the hearing.[189] Where the proceedings were initiated on application under rule 48.9 (relating to breach of an order), the notes to Part 48 state that hearsay evidence is admissible under the Civil Evidence Act 1995. This suggests that the Criminal Procedure Rules treat proceedings for contempt by breach of order as civil proceedings for the purpose of the admissibility of hearsay. Given that there is thus no presumption against the use of hearsay evidence in cases of contempt by breach of order, there could be a concern that a defendant's right under article 6(3)(d) may not be protected adequately. However, there is at least a requirement in Part 48 that in cases of contempt by breach of order a party who wishes to introduce such evidence must give notice to the other party of their intention to do so.[190] By contrast, Part 48 of the Criminal Procedure Rules is silent on the admissibility of – and the procedure for introducing – hearsay evidence in proceedings for contempt by obstruction or disruption.[191] This suggests that in such cases the ordinary rules governing hearsay evidence in criminal proceedings would apply.

Article 6 and procedure rules

8.127 The above analysis suggests that particular features of the procedure in contempt proceedings may risk interfering with a person's right to a fair trial under article 6 of the ECHR. Concerns arise particularly where the court that observed the alleged contempt is the same court that conducts the enquiry, and where the enquiry is conducted immediately which means the defendant may have limited time to prepare and little information about the allegation. Having identified possible gaps in procedural safeguards afforded to defendants in contempt proceedings, we now turn to consider how the procedure could be reformed in a way that would strengthen these protections.

STAGES OF PROCEDURE

8.128 The procedure for contempt proceedings in courts, tribunals and other bodies should be sufficiently simple and prescriptive to ensure it can be utilised where necessary, while also adequately protecting a defendant's rights under article 6 of the ECHR. In this part of the chapter, we explore each stage of the procedure in contempt proceedings and consider the features that should be incorporated to ensure that it achieves these objectives effectively.

8.129 We do this in terms of our provisional proposals in Chapter 6 relating to the powers of courts, tribunals and other bodies to address apparently contemptuous conduct. In that chapter we provisionally conclude that superior courts of record should retain their powers to deal with contempt themselves. We then provisionally propose that inferior courts, tribunals and other bodies should have the power to deal with certain contempts themselves, in addition to the power to refer all types of contempt to the

189 CrimPR, rr 48.8(3)(b) and 48.10(3)(b).

190 Above, r 48.11.

191 Part 20 of the CrimPR sets out the procedure for introducing hearsay evidence in criminal proceedings generally.

High Court (or to the UT or EAT). We now consider what should be the procedure where a court, tribunal or other body exercises these powers.

Instituting proceedings

8.130 The first stage of the procedure is the institution of proceedings. Under the current law, contempt proceedings generally can be instituted either by a court itself or on application. An application may be made by a party to existing proceedings or another sufficiently connected person, such as the AG. In our provisional view, it should continue to be possible to institute contempt proceedings by either of these routes. However, there are various features of the existing procedures for instituting proceedings that require reform to ensure a coherent, simple, clear, and effective regime. We consider these issues and options for reform below.

Instituting proceedings of the court's own motion

8.131 The ability of superior courts of record to institute contempt proceedings of their own motion is an important feature of their inherent jurisdiction; it is a necessary tool for regulating their own proceedings. In pre-consultation meetings judges emphasised the importance of retaining this discretion to ensure that they can deal effectively with threats to the administration of justice. In light of our provisional proposals in Chapter 6 that protected inferior courts, tribunals and other bodies should have the power to deal with general contempt and contempt by breach of order, we provisionally conclude that a procedure by which they can institute proceedings themselves must be available to them as well.

8.132 The utility of such a procedure is also reflected in a large body of case law that has addressed the question whether, if conduct may also be a criminal offence, the court should not initiate contempt proceedings but should leave it to be dealt with as a criminal offence. For example, in *R v AS*, the Court of Appeal noted that "being able to state that action will be taken by the court as soon as practicable may often be enough to enable the trial to continue without further interruption", but "a judge can only say that if he resolves to deal with the matter of his own motion rather than leaving the matter to the discretion of the prosecuting authorities".[192]

8.133 However, judges raised concerns with us about the lack of clarity as to when it is appropriate for the court to institute proceedings itself and, in some cases, how to do so. It is these issues that we consider in this section.

8.134 Informed by stakeholders' views and case law, we provisionally conclude that the procedure for instituting proceedings of the court's own motion should involve the following features:

(1) A procedure by which the court conducts an initial enquiry into the allegation and considers whether to initiate substantive contempt proceedings against the defendant.

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192 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716 at [22].

(2) While the court considers whether to initiate substantive contempt proceedings, a procedure by which it can detain the defendant immediately for a limited period. This procedure will be needed only where a defendant is in court.

(3) A procedure by which the court can initiate contempt proceedings where it considers it necessary to do so.

8.135 Each of these processes is available currently under rule 48.5 of the Criminal Procedure Rules where a contempt by obstruction or disruption arises in the magistrates' courts, Crown Court, or Court of Appeal (Criminal Division). However, there is no corresponding rule under the Civil Procedure Rules, Family Procedure Rules, or Court of Protection Rules 2017. All contempt proceedings instituted by summons in the county court, High Court, Court of Appeal (Civil Division), or Court of Protection are heard at a later date as the defendant must be given notice (though it is not clear from each set of procedure rules how much notice is required).[193] In our provisional view, the existing procedure in rule 48.5 of the Criminal Procedure Rules provides a useful starting point for a model set of rules to be applied in other courts, tribunals and other bodies. In the discussion that follows we consider how that procedure can be developed and improved to strengthen the protection of a defendant's fair trial rights and compliance with article 6, and how it would operate appropriately in various settings.

Initial enquiry

8.136 In all cases where a potential contempt arises, and the court, tribunal or other body is contemplating the initiation of contempt proceedings, it should be required first to enquire into the conduct. This should involve the court, tribunal or other body:

(1) explaining to the defendant the allegation, the procedure that will follow, and the sanctions available to the court, tribunal or other body upon making a finding of contempt;

(2) allowing the defendant sufficient time to receive legal advice and to reflect on the conduct;

(3) providing an opportunity to the defendant to admit, explain, and apologise for the conduct.

8.137 The purpose of this process is to enable the court, tribunal or other body to "warn"[194] the defendant that their behaviour may constitute contempt and to determine whether to institute contempt proceedings against them, refer the conduct to the High Court (or to the UT or EAT),[195] or take no further action. By explaining to the defendant the circumstances and the potential consequences of a contempt finding, and by giving them time to "cool off", the court, tribunal or other body may be able to de-escalate the situation. In such cases, it may be unnecessary to pursue contempt proceedings and thus the matter can be dispensed with quickly. In other cases, an initial enquiry may

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193 See para 8.86 above.

194 Judiciary of England and Wales, *Contempt in the Face of the Court: Guidance* (15 December 2023) para 6.

195 In line with our provisional proposal in Chapter 6, the option of referring the matter to the High Court, UT, or EAT would be available only to an inferior court, tribunal or other body.

reveal to the court, tribunal or other body that, for example, the defendant contests the allegation and so a substantive hearing may be warranted.

8.138 A procedure of this kind is available under the Criminal Procedure Rules in cases of contempt by obstruction or disruption (that is, conduct commonly referred to as "criminal" contempt). However, we consider that such a procedure is necessary also in cases where the allegation relates to breach of an order (conduct that is commonly referred to as "civil" contempt). For example, a person who refuses to obey an order may decide to comply after hearing from the judge that they can impose imprisonment if a finding of contempt is made. Therefore, in our provisional view, an initial enquiry should be the first step taken by the court where any type of potential contempt arises.

8.139 This procedure should be undertaken by the court, tribunal or other body only where it is contemplating initiating contempt proceedings. In some cases where a potential contempt arises, the court, tribunal or other body may choose not to address it at all. It was widely recognised by stakeholders that a court's discretion not to deal with an alleged contempt is an invaluable feature of the current regime. Members of the judiciary considered this to be the case particularly in the context of criminal, family, or Court of Protection proceedings, where emotions can run high and sensitive matters may be in issue.

8.140 A Crown Court judge explained that "it is human nature that people who are connected to the defendant have heightened emotions during a trial" and may act inappropriately as a result but this will not necessarily warrant punishment. We also heard from stakeholders that, in family cases, the courts often see litigants-in-person who view their outbursts during proceedings, for example, merely as venting. We were told that such behaviour is so common in family proceedings, given their sensitive nature, that the courts rarely enforce contempt rules. These examples illustrate the importance of enabling a court, tribunal or other body to use their discretion to decide whether it is in the interests of justice and fairness to address a potential contempt. Consequently, a court, tribunal or other body should be required to make an initial enquiry into a contempt allegation only where it contemplates initiating proceedings.

8.141 After the court, tribunal or other body has conducted an initial enquiry into a contempt allegation, it should have the following options:

(1) to take no further action;

(2) to institute contempt proceedings, where the court, tribunal or other body has the power to do so (where this option is pursued, it should remain open to the court, tribunal or other body to discontinue proceedings at any point);

(3) to refer the matter to the High Court (or to the UT or EAT), asking the High Court (or the UT or EAT) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral); or

(4) to refer the matter to the AG (asking the AG to consider whether to institute contempt proceedings) or the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence).

8.142 In our view, the initial procedure in cases of contempt by obstruction or disruption under rule 48.5(2) of the Criminal Procedure Rules is appropriate for these purposes, subject to one addition. Therefore, we provisionally propose that the steps taken by a court, tribunal or other body where it conducts an initial enquiry largely should mirror that procedure, which requires the following:

> (2) Unless the respondent's behaviour makes it impracticable to do so, the court must—
>
> (a) explain, in terms the respondent can understand (with help, if necessary)—
>
> (i) the conduct that is in question,
>
> (ii) that the court can impose imprisonment, or a fine, or both, for such conduct,
>
> (iii) (where relevant) that the court has power to order the respondent's immediate temporary detention, if in the court's opinion that is required,
>
> (iv) that the respondent may explain the conduct,
>
> (v) that the respondent may apologise, if he or she so wishes, and that this may persuade the court to take no further action, and
>
> (vi) that the respondent may take legal advice; and
>
> (b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise.

The addition is that the procedure should also include a requirement for the court, tribunal or other body to explain to the defendant that it may refer the matter to the High Court (or to the UT or EAT), or to the AG or police (as above). Courts and tribunals that are protected by the law of contempt are permitted to make a referral to the AG or police already, but the existing procedure in rule 48.5(3) of the Criminal Procedure Rules does not require such a warning to be given to the defendant.

Consultation Question 67.

8.143 We provisionally propose that, where practicable, a court, tribunal or other body *should be required first to conduct an initial enquiry* into the allegation in all cases where:

(1) the court, tribunal or other body observes, or someone reports to it, a potential contempt; and

(2) the court, tribunal or other body is contemplating instituting contempt proceedings.

Do consultees agree?

Consultation Question 68.

8.144 We provisionally propose that the procedure on initial enquiry should require the following:

(1) Unless the defendant's behaviour makes it impracticable to do so, the court, tribunal or other body must—

(a) explain, in terms the defendant can understand (with help, if necessary)—

(i) the conduct that is in question;

(ii) (where relevant) that the court, tribunal or other body may refer the matter to the High Court (or to the Upper Tribunal or Employment Appeal Tribunal) (asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself);

(iii) (where relevant) that the court, tribunal or other body may refer the matter to the Attorney General (asking the Attorney General to consider whether to institute contempt proceedings) or to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence);

(iv) the sanctions that the court, tribunal or other body can impose for such conduct;

(v) (where relevant) that the court, tribunal or other body has power to order the defendant's immediate temporary detention, if that is required in the opinion of the court, tribunal or other body;

(vi) that the defendant may explain the conduct;

(vii) that the defendant may apologise, if they so wish, and that this may persuade the court, tribunal or other body to take no further action; and

(viii) that the defendant may take legal advice; and

(b) allow the defendant a reasonable opportunity to reflect, take advice, explain and, if they so wish, apologise.

Do consultees agree?

Consultation Question 69.

8.145 We provisionally propose that, after conducting an initial enquiry into the contempt allegation, the court, tribunal or other body should have the option to:

(1) take no further action in respect of the allegation;

(2) institute proceedings for contempt in respect of the allegation, where the court, tribunal or other body has the power to do so (and the court, tribunal or other body should be able to discontinue those proceedings at any time);

(3) refer the matter to the High Court (or to the Upper Tribunal or Employment Appeal Tribunal), asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral); or

(4) refer the matter to the Attorney General (asking the Attorney General to consider whether to institute contempt proceedings) or the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute it as a criminal offence).

Do consultees agree?

Immediate temporary detention

8.146 The issue for consideration here is the procedure for the immediate temporary detention of a defendant alleged to have committed a contempt. The superior courts have an inherent power to order the immediate temporary detention of a defendant,[196] whereas an inferior court can do so only where such a power has been conferred by statute. For example, section 12(2) of the CCA 1981 empowers a magistrates' court to detain temporarily a defendant until later the same day on a contravention of that section. Given our provisional conclusion in Chapter 6 that *all* inferior courts, tribunals and other bodies should have the same powers as each other to address apparently contemptuous conduct, a question arises of whether they should all have a power similar to that of the magistrates' courts. We seek consultees' views on this below.

8.147 Part 81 of the Civil Procedure Rules, Part 37 of the Family Procedure Rules, and Part 21 of the Court of Protection Rules 2017 do not contain a procedure for the immediate temporary detention of a defendant alleged to have committed a contempt. By contrast, Part 48 of the Criminal Procedure Rules sets out a procedure by which the court can do so in cases of contempt by obstruction or disruption, prior to conducting the initial enquiry into the allegation in accordance with rule 48.5(2).[197] Rule 48.6 of

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196 *Delaney v Delaney* [1996] QB 387 at [401]: "a power has long been exercised by the superior courts to detain those committing or apparently committing contempts in the face of the court until the rising of the court on the day of the alleged contempt and there is no reason to doubt the existence of that inherent power". See also Senior Courts Act 1981, ss 15 and 45.

197 CrimPR, r 48.6.

the Criminal Procedure Rules requires that where the court detains a defendant under this procedure:

> (2) The court must review the case—
>
> (a) if a magistrates' court, later the same day; or
>
> (b) if the Court of Appeal or the Crown Court, no later than the next business day.
>
> (3) On the review, the court must—
>
> (a) unless the respondent is absent, repeat the explanations required by rule 48.5(2)(a); and
>
> (b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise.
>
> (4) The court may then—
>
> (a) take no further action in respect of the conduct;
>
> (b) if a magistrates' court, enquire into the conduct there and then; or
>
> (c) if the Court of Appeal or the Crown Court—
>
> (i) enquire into the conduct there and then, or
>
> (ii) postpone the enquiry, and order the respondent's release from such detention in the meantime.

8.148 Generally, in pre-consultation meetings judges in the criminal courts told us of the value of the procedure in the Criminal Procedure Rules for the immediate temporary detention of a defendant. We heard that detaining temporarily a defendant who is behaving poorly in court gives them time to reflect and "cool off", and they often return with an apology for the court. In such cases, it tends to be unnecessary for the court to take any further action by instituting contempt proceedings. This procedure thus was described by criminal judges as a tool for de-escalating these types of situations, enabling the court to dispense quickly with the contempt matter and continue the original proceedings.

8.149 However, a number of concerns arise in respect of this procedure in the Criminal Procedure Rules. First, though where the Crown Court or Court of Appeal (Criminal Division) temporarily detains a defendant it must review the case no later than the next business day,[198] in theory this could be five days later.[199] We considered this issue in our consultation paper on contempt of court, published in 2012, and our provisional view was that "[t]his is far too long a period for a person to be detained

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198 CrimPR, r 48.6(2)(b).

199 See, for example, *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254.

without review of that detention".[200] Though we did not publish a final report with recommendations on this issue, we provisionally proposed that the defendant "should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out".[201] A number of consultees agreed.[202]

8.150 Secondly, while a criminal defendant who is detained has a right to have someone told of the detention,[203] there is no explicit corresponding right for contempt defendants who are detained under the procedure in the Criminal Procedure Rules. This issue was also considered in our 2012 consultation paper on contempt. We provisionally concluded that where a defendant in contempt proceedings is detained under this procedure "some minimum rights ought to be afforded to [them]"[204] and that these should be put in statute. It was our view that these rights should be similar to those available to a person who has been arrested and held in custody. Every consultee who responded to this proposal agreed with it.

8.151 Given the feedback from judges that their ability to order the immediate temporary detention of a defendant in contempt proceedings is vital to ensure the administration of justice, we provisionally consider it desirable to extend the availability of such a procedure to all courts, tribunals and other bodies with such a power. The use of such a procedure will, however, only be possible in courts, tribunals and other bodies that have cells available and staff to execute the order.

8.152 The exercise of this procedure should be limited to cases of contempt by obstruction or disruption (as is the case currently in respect of the procedure in rule 48.6 of the Criminal Procedure Rules) and only where the immediate temporary detention of the defendant is necessary to enable the court, tribunal or other body to conduct an initial enquiry into the allegation. This may be necessary where, for example, the defendant is verbally abusing the judge and refuses to stop. In our provisional view, the existing procedure in rule 48.6 of the Criminal Procedure Rules provides a useful starting point for these purposes.

8.153 However, we remain concerned about the lack of a right for the defendant to have a person told of their detention and the length of time for which a defendant may be detained before their case is reviewed. Therefore, we provisionally propose that where a court, tribunal or other body orders the immediate temporary detention of a defendant in a contempt case the defendant should be entitled to have a person told of their detention. Additionally, we provisionally propose that the court, tribunal or

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200 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.93.

201 Above, para 5.96.

202 At para 8.170 below we discuss the resource implications of the requirement in rule 48.5(3)(c) of the CrimPR that the magistrates' courts must hear contempt proceedings on the same day that the alleged contempt occurred. In light of those concerns, we provisionally propose that there should be no such requirement on any courts, tribunals or other bodies. The procedure for reviewing the case of a defendant who is detained is less onerous than the procedure for the substantive contempt proceedings. For this reason, it seems unlikely that the review procedure has the same resource implications in the magistrates' courts as the procedure for the substantive proceedings.

203 Police and Criminal Evidence Act ("PACE") 1984, ss 56 and 58.

204 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.91.

other body should be required to review the defendant's detention by the end of the same day. This would ensure that the defendant is not detained for a disproportionate period of time in light of the fact that at that stage they are being detained without having yet been found liable for contempt. We recognise that the effect of this reform will be that where the relevant conduct occurs late in the day the defendant is likely to spend less time in immediate temporary detention than if it occurs earlier in the day. However, such outcomes may result in other contexts. For example, a successful bail application heard late in the day will result in the defendant having spent more time in custody beforehand than if the application had been heard in the morning. Our provisional conclusion is that these outcomes are unavoidable and, in any case, proportionate to avoid the detention of defendants for excessive periods.

Consultation Question 70.

8.154 We invite consultees' views on whether all protected inferior courts, tribunals and other bodies should have a power to order the immediate temporary detention of a defendant in contempt proceedings.

Consultation Question 71.

8.155 We provisionally propose that all courts, tribunals and other bodies that are empowered to order the immediate temporary detention of a defendant in contempt proceedings should have available to them a specific procedure for doing so.

Do consultees agree?

Consultation Question 72.

8.156 We provisionally propose that a defendant who is detained temporarily by a court, tribunal or other body should be entitled to have someone told of their detention.

Do consultees agree?

Consultation Question 73.

8.157 We provisionally propose that where a court, tribunal or other body orders the immediate temporary detention of a defendant in contempt proceedings it should be required to review the case no later than the end of the same day.

Do consultees agree?

In what circumstances should a court, tribunal or other body institute proceedings themselves or refer the matter elsewhere?

8.158 Judges, particularly in the criminal courts, told us that it is not clear to them when it is appropriate for the court to institute contempt proceedings itself, rather than referring the matter elsewhere. They specifically identified the options of referring it to another judge of the same court, to the AG asking them to consider whether to institute contempt proceedings, or to the police asking them to investigate and consider referring it to the Crown Prosecution Service for a decision on prosecuting the matter as a criminal offence. The various sets of procedure rules do not address this issue.

8.159 Much of the case law that considers this question is largely unhelpful for our purposes. This is because the courts generally cite the need to deal *immediately* with a threat to the administration of justice as the main reason for instituting proceedings themselves.[205] However, as we discuss at paragraph 8.168 below, the effect of our provisional proposals is that in most cases there will necessarily be some time between the institution of proceedings and the hearing. Consequently, in the absence of an *immediate* procedure, the guidance developed in that body of case law is not particularly relevant.

8.160 Recently, guidance on dealing with contempt in the face of the court was issued to judges in various courts and tribunals,[206] mapping out the various options available to them in such cases. It advises that "judges should avoid dealing with the matter themselves unless absolutely necessary, and should instead refer the matter to the relevant Presiding Judge".[207] Where the Presiding Judge determines that further action is warranted, the guidance advises them to refer the matter on to the police (where the conduct constitutes a criminal offence) or to the Senior Presiding Judge, who will decide whether to send it to the AGO to consider bringing contempt proceedings in the High Court.[208] In our provisional view, guidance of this kind is sufficiently important to be mandated by procedure rules. Therefore, we provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should set out factors for the court, tribunal or other body to take into account when considering whether to institute proceedings itself or refer the matter elsewhere. Relevant factors may include the nature and seriousness of the

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205 See, for example, *Balogh v St Albans Crown Court* [1975] QB 73; *R v Griffin* (1989) 88 Cr App R 63.

206 Judiciary of England and Wales, *Contempt in the Face of the Court: Guidance* (15 December 2023). This guidance applies to allegations of contempt in the face of the court in the Crown Court, the county court, the family court, the Upper Tribunal, First-tier Tribunal, the employment tribunals, and the Employment Appeal Tribunal in England and Wales. It does not apply to the magistrates' courts. See para 1 of the Guidance.

207 Above, para 11.

208 Above, para 21.

conduct,[209] the availability and type of evidence,[210] and the appropriateness of the court's sentencing powers for contempt.

8.161 In the event that inferior courts, tribunals and other bodies are empowered to refer apparently contemptuous conduct to the High Court (or to the UT or EAT),[211] it will be necessary also to develop guidance on the circumstances in which such a referral should be made. Our provisional view is that this guidance should encourage inferior courts, tribunals and other bodies to exercise these referral powers in most cases and to deal with the conduct themselves only in exceptional circumstances. This is because we recognise concerns expressed by stakeholders that:

(1) some inferior courts, tribunals and other bodies may not be well-equipped to deal with complex contempt matters themselves; and

(2) contempt proceedings require a degree of formality and rigidity in procedure that is often inconsistent with the necessarily informal setting of some tribunals and other bodies.

8.162 As in the case of the guidance discussed at paragraph 8.159 above, we think this guidance should be mandated by procedure rules. Therefore, we provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should identify factors to be considered by the inferior court, tribunal or other body in determining whether to make a referral or deal with the matter itself.

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209 Such considerations may include, for example, whether the core wrong of the conduct relates to the administration of justice. We heard from judges that, where the conduct may constitute either contempt or a criminal offence, it may be preferable to deal with it as contempt rather than referring it to the police as a potential criminal offence because this ensures that the wrongful nature of the conduct is reflected in the way it is labelled and treated by the courts.

210 See paras 8.194 to 8.196 below for discussion of the admissibility of hearsay evidence in contempt proceedings. Though we discuss the issues in the context of proceedings instituted on application, they are relevant also where proceedings are instituted by the court itself.

211 This reflects our provisional conclusions in Chapter 6.

Consultation Question 74.

8.163 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should require the court, tribunal or other body to consider whether to institute proceedings itself or to refer the matter to:

(1) the Attorney General, asking the Attorney General to consider whether to institute contempt proceedings in the High Court;

(2) the police, asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence; or

(3) the High Court (or to the Upper Tribunal or Employment Appeal Tribunal), asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral).

Do consultees agree?

8.164 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should set out the relevant factors for the court, tribunal or other body to take into account when considering whether to institute proceedings itself or to refer the matter to the Attorney General, police, High Court, Upper Tribunal or Employment Appeal Tribunal. Relevant factors may include the complexity of the matter, the seriousness of the conduct, the availability and type of evidence, the expertise of the court, tribunal or other body, and the appropriateness of its sentencing powers for contempt.

Do consultees agree?

We invite consultees' views on other factors that may be relevant.

Setting a hearing date

8.165 We provisionally propose at paragraph 8.145 above that, following an initial enquiry into the conduct, the court, tribunal or other body should have the option to take no further action or to institute contempt proceedings against the defendant. This broadly mirrors the existing procedure in rule 48.5(3) of the Criminal Procedure Rules. Under that procedure, where the court chooses to institute contempt proceedings, the hearing can take place "there and then" or it can be postponed.[212] A magistrates' court may postpone proceedings only until later that same day,[213] whereas the rules do not restrict the duration of the postponement in the Crown Court and Court of Appeal (Criminal Division). The rules are silent on the circumstances in which the court should exercise one option or the other. However, judges in the Crown Court told us that the guidance they receive instructs them not to institute proceedings "there and then" and

[212] CrimPR, r 48.5(3)(b) and (c).

[213] Above, r 48.5(3)(c).

that they should institute postponed proceedings only once approved by the relevant senior judge.[214]

8.166 As discussed above, dealing with an alleged contempt "there and then" may interfere with a person's right to a fair trial under article 6 of the ECHR.[215] In particular, if proceedings are instituted immediately it will engage the right to be informed promptly, in a language which the defendant understands and in detail, of the nature and cause of the accusation against them; and the right to have adequate time and facilities to prepare a defence.[216] For this reason, it has been held that the court should not hear contempt proceedings until arrangements have been made to ensure that adequate procedural safeguards are in place for the defendant.[217] The importance of this was illustrated in *Re Yaxley-Lennon* where the Court of Appeal (Criminal Division) held that the haste with which the matter was addressed meant that the defendant's counsel could not provide proper legal advice.[218]

8.167 Given that it can be difficult to secure legal representation in contempt matters, as we have heard from stakeholders, in many cases there may be a need to delay the substantive proceedings. The amount of time required to make arrangements for legal advice and representation will depend on the circumstances. Where the defendant is legally represented in the original proceedings to which the contempt relates, then that representative may be able to advise on the contempt matter within hours. In other cases, including where a defendant is unrepresented, it may take days or weeks – for example, in *R v AS* the contempt proceedings were adjourned for three weeks to accommodate the schedule of the defendant's legal representative.[219]

8.168 Consequently, it will rarely, if ever, be accurate to describe the courts as having the option to hear the contempt proceedings "there and then"[220] because in practice it is almost always necessary for the court to defer proceedings, whether for an hour or a week. In our provisional view, this is the right approach and would be reflected more clearly in a procedure that does not distinguish between immediate and postponed proceedings. Therefore, we provisionally propose that where court, tribunal or other body decides to institute contempt proceedings it should be required in all cases to set a hearing time or date that allows a reasonable opportunity for the defendant to obtain legal advice and prepare their defence.

8.169 The court, tribunal or other body should exercise its discretion to determine what is a "reasonable opportunity" in the particular case – for example, it 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. This balances the need for judges to be able to respond promptly, where appropriate, to disruptive conduct in court against the need to safeguard appropriately the defendant's right to a fair trial.

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214 Judiciary of England and Wales, *Contempt in the Face of the Court: Guidance* (15 December 2023).

215 See para 8.117 above.

216 ECHR, art 6(3)(a) and (b).

217 *Wilkinson v S and another* [2003] EWCA Civ 95, [2003] 1 WLR 1254.

218 *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400.

219 *R v AS* [2008] EWCA Crim 138, [2008] Crim LR 716.

220 CrimPR, r 48.5(3)(b).

Moreover, a requirement that in all cases a hearing should be set at a time or date that protects the defendant's rights (and by incorporating additional safeguards into the procedure) may make it unnecessary for judges to seek approval from a more senior judge before instituting proceedings.

8.170 It follows from these provisional conclusions that there should not be a requirement imposed on courts, tribunals or other bodies to hear contempt proceedings by the end of the same day (which the magistrates' courts are required to do under the current rules). As discussed, in many cases it may not be possible to secure a defendant's procedural protections – particularly access to legal representation – in such a short period of time. Furthermore, we were told that this requirement is not practical in the magistrates' courts. Given the high volume of cases dealt with by the magistrates' courts, a judge or panel of magistrates may have to extend the court day for several hours in order to make time for the contempt hearing and ensure compliance with Part 48 of the Criminal Procedure Rules. This rule was described to us as "overly cautious", contrasting it with the procedure for dealing with contempt by breach of an order under section 63(3) of the MCA 1980 in which case a magistrates' court can postpone the hearing for two weeks.[221]

8.171 Therefore, we provisionally propose that where a court, tribunal or other body institutes contempt proceedings, it should not be required to hear those proceedings on the same day. This is not to say, however, that a court, tribunal or other body would be prohibited from doing so (in cases where the defendant's rights could be protected adequately). We were told by stakeholders that in some cases it can be valuable to hear the proceedings on the same day. This provisional proposal seeks merely to ensure that all courts, tribunals and other bodies have the option to postpone where necessary and appropriate.

8.172 For the avoidance of doubt, the postponement of proceedings is distinct from the immediate temporary detention of a defendant. A court may detain a defendant prior to conducting the initial enquiry into the allegation in accordance with rule 48.5(2) of the Criminal Procedure Rules,[222] and the case must be reviewed by the end of the same day in the magistrates' courts or by the end of the next business day in the Crown Court and Court of Appeal (Criminal Division).[223] Our provisional proposal at paragraph 8.156 above that a court, tribunal or other body must review by the end of the same day the case of a defendant who has been immediately detained will be unaffected by our provisional proposal here that there should be no requirement to hear the substantive contempt proceedings on the same day. This is because (in the event the court has decided to institute proceedings) in a magistrates' court, the court must hear the substantive proceedings on the same day regardless of whether the defendant has been detained. In the Crown Court or Court of Appeal (Criminal Division) there is no requirement to hear proceedings on the same day regardless of whether the defendant has been detained. That is, the two provisional proposals sit independently.

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221 See paras 8.46 to 8.48 above.

222 CrimPR, r 48.6.

223 Above, r 48.6(2).

Consultation Question 75.

8.173 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.

Do consultees agree?

Consultation Question 76.

8.174 We provisionally propose that, where a court, tribunal or other body institutes contempt proceedings, it should not be required to hear the proceedings on the same day.

Do consultees agree?

Information to be provided to the defendant

8.175 The next issue for consideration is the type of information that should be provided to a defendant against whom a court, tribunal or other body initiates contempt proceedings. The Criminal Procedure Rules require that the court must provide the defendant with the following information where it postpones proceedings for contempt by obstruction or disruption or initiates proceedings for contempt by breach of order (but not where the court initiates immediate proceedings for contempt by obstruction or disruption):[224]

- a written statement that contains "such particulars of the conduct in question as to make clear" what the defendant is alleged to have done;
- notice of where and when the proceedings will take place; and
- a notice that informs the defendant that the court can impose imprisonment and/or a fine for contempt of court and may hear the proceedings in the defendant's absence if they do not attend.[225]

8.176 By contrast, the existing procedures in the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 require that, in all cases where the court

[224] CrimPR, rr 48.7(2) and 48.9(4)(a).

[225] Above, rr 48.7(2) and (3), and 48.9(3)(d) and (4). Note that where the court initiates proceedings of its own motion in respect of contempt by breach of order the written statement must also identify the defendant and explain that that the defendant is to be dealt with for contempt of court. In these circumstances, the notice warning the defendant that the court can impose imprisonment and/or a fine for contempt of court and may hear the proceedings in the defendant's absence is included in the written statement. This is served on the defendant alongside notice of where and when the court will consider the allegation. See CrimPR, r 48.9(3) and (4).

initiates proceedings, it must serve on the defendant a summons that includes statements of the following (unless wholly inapplicable):

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.[226]

8.177 It is clear that the requirements of a summons issued by the court under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 are more detailed than the requirements of a written application prepared by a court under the Criminal Procedure Rules. Given that it has been held that the requirements of a summons issued under the Civil Procedure Rules are compliant with article 6 of the ECHR,[227] in our provisional view a defendant should be provided with that information (in writing) in all cases where a court, tribunal or other body initiates contempt proceedings. In addition to the information listed at paragraph 8.173 above, the defendant should be provided also with a notice of where and when the proceedings will take place. In response to concerns raised by criminal judges about whether, and how, they can compel the defendant to return for the hearing at a later time or date, the defendant should be warned (where applicable) that the court can issue a bench warrant to secure their attendance at the hearing if they do not attend.[228]

8.178 We set out our provisional proposals on these issues at paragraph 8.182 below, following the discussion of information to be provided to a defendant where contempt proceedings are initiated by application.

Instituting proceedings on application

8.179 An alternative to a court, tribunal or other body initiating contempt proceedings on its own motion should be that an application to initiate proceedings can be made by a party or other affected person. An existing procedure for initiating proceedings on application is available under the Criminal Procedure Rules in respect of contempt by breach of an order, and under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 in respect of any type of contempt.[229]

8.180 Stakeholders did not raise concerns with us about the procedure on application in the Criminal Procedure Rules. However, with respect to the other sets of procedure rules, some considered it necessary to reform the following elements:

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226 CPR, rr 81.4(2) and 81.6(3); FPR, rr 37.4(2) and 37.6(3); CoPR, rr 21.4(2) and 21.6(3).

227 *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm) at [77]. See para 8.114 above.

228 This is an inherent power of the higher courts. See also CPR, r 81.7(2); FPR, r 37.7(2); CoPR, r 21.7(2).

229 CrimPR, r 48.9; CPR, r 81.3; FPR, r 37.3; CoPR, 21.3.

(1) the information that must be provided to the defendant;

(2) types of evidence that may be used in support of a contempt application;

(3) permission requirements for making an application under the Civil Procedure Rules; and

(4) where the responsibility lies for making an application for breach of an order in the family and commercial contexts.

8.181 We consider these issues in turn below.

Information to be provided to the defendant

8.182 The first issue to consider here is the type of information that should be provided to the defendant where contempt proceedings are initiated on application. Under the Criminal Procedure Rules, the requirements of an application to the court to bring contempt proceedings for breach of an order are the same as the requirements of a written statement issued by the court where it initiates such proceedings of its own motion. These requirements were discussed at paragraph 8.175 above. Similarly, under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017, a contempt application is required to contain the same information as a summons issued by the court where it initiates proceedings itself. This information was considered at paragraph 8.176 above.

8.183 Just as a written statement issued by the court where it initiates proceedings of its own motion should provide a defendant with relevant and detailed information about the allegation, so too should a contempt application. It is important that an application is sufficiently informative to enable the defendant to understand the allegation and defend themselves.

8.184 For the purposes of creating a simple and consistent contempt procedure, we provisionally propose that the requirements of an application should mirror those of a written statement issued by a court, tribunal or other body. Further, both a contempt application and written statement should be served on the defendant alongside notice of where and when the allegation will be considered.

Consultation Question 77.

8.185 We provisionally propose that the following information should be provided to a defendant in a contempt application (where proceedings are initiated by application) or in a written statement issued by a court, tribunal or other body (where proceedings are initiated by a court, tribunal or other body):

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) where the alleged contempt relates to breach of an order,

(i) the date and terms of any order allegedly breached or disobeyed,

(ii) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service,

(iii) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service,

(iv) confirmation that any order allegedly breached or disobeyed included a penal notice;

(c) where the alleged contempt relates to breach of an undertaking,

(i) the date and terms of any undertaking allegedly breached,

(ii) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(d) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(e) that the defendant has the right to be legally represented in the contempt proceedings;

(f) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(g) that the defendant may be entitled to the services of an interpreter;

(h) that the defendant is entitled to a reasonable time to prepare for the hearing;

(i) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(j) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(k) that the court may issue a bench warrant to secure the defendant's attendance at a hearing of the allegation, if they do not attend;

(l) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(m) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets (where applicable) or other punishment under the law;

(n) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(o) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(p) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

This information should be served on the defendant with a notice of where and when the contempt proceedings will take place.

Do consultees agree?

We invite consultees' views on whether it should be necessary to include any other information in the contempt application or written statement.

Evidence in support of a contempt application

8.186 The second issue when initiating proceedings is how evidence is obtained and provided for the purpose of accompanying a contempt application. We have concerns about the following, and we consider each in turn below:

(1) where a court requires that a contempt application must be supported by written evidence given by affidavit or affirmation, in accordance with the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017;

(2) the admissibility in contempt proceedings of hearsay evidence; and

(3) the admissibility in contempt proceedings of evidence obtained during a police investigation into conduct that may constitute both a criminal offence and contempt.

8.187 First, the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 all require that "[u]nless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation".[230] In addition to written evidence, oral evidence may be presented and deponents cross-examined.[231] Though we are aware of cases in which the court has directed that the evidence may be given by witness statement, rather than affidavit,[232] it is not clear to us how common this is. By contrast, the procedure in the Criminal Procedure Rules requires neither that evidence must be provided in writing nor that it must be given by affidavit; instead, witness statements are used.[233]

8.188 The Civil Procedure Rules define a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally".[234] It has a similar meaning in criminal law and procedure.[235] A witness statement must contain a declaration that the facts stated in the witness statement are true.[236] Like a witness statement, an affidavit will set out the facts to which the person can attest. However, an affidavit must be sworn on oath or affirmed before a solicitor or other authorised person.[237]

8.189 Both swearing a false affidavit and making a false witness statement constitute contempt.[238] Swearing a false affidavit is also perjury, which carries a maximum sentence of seven years' imprisonment, and is triable on indictment only.[239] Making a false witness statement in criminal proceedings is dealt with as if it were perjury, but the maximum penalty is two years' imprisonment and the offence is triable either way.[240] Making a false witness statement in civil proceedings seems only to be contempt.[241]

8.190 In our pre-consultation engagement, we were not made aware of any reason behind the two approaches, or why affidavits are still required by the Civil Procedure Rules,

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230 CPR, r 81.4(1); FPR, r 37.4(1); CoPR, r 21.4(1).

231 See, for example, *Sports Direct International Plc v Rangers International Football Club Plc* [2016] EWHC 85 (Ch) at [59].

232 See, for example, *North Warwickshire Borough Council v Litten, Kirin, Charlesworth, Burns, Shatford and Adams* [2022] EWHC 2777 (KB) at [16].

233 CrimPR, rr 48.11 to 48.15.

234 CPR, r 32.4(1).

235 Criminal Justice Act 1967, s 9; CrimPR, Part 16.

236 Criminal Justice Act 1967, s 9(2)(b); CPR Practice Direction 32, para 20. See also CPR, r 22.1(4). For a witness statement template, see the guidance accompanying the CPR: "Witness Statements" (undated).

237 See CPR, r 32.15 and Practice Direction 32, para 9.1. For a general form of affidavit see HMCTS, "Form N285: Affidavit template" (1 April 1999).

238 *Hydropool Hot Tubs Ltd v Roberjot* [2011] EWHC 121 (Ch) at [62]; CPR, r 32.14; P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") paras 10-164–10-166. See the discussion of liability for making false statements to the court in Chapter 3 on general contempt, paras 3.163 to 3.167.

239 Perjury Act 1911, s 1(1)-(3); *Blackstone's Criminal Practice* (2024) para B14.7.

240 Criminal Justice Act 1967, s 89; *Blackstone's Criminal Practice* (2024) para B14.20.

241 CPR r 32.14(1); *Blackstone's Criminal Practice* (2024) para B14.49.

Family Procedure Rules, and Court of Protection Rules 2017 when much else has changed to witness statements. The AGO told us that affidavits are more time consuming and resource intensive to prepare than witness statements. We heard similar concerns from a lawyer. One reason for this is that, while a witness statement can be signed by a witness and so it does not matter where the witness is located, an affidavit must be signed in the presence of a solicitor. The AGO explained that this may require more resources if the witness is not located near to the AGO or the solicitors engaged are unfamiliar with contempt matters. The AGO also noted that there has been a shift towards witness statements in criminal proceedings and said that the requirement for affidavits is "archaic" and no longer justifiable.

8.191 Unless there are sound reasons for different approaches it seems that consistency would be preferable. Given the above concerns and the general move to witness statements, the question arises as to whether it would be appropriate for witness statements to be used in contempt proceedings rather than affidavits.

Consultation Question 78.

8.192 We invite consultees to tell us their experience where a court or tribunal directs that a contempt application does not need to be supported by written evidence given by affidavit or affirmation: in what form does the court or tribunal tend to direct that the evidence must be provided (for example, a witness statement or oral evidence)?

Consultation Question 79.

8.193 We seek consultees' views on whether, when written statements of witnesses are used as evidence, witness statements should be admissible (and the requirement for such evidence to be given on affidavit abandoned where it exists).

8.194 Our second concern relates to the admissibility of hearsay evidence in contempt proceedings. This is relevant not only where contempt proceedings are instituted on application, but also where they are instituted by the court itself. As discussed at paragraphs 8.120 to 8.123 above, a defendant's rights under article 6(3)(d) of the ECHR may be at risk of interference where there is no presumption against the use of hearsay. Currently there is no such presumption in any contempt proceedings under the Civil Procedure Rules. This reflects section 1(1) of the Civil Evidence Act 1995, which states that in civil proceedings "evidence shall not be excluded on the ground that it is hearsay". Similarly, the Criminal Procedure Rules state that in proceedings in criminal courts for contempt by breach of an order, "hearsay evidence is admissible under the Civil Evidence Act 1995".[242] From this we infer that the Rules envisage that in proceedings in criminal courts for contempt by obstruction or disruption, the rules governing hearsay evidence in the CJA 2003 would apply, and thus there is a presumption against the admissibility of such evidence.[243]

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242 CrimPR, Notes to r 48.11.

243 See para 8.123 above.

8.195 We recognise that there may be circumstances in which the application of the hearsay rules in the CJA 2003 to contempt proceedings may have the effect that some currently admissible evidence would be excluded, with a result that some contempts might not be addressed effectively. For example, in some civil cases where a contempt in the face of the court occurs there may be very few people in the court who could give oral evidence about what happened. This may arise in some family proceedings if only the judge and parties are present during the hearing. If one of the parties were to behave in a manner that may constitute contempt, and the other party was not willing to give oral evidence in subsequent contempt proceedings about that behaviour but was willing to provide an affidavit or witness statement, that statement may not be admissible if the hearsay provisions in the CJA 2003 were to apply. In these circumstances it would be difficult to prove the contempt without that statement. Therefore, it is arguable that it would be undesirable for the hearsay provisions in the CJA 2003 to apply.

8.196 Though we are alive to these concerns, our provisional view is that they do not outweigh the need for the procedure in contempt proceedings to comply with the ECHR. Given our conclusion that all contempt proceedings are criminal for the purposes of article 6, the rules governing the admissibility of hearsay in contempt proceedings must comply with article 6. As the ECtHR has held that the strict rules of evidence in the CJA 2003 (which limit the circumstances in which hearsay will be admissible) comply with article 6(3)(d),[244] our provisional view is that these rules should apply in all contempt proceedings. We make a provisional proposal to this effect at paragraph 8.203 below.

8.197 Our third concern relates to the admissibility of evidence obtained during a police investigation into conduct that may constitute both a criminal offence and contempt (for example, taking or publishing photos of court proceedings).[245] Where the conduct is originally reported to police and treated as a potential criminal offence, the police may exercise their various investigatory powers to gather evidence. These powers are provided and regulated primarily under the Police and Criminal Evidence Act 1984 ("PACE") and the accompanying PACE codes of practice.[246] For example, the police may arrest, interview, and search a person on suspicion of the relevant criminal offence. However, the CPS may decide ultimately that the conduct is sufficiently serious that, instead of prosecuting the person for the criminal offence, the matter should be referred to the AG to consider bringing contempt proceedings. In the event that the AG decides to bring contempt proceedings, it is possible that the evidence gathered by police when investigating the conduct as a criminal offence may be adduced in support of the contempt application.

8.198 This was the case in *Solicitor General v Wong*.[247] The defendant allegedly had published a recording of a hearing involving a child in the family court, contrary to the

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244 *Al-Khawaja and Tahery v the United Kingdom* (2011) App Nos 26766/05 and 22228/06 (Grand Chamber).

245 Criminal Justice Act 1925, s 41; Children Act 1989, s 97. See also *Solicitor General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15.

246 See Home Office, *Police and Criminal Evidence Act 1984 (PACE) codes of practice* (26 March 2013, last updated 20 December 2023), available at: https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice.

247 *Solicitor General v Wong* [2023] EWHC 2684 (Fam), [2024] 1 FLR 885.

offence in section 97 of the Children Act 1989 (which is punishable by a fine of up to £2,500) and was arrested and interviewed by police on suspicion of an offence under that provision. The defendant was later charged with the offence, but the prosecution was discontinued when the AG indicated that she would bring contempt proceedings in respect of the conduct. As evidence in support of the contempt application, police bodycam footage of the arrest and an audio-recording and full transcript of the police interview were provided.[248] In those contempt proceedings, the court noted that the defendant had made "a number of material admissions" in the police interview and that he had "accepted in a number of different places … that he recorded the hearing" (including when arrested and in the police interview under caution).[249] Ultimately, the court held that the defendant had "knowingly brought a hand-held recording device into the Family Court … and intended to, and did in fact, use it to record the entirety of the hearing".[250] In reaching this conclusion, the judge "rel[ied] on [the defendant's] admission when arrested and his comments in police interview".[251]

8.199 The admissibility in contempt proceedings of evidence obtained during a police investigation into a criminal offence raises potential concerns about fair trial rights. The definition of the offence will not be identical to the definition of contempt (though it may be similar) and may have a less severe maximum penalty, such as a fine rather than imprisonment. These factors may influence the information that a person is willing to share with the police during the interview and, where they are legally represented, the advice given to them by their solicitor. For example, a person who is arrested and interviewed by police on suspicion of publishing a recording of a hearing involving a child contrary to section 97 of the Children Act 1989 (as in *Solicitor General v Wong*) may admit solely to making – but not publishing – a recording. They might feel comfortable making such an admission because the mere recording of a hearing would not amount to an offence under section 97, which requires publication, though making a recording may constitute contempt.[252] Alternatively, they may be willing to admit publishing, as a section 97 offence is punishable by a maximum fine of £2,500, whereas they may not be willing to make admissions in respect of contempt because that exposes them to imprisonment and an unlimited fine. In the event that the person was not notified before the police interview that their responses may be used as evidence in contempt proceedings, it is arguably unfair to rely on admissions made in that interview in such proceedings.

8.200 In the ordinary criminal context, PACE Code C provides that before interviewing a person suspected of committing an offence, the police must give them and, where they are legally represented, their solicitor "sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it".[253] The purpose of this is "to allow for the effective exercise of the rights of the

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248 *Solicitor General v Wong* [2023] EWHC 2684 (Fam), [2024] 1 FLR 885 at [10] and [29].

249 Above at [29] to [31].

250 Above at [63].

251 Above at [64].

252 See, for example, CCA 1981, s 9(1)(a).

253 PACE Code C, 11.1A.

defence",[254] specifically to enable the provision of meaningful legal advice. Where the suspect has not been notified that they are being interviewed in relation to additional or alternative offences, there is a risk that they may be deprived of the opportunity to receive meaningful legal advice with respect to those offences and/or the opportunity to put forward their case. Though contempt is not a criminal offence, our provisional conclusion is that there is similar cause for concern where a person is interviewed on suspicion of a criminal offence and admissions made in that interview are relied upon in contempt proceedings relating to the same conduct.

8.201 In criminal cases, evidence may be excluded from proceedings at common law or under PACE.[255] This includes, but is not limited to, evidence obtained in breach of the PACE codes of practice. The Court of Appeal has set out general principles that apply where there has been such a breach.[256] Notably, the exclusion of such evidence is not automatic; it is left to the court's discretion.[257] Further, the breach must be significant and substantial.[258] The test to be applied is that in section 78 of PACE.[259] Relevantly, that section states that the court may exclude evidence on which the prosecution proposes to rely:

> if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[260]

8.202 In our provisional view, the discretion in section 78 of PACE should also apply to contempt proceedings. Though the discussion in this section has focused on admissions made in a police interview, these rules would also enable the exclusion of other types of evidence obtained by police (where the relevant test is satisfied) where the conduct was treated initially as a potential offence. This would include, for example, evidence obtained by police in the exercise of their powers to search an arrested person and to seize anything that may be evidence of an offence.[261]

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254 PACE Code C, 11.1A.

255 *Archbold* (2024) para 15A-11.

256 *Absolam* (1989) 88 Cr App R 332; *Delaney* (1989) 88 Cr App R 338. See also *Archbold* (2024) para 15A-11.

257 *Absolam* (1989) 88 Cr App R 332; *Delaney* (1989) 88 Cr App R 338.

258 *Absolam* (1989) 88 Cr App R 332.

259 *Grannell* (1990) 90 Cr App R 149.

260 PACE 1984, s 78(1).

261 See, for example, PACE 1984, ss 19(3)(a) and 32(1) and (2).

Consultation Question 80.

8.203 We provisionally propose that contempt proceedings should be subject to the same rules of evidence that apply in criminal proceedings such that:

(1) hearsay evidence would be admissible only in the circumstances permitted by the Criminal Justice Act 2003; and

(2) the court may refuse to admit evidence if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Do consultees agree?

Permission requirements

8.204 The third issue to consider where contempt proceedings are initiated on application is the requirement to obtain permission from the court. Currently, permission is not required under the Criminal Procedure Rules. However, it is required under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 in the following circumstances:

(1) where the application is made in relation to an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement;[262]

(2) other than in the Court of Protection, where the application is made in relation to an interference with the due administration of justice, except in relation to existing High Court proceedings;[263]

(3) in the Court of Protection, where the application is made in relation to an interference with the due administration of justice in connection with proceedings in the Court of Protection, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court.[264]

8.205 This means that in many circumstances permission is not required. It depends on the type of alleged contempt and the court in which the application is made. For example, permission is not required where the application relates to an interference with the due administration of justice in existing High Court proceedings (other than knowingly

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262 CPR, r 81.3(5)(b); FPR, r 37.3(5)(b); CoPR, r 21.3(2)(b).

263 The CPR and FPR also require permission where the contempt application is made in relation to an interference with the due administration of justice other than in relation to existing county court or family court proceedings, respectively: CPR, r 81.3(5)(a); FPR, r 37.3(5)(a).

264 CoPR, r 21.3(2)(a).

making a false statement); or to contempt by breach of an order made in respect of existing Court of Protection proceedings.

8.206 In our pre-consultation engagement, some stakeholders suggested that the circumstances in which permission is required should be extended to contempt applications relating to breach of an order. A member of the senior judiciary raised concern about the fact that in some cases applications are brought for vindictive purposes and there is no permission stage to filter them out, concluding that "[i]t seems like a misfit that there is a set of controls for one area but not another". This judge considered whether there should be any constraints on a party's ability to bring proceedings for breach of an order where it is no longer for the purpose of vindicating their rights in that litigation.

8.207 A related point was raised by another senior judge, who told us that contempt applications for breach of order are often used by parties as a "litigation tactic" in the Commercial Court specifically (and in the commercial context more generally). The judge explained that commercial disputes often begin with the grant of a worldwide freezing order and a disclosure of assets order against a party that is not domiciled in the UK and is in another jurisdiction, thus non-compliance is likely. Contempt applications are thus made in these cases to pressure the defendant to settle the original dispute, given that defending a contempt allegation can be very costly, or to expose the defendant to sanctions before the main proceedings even begin. The judge suggested that bringing in a permission stage for these applications would help to deal with these problems and would reduce associated costs and delays.

8.208 However, a lawyer raised concerns about including a permission stage for contempt applications relating to breach of order. In particular, they underlined the need to deal with contempt proceedings promptly to avoid the issue of the contempt "becoming stale". They also highlighted that "bringing contempt proceedings is expensive and time-consuming", noting that much of the costs are not recoverable from contemnors with no money or assets. This suggests that adding a permission requirement may simply increase costs of, and delays to, an already expensive and time-consuming process.

8.209 We consider the arguments raised by members of the senior judiciary to be compelling. It is inappropriate for the contempt process to be used as a litigation tool to deter parties from pursuing the substantive proceedings and to cause delays. We recognise that a party is entitled to expect that an order will be complied with, given that the order was granted by the court for the benefit of that party against a bound party. However, that does not mean that they have a right to bring proceedings for contempt of court. A finding of contempt is particularly serious and should be a last resort – it indicates that a party has interfered with the administration of justice and "potentially draconian consequences"[265] can follow, such as imprisonment. The courts have various tools at their disposal to enforce orders in private litigation without making a finding of contempt – for example, sequestering a party's assets[266] – and these should be utilised where appropriate. We recognise, however, that the remedies available to the courts under the current law are not satisfactory, and thus in

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265 *Attorney General v Crosland* [2021] UKSC 58, [2021] 4 WLR 103 at [43].

266 See Chapters 4 and 10.

Chapter 4 we provisionally propose a new interim remedies framework that would apply to contempt applications for breach of order.

8.210 The introduction of a permission requirement for applications relating to contempt by breach of an order would provide an opportunity for the courts to filter out cases where there is a more effective and less costly way of dealing with the issue at hand (for example, by awarding an interim remedy in line with our provisional proposals in Chapter 4). It would allow for active case management as a permission hearing would provide an opportunity for the court to give directions as to, for example, likely timings of hearings relating to the application, relevant evidence, and anticipated costs. Consequently, at the permission stage the court can clarify what the parties should expect from the process with a view to reducing delays and thus costs. In any case, where there is a clear breach of an order it is likely that permission would be granted.

8.211 For these reasons, we provisionally propose that – in addition to the existing permission requirements under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 outlined at paragraph 8.204 above – permission should be required also for contempt applications relating to breach of an order. This should be the case across all courts, tribunals and other bodies. This would bring greater consistency and clarity to the regime. Further, such a reform would not impose a substantial additional burden on the courts or parties because the hearing of a permission application tends to be folded into the hearing of the substantive application. We also invite consultees' views on whether permission should be required for applications relating to all other types of contempt.

Consultation Question 81.

8.212 We provisionally propose that (in addition to the existing permission requirements under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017) permission to make a contempt application should be required in all courts, tribunals and other bodies where the application relates to breach of an order.

Do consultees agree?

We invite consultees' views on whether permission should be required for applications relating to all other types of contempt.

Responsibility for enforcing court orders

8.213 In our pre-consultation engagement, some stakeholders expressed concern about where the responsibility lies for initiating contempt proceedings, specifically relating to breach of an order. Generally, where an order is breached, it is left to the aggrieved party to make an application to bring contempt proceedings. Neither the court nor the AG is likely to do so.

8.214 We heard from a family law barrister that problems can arise in the family context from the fact that the burden to enforce orders lies with the parties. He explained that separated parents are reluctant to enforce orders such as contact orders by way of contempt proceedings for fear that the other parent will use the fact of an application

for committal to prison to alienate the children from the applying parent. He told us that, in these circumstances, the consequence is that the order is left unenforced and that parent does not see their children.[267] This barrister suggested that the onus of bringing proceedings in these cases should be on the state or the court, instead of the party. Similarly, a judge explained that in the Court of Protection, where the usual practice is for the relevant statutory body to bring proceedings, there can also be a reluctance to make an application due to the expense and because the outcome (for example, a fine) may not be worth it.

8.215 These stakeholders' views raise the question of whether the burden of initiating contempt proceedings for breach of an order should lie with the parties in all cases, or whether there are circumstances in which that burden should lie with the courts in order to ensure the administration of justice. Our provisional conclusion is that the burden should not lie only with the parties; the court should be able to initiate proceedings. However, there should be no requirement that the courts must initiate proceedings in any circumstances, given that we heard substantial support from judges for retaining the discretionary nature of their contempt powers. Further, requiring the courts to bring proceedings against, in many cases, local authorities or other government-funded bodies may not be effective in achieving the intended aim; we heard that such parties often fail to comply with court orders in this context due to under-resourcing.

8.216 The problem raised at paragraph 8.213 above may be resolved to an extent by establishing an enforcement body with responsibility for investigating contempt allegations and initiating proceedings, to which the court could refer contempt matters where appropriate.[268] Several stakeholders favoured this idea.

8.217 Judges in the Family Division of the High Court supported the creation of a new body whose role would be neutral and suggested that it could be an extension of the role of the tipstaff, which would sit within HMCTS. A tipstaff is an enforcement officer for all orders in the High Court whose duties include effecting arrests and seizing property.[269] Their role is concerned with the practical execution of orders, rather than applying to the court to have orders enforced. Expanding the role of the tipstaff as suggested would be a substantial change, adding a legal dimension to their duties.

8.218 An alternative may be to establish a system that enables the court to appoint a person to act in a similar capacity to an Advocate to the Court (amicus curiae). On the one hand, this may be an appropriate solution to the issue described at paragraph 8.213 above. An Advocate to the Court does not represent anyone; "[t]heir function is to give to the court such assistance as they are able on the relevant law and its application to the facts of the case".[270] Therefore, where a party benefits from a court order but does not want to have to enforce it, an Advocate to the Court could be responsible for bringing contempt proceedings for breach independently. In this context, they would

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267 This presumes that other enforcement measures have not been successful.

268 This is similar to the powers of the Serious Fraud Office and the National Crime Agency in their respective fields: Criminal Justice Act 1987, s 1(3) to (5); Crime and Courts Act 2013, s 1.

269 FPR, Practice Direction 12.7D.

270 CPR PD3F, para 4.

be acting under a duty to ensure that the court's orders are respected and thus justice is administered.

8.219 On the other hand, however, this is essentially the function carried out by the AG under the current contempt regime. As recognised by Lord Cross in *Attorney General v Times Newspapers*, in bringing contempt proceedings the AG acts as:

> 'amicus curiae' bringing to the notice of the court some matter of which he considers that the court should be informed in the interests of the administration of justice.[271]

Consequently, enabling the court to appoint an Advocate to the Court to act in contempt proceedings may not have any real impact.

8.220 Moreover, an Advocate to the Court will usually not be instructed to lead evidence, cross-examine witnesses, or investigate facts.[272] They would thus not be able to be responsible for investigating contempt allegations and would play a very limited role during proceedings. Therefore, using an Advocate to the Court would not resolve the problems identified by stakeholders.

8.221 The creation of an enforcement body tasked with bringing contempt proceedings may have only limited value. First, it would not assist in allowing the courts to deal with cases of contempt urgently and efficiently. It would therefore only be appropriate to refer a matter to such an authority where it does not need to be dealt with immediately. Secondly, creating another body to which the court may refer an alleged contempt may increase the complexity of the system. Such a body might simply replicate the problems currently experienced by the AGO in the exercise of its contempt functions, discussed further in Chapter 7. It is thus not clear that this idea would improve the procedural problems with the contempt regime.

8.222 Rather than empowering it simply to bring proceedings to enforce an order, a new enforcement body instead could operate its own administrative regime through which it issues decisions and deals with contempt itself. This is similar to the type of system administered by the Financial Conduct Authority and the Child Maintenance Service, which can issue financial penalties without applying to the courts.[273] The Competition and Markets Authority told us that it has been looking to establish a regime similar to that of the Financial Conduct Authority in order to enforce compliance with court orders more effectively.

8.223 However, this type of model may not be appropriate for our purposes for several reasons. First, the Financial Conduct Authority enforces regulations, which are set out clearly in statute and guidance, and the Child Maintenance Service only enforces orders for payment. We are instead concerned with all court orders, which may vary significantly in substance depending on the circumstances of a particular case. Consequently, determining whether a breach has occurred can be a complex task that requires the courts' expertise. Secondly, the problem of potential parental alienation

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271 *Attorney General v Times Newspapers* [1974] AC 273, 326.

272 CPR PD3F, para 4.

273 Financial Services and Markets Act 2000, s 206; UK Government, *Make child maintenance deductions from an employee's pay* (undated).

would not necessarily be resolved by enforcing the order via a third party; whilst the alienated parent may not be involved in the decision to enforce the order or the process of doing so, to their children it may nonetheless seem as though they are. Thirdly, this type of system would rely on the beneficiary of the order reporting to the enforcement body that a breach has occurred so that it can take action. However, given that the party benefiting from the order is reluctant to enforce it out of fear of alienation from their children, they might still be deterred from reporting a breach if that meant that proceedings would be initiated against the other parent. Finally, the creation of a body that operates its own administrative regime would likely incur significant costs to an already under-resourced justice system.

8.224 Ultimately, there does not appear to be a compelling case for establishing a new body with responsibility for enforcing orders or initiating contempt proceedings. However, we welcome consultees' views on whether there is a need for an authority specifically tasked with bringing contempt proceedings where appropriate and enforcing court orders more generally.

Consultation Question 82.

8.225 We invite consultees' views on whether the burden of bringing a contempt application for breach of an order should lie always with the party seeking to enforce the order.

Consultation Question 83.

8.226 We invite consultees' views on whether there should be a new enforcement body that is empowered to make a contempt application for breach of an order.

Remand in custody prior to a finding of contempt

8.227 As discussed above, the superior courts have an inherent power to detain temporarily a person who commits a contempt "in the face of the court", and some inferior courts have similar powers conferred on them by statute.[274] This is reflected in the Criminal Procedure Rules, which set out a procedure by which the court may order the immediate temporary detention of a defendant until later the same day or until the next business day in cases of contempt by obstruction or disruption.[275] However, the courts do not have an inherent power to remand a defendant in custody after that point and prior to making a finding of contempt.[276] *In Re B*, the Court said that "where contempt of court has not been proved, [it] is a matter for Parliament to decide. Such powers

[274] See para 8.146 above.

[275] See para 8.147 above.

[276] *Delaney v Delaney* [1996] QB 387 at [397]. See also *In re D (A Minor)* (15 April 1994) CA (unreported); and *In re B (Child Abduction: Wardship: Power to Detain)* [1994] 2 FLR 479 at [483].

ought not to be exercised by extending the limits of the inherent jurisdiction of the courts".[277]

8.228 Parliament has provided limited powers to remand in custody pending a finding of contempt. For example, in family law cases involving breach of occupation orders and non-molestation orders, section 47(7)(b) of the Family Law Act 1996 provides a general power to remand and section 48 provides a specific power to remand for medical examination and report. There are other limited examples of powers to remand a person in custody prior to a finding of contempt, such as in the Anti-Social Behaviour, Crime and Policing Act 2014[278] and the Policing and Crime Act 2009.[279] Generally, with the exception of the inherent power of immediate temporary detention where there is a contempt in the face of the court, the position remains that a court cannot remand a person in custody prior to a finding of contempt.

8.229 We have not heard any views to suggest that, prior to making a finding of contempt, a court, tribunal or other body should have powers to remand a person in custody beyond the powers of immediate temporary detention. We are of the provisional view that the current position should remain. If the conduct that potentially amounts to contempt is violent, threatening, or otherwise warrants detention beyond immediate temporary detention for contempt purposes – for example, to protect a victim – then it should be dealt with under the criminal law and not the law of contempt. In such circumstances, the police could be called and the person could be arrested. The person would then be entitled to the procedure and protections afforded under the criminal law, which are not necessarily available under the law of contempt.[280] If, instead, the conduct does not warrant such serious or immediate measures to be taken, then the court should determine whether (and, if so, when) contempt proceedings will be instituted and release the defendant consistently with contempt procedures.

8.230 We would welcome comments or evidence of particular circumstances where a power is needed to remand a person in custody before a finding of contempt is made, beyond the inherent power of immediate temporary detention.

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277 *In re B (Child Abduction: Wardship: Power to Detain)* [1994] 2 FLR 479 at [483].

278 Anti-Social Behaviour, Crime and Policing Act 2014, s 9(5)-(6) and s 10(8) read with sch 1, which details the power of a court to remand in custody or on bail.

279 The Policing and Crime Act 2009 makes provision for civil injunctions to be made in respect of gang-related violence. Sections 43(5) and 44(4) (read with sch 5) provide a power to remand in custody an alleged contemnor prior to a finding of breach of an injunction. Section 45 provides for remand for medical examination and reports.

280 Alternatively, and where necessary, the person could be detained under the rules on immediate temporary detention ("ITD"): see paras 8.146 to 8.153 above. Our provisional proposal not to broaden powers to remand in custody prior to a finding of contempt would not impact the court's power to order ITD.

Consultation Question 84.

8.231 With the exception of the inherent power of immediate temporary detention and any specific powers provided for in statute, we do not propose the creation of a general power to remand a defendant in custody prior to a finding of contempt.

Do consultees agree?

The hearing

8.232 The procedure for the hearing of a contempt allegation was the subject of significant stakeholder concerns in our pre-consultation meetings. These concerns related primarily to the procedure set out in Part 81 of the Civil Procedure Rules (which is identical to the procedure in Part 37 of the Family Procedure Rules and Part 21 of the Court of Protection Rules 2017), rather than Part 48 of the Criminal Procedure Rules. In particular, we were told that the hearing procedure under the Civil Procedure Rules lacks specificity – for example, it does not provide explicitly an opportunity for the defendant to admit the conduct, introduce evidence, or make representations to the court. The procedure in the Civil Procedure Rules (and the Family Procedure Rules and Court of Protection Rules 2017) simply requires that:

(1) The court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate.

(2) The court may issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing.

(3) The court may not give any direction compelling the defendant to give evidence either orally or in writing.[281]

8.233 By contrast, the procedure set out in the Criminal Procedure Rules is significantly more prescriptive and more appropriately safeguards a defendant's right to defend themselves under article 6. This applies to all contempt proceedings. The Criminal Procedure Rules provide a step-by-step procedure which first requires the court to:

(a) ensure that the defendant understands (with help, if necessary) what is alleged, if the hearing has been postponed from a previous occasion;

(b) explain what the procedure at the enquiry will be; and

(c) ask whether the defendant admits the conduct in question.[282]

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281 CPR, r 81.7; FPR, r 37.7; CoPR, r 21.7.

282 CrimPR, rr 48.8(1) and 48.10(1).

8.234 In the event that the defendant admits the conduct, the court need not receive evidence.[283] However, if the defendant does not admit the conduct, the procedure in the Criminal Procedure Rules requires that the court must then consider:

(a) any statement served on the defendant where proceedings were initiated by the court itself, or any application served on the defendant where proceedings were initiated on application;

(b) any other evidence of the conduct;

(c) any evidence introduced by the defendant; and

(d) any representations by the defendant about the conduct.[284]

8.235 Comparing the procedure in the Criminal Procedure Rules with the procedure in the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017 indicates that there is scope for significant clarification of the latter. Stakeholders' views suggest that a general step-by-step procedure should be set out for courts, tribunals and other bodies to follow in most cases. In our provisional view, the hearing procedure in the Criminal Procedure Rules is sufficiently clear and prescriptive to be used as a model set of rules to be applied in other settings. This would go some way in addressing concerns about the lack of specificity and structure in the procedure in the Civil Procedure Rules (and the Family Procedure Rules and Court of Protection Rules 2017).

283 CrimPR, rr 48.8(2) and 48.10(2).

284 Above, rr 48.8(3) and 48.10(3).

Consultation Question 85.

8.236 We provisionally propose that in all contempt proceedings the procedure for hearing a contempt allegation should have the following features:

(1) The court, tribunal or other body must:

(a) ensure that the defendant understands (with help, if necessary) what is alleged;

(b) explain what the procedure at the hearing will be; and

(c) ask whether the defendant admits the conduct in question.

(2) If the defendant admits the conduct, the court, tribunal or other body need not receive evidence.

(3) If the defendant does not admit the conduct, the court, tribunal or other body must then consider:

(a) any statement served on the defendant where proceedings were initiated by the court, tribunal or other body itself, or any application served on the defendant where proceedings were initiated on application;

(b) any other evidence of the conduct;

(c) any evidence introduced by the defendant; and

(d) any representations by the defendant about the conduct.

Do consultees agree?

Which judge should conduct the hearing?

8.237 The existing hearing procedure in the Criminal Procedure Rules permits the court that hears the substantive proceedings to include the same members as the court that observed the conduct unless it would be unfair to the defendant.[285] This applies in cases of contempt by obstruction or disruption; there is no corresponding rule under the Criminal Procedure Rules in respect of contempt by breach of order or under the Civil Procedure Rules, Family Procedure Rules, or Court of Protection Rules 2017. This is because in those circumstances the substantive contempt proceedings are heard with notice at least a few days later, and thus it is less likely that they will be heard by the same judge.

8.238 At paragraphs 8.106 to 8.110 above, we considered how a person's right to be heard by an independent and impartial tribunal under article 6 might be at risk of interference by a procedure that allows the same judge to observe and adjudicate an alleged

[285] CrimPR, r 48.5(8).

contempt. In pre-consultation meetings, we were told by some members of the judiciary that usually the case should be heard by another judge where it involves contempt in the face of the court (but they also acknowledged that there may be a risk of actual or apprehended bias in other contexts). However, we also heard from judges that in some cases it can be valuable to have the same judge determine the contempt application. This may be helpful where, for example, that judge is familiar with the facts of the case and the circumstances around the contempt, particularly in the context of family or Court of Protection proceedings where people who lack capacity or vulnerable people are involved.

8.239 In our consultation paper on contempt of court published in 2012, we considered arguments that referral to another court may be necessary where the contempt was particularly personal to the judge or where the allegation is disputed.[286] However, we also acknowledged the possibility that, "even if the contempt is heard by another court, that court would be seen as pre-disposed to believe the evidence of the judge or bench in whose court the contempt was said to have happened".[287] Ultimately, we did not make any provisional proposals on this issue.

8.240 In our provisional view, it is neither necessary nor desirable to require that in all cases the members of the court, tribunal or other body that observed the alleged conduct should be different to the members who carry out the hearing. Instead, the matter should be heard by another judge only where the defendant contests the allegation. This approach seeks to improve the protection of a defendant's article 6 rights while also avoiding unnecessary delay and disruption to proceedings. Moreover, we provisionally propose that there should be a clear step-by-step procedure for making a referral to another member of the court, tribunal or other body in these cases.

Consultation Question 86.

8.241 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.

Do consultees agree?

Publication of contempt judgments

8.242 Where a court or tribunal has made a decision in a contempt case, the question arises of whether and how a judgment should be published. Under the Civil Procedure Rules, the court is responsible for ensuring that a "judgment [is] transcribed and published on the website of the judiciary of England and Wales"[288] where a sentence of imprisonment (whether immediate or suspended) is passed in contempt proceedings under Part 81. The Family Procedure Rules and Court of Protection

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286 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 5.77 to 5.81.

287 Above, para 5.79.

288 CPR, r 81.8(8).

Rules 2017 similarly impose a responsibility on the court to ensure that judgments are "transcribed and published on the website of the judiciary of England and Wales",[289] but this applies to all contempt cases and not just those in which a sentence of imprisonment is passed. There is no corresponding provision in the Criminal Procedure Rules.

8.243 In Chapter 1 we give an overview of what judgments are available on the judiciary website: there are 427 judgments, almost all from civil courts, with considerable variation in how these are catalogued.[290] Stakeholders told us that consistency, accessibility and availability is "patchy"; some judgments are published, others are not, and some are no more than a few lines long. The inconsistency and incompleteness of the approach to publishing judgments gave rise to many concerns, including that unless judgments are published, there is no discernible way of finding out how many breaches of injunctions have led to committals, whether and why committals were suspended or immediate, or whether defendants were represented. It was also suggested that the lack of published judgments makes it difficult to establish evidence regarding which sanctions are and are not effective, which it was said would assist judges in determining which sanction to impose.

8.244 The publication of judgments obviously requires a commitment of resources. We have not heard any comments about the resources that are required given the existing procedural rules, but it is clear to us that many stakeholders are of the view that there is currently a lack of transparency, and that publication of judgments is important. This does not necessarily mean that every decision in a contempt case should be published, but where there is a committal, there is a stronger case for publication.

8.245 In light of the above, we make two provisional proposals for reform relating to the publication of judgments in contempt cases. First, we provisionally propose that judgments should be published where a court, tribunal or other body makes an order of committal, whether immediate or suspended. We recognise that this would result in an inconsistency in standards, as judgments in cases involving committals for contempt would be required to be published whereas judgments or sentencing remarks for imprisonment for criminal offences might not be published. This higher standard is warranted because of the dearth of information about committal for contempt and the fact that committal occurs without a criminal conviction.

8.246 We also recognise that this reform would increase the workload of courts, tribunals and other bodies that are not required to publish judgments in such cases under the current procedure rules. However, we heard from many stakeholders that open justice, transparency and consistency are of great importance, especially in cases resulting in committal, such as to justify the increase in workload. In many cases, however, it will be sufficient for the judgment to be brief; for example, where there is a committal for seven days then it may be that the judgment is only a few lines long and the order is appended to it.

8.247 Such a reform may be particularly burdensome for the magistrates' courts in light of the existing requirement that in cases of contempt by obstruction or disruption they

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289 FPR, r 37.6(13); CoPR, r 21.8(13).

290 See para 1.6 above.

must conduct the hearing on the same day that the allegation is raised.[291] As discussed at paragraph 8.170 above, it is practically difficult for the magistrates' courts to comply with this requirement because their high workload means it is often challenging to find sufficient time in the same court day for the hearing. We were told that an additional requirement to draft and publish judgments in contempt cases where an order of committal is made would exacerbate these difficulties by increasing the amount of time that the court must dedicate to dealing with the matter entirely. However, our provisional proposal at paragraph 8.174 above that there should not be a requirement for contempt proceedings to be heard on the same day would reduce pressures on the magistrates' courts and thus would go some way to alleviate these concerns.

8.248 Our second provisional proposal relating to the publication of judgments is that all contempt judgments required to be published should be sent to the National Archives for publication on the established case law database, Find Case Law.[292] Since April 2022, this database has been the authoritative and official repository for case law of many courts in England and Wales. It holds material permanently. The database is searchable, and cases are uploaded in formats that enable them to be easily analysed using computers. Judgments are catalogued to the international standard for legal documents so that there is consistently structured information. There is an established system for transferring judgments from the courts to the National Archives.[293] The database already holds a number of contempt judgments.

8.249 The Find Case Law service does not currently hold judgments from the Crown Court, the county court or magistrates' courts.[294] However, the National Archives "share[s] an ambition with the Ministry of Justice and the Judiciary to grow the scope of Find Case Law to become a comprehensive and authoritative repository for case law in England and Wales".[295] We heard from the National Archives that there must be clear criteria identifying the judgments to be sent to them, so that judges know which to send. We recognise that publication by the National Archives will require additional resources. Until the service has sufficient resources to accept contempt judgments from courts whose judgments it does not currently host, our provisional view is that those contempt judgments should be published on the judiciary website. They would then be accessible and could subsequently be published on the Find Case Law service as and when that service expands.

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291 CrimPR, r 48.5(3)(c).

292 The National Archives, Find Case Law.

293 A full explanation of the service is at The National Archives, *About the Find Case Law service* (last updated 23 May 2023).

294 The National Archives, Find Case Law, *About the Find Case Law service* (last updated 23 May 2023).

295 Above.

Consultation Question 87.

8.250 We provisionally propose that judgments should be published where a court, tribunal or other body makes an order of committal for contempt of court, whether immediate or suspended.

Do consultees agree?

Consultation Question 88.

8.251 We provisionally propose that judgments in which a court, tribunal or other body makes an order of committal for contempt of court should be sent to the National Archives for publication on the Find Case Law service. Where that service does not accept judgments from the sentencing court, tribunal or other body then judgments should be published on the website of the judiciary of England and Wales.

Do consultees agree?

STAGES OF PROCEDURE IN THE DEVOLVED TRIBUNALS IN WALES

8.252 In Chapter 6 we provisionally propose that the devolved tribunals in Wales should have contempt protection and powers. We make these proposals in the context of the expected change to the Welsh tribunals system such that the protected tribunals would be:

(1) the Appeal Tribunal for Wales ("ATW"), which may be a superior court of record; and

(2) all chambers of a First-tier Tribunal for Wales ("FtTW").[296]

8.253 Whether the ATW is a superior court is likely to be determined by the Welsh Government and the Senedd. If it is identified in statute as a superior court of record, then it will have all the powers that the superior courts have in England and Wales. The FtTW would not be a superior court but would fall into the category of inferior courts, tribunals and other bodies.

8.254 Just as we provisionally propose in Chapter 6 consistency with respect to the powers of the devolved tribunals in Wales to address contumacious conduct, we provisionally conclude that there should be consistency in the procedures for exercising these powers. Therefore, here we make several provisional proposals regarding procedure in the devolved tribunals in Wales that mirror our provisional proposals relating to procedure in non-devolved tribunals above.

8.255 First, we provisionally propose that the committee responsible for devising procedure rules that apply in the devolved tribunals in Wales should consider developing a uniform, general procedure for contempt proceedings. Secondly, we make provisional

[296] See paras 6.141 to 6.146 above.

proposals on referral procedures and these parallel those above, but with one exception. The exception is that we do not include referral to the AG in our provisional proposal. The reason for this is that in pre-consultation engagement the question arose whether, for a potential contempt in devolved tribunals, the AG is the person to whom it should be referred. The immediate alternative possibility may be referral to the Counsel General for Wales, but we were told that it is unclear whether the Counsel General has the power to commence contempt proceedings in the public interest. Accordingly, we ask an open question about the role of the Counsel General and the AG.

Consultation Question 89.

8.256 We provisionally propose that the committee responsible for devising procedure rules that apply in the devolved tribunals in Wales should consider developing a uniform, general procedure for contempt proceedings.

Do consultees agree?

Consultation Question 90.

8.257 We provisionally propose that, after conducting an initial enquiry into the contempt allegation, the First-tier Tribunal for Wales or Appeal Tribunal for Wales should have the option to:

(1) take no further action in respect of the allegation;

(2) institute proceedings for contempt in respect of the allegation, where the devolved tribunal has the power to do so (and the devolved tribunal should be able to discontinue those proceedings at any time);

(3) refer the matter to the Appeal Tribunal for Wales (from the First-tier Tribunal for Wales) or to the High Court (from the Appeal Tribunal for Wales), asking that tribunal or court to consider instituting contempt proceedings itself (where the First-tier Tribunal for Wales or Appeal Tribunal for Wales has the power to make such a referral); or

(4) refer the matter to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute it as a criminal offence).

Do consultees agree?

Consultation Question 91.

8.258 We invite consultees' views on what should be the role of the Attorney General and Counsel General in relation to contempt in the devolved tribunals in Wales.

Chapter 9: Representation in contempt proceedings

9.1 This chapter considers several issues that arise in relation to representation in contempt proceedings.

9.2 First, it considers the operation of legal aid in contempt proceedings. It begins by explaining the underlying human rights framework and that contempt proceedings are criminal matters for the purpose of legal aid. It then turns to five specific issues that arise as a result of that: (1) the status of permission proceedings; (2) applications to discharge committal orders; (3) the legal aid framework; (4) means testing; and (5) the law and practicalities for providing and accessing legally aided advice and representation. Secondly, it looks at the operation of conditional fee agreements in contempt proceedings. Thirdly, it examines costs in contempt proceedings, looking at whether and how the defendant's means should be considered, and at an inconsistency in cost capping where defendants are legally aided.

9.3 Where in this chapter we address issues relating to legal aid, our aim is to examine how contempt is classified for the purposes of legal aid and, where appropriate, ensure that there is principled certainty and consistency in that area of the law, rather than examining the allocation of resources.

LEGAL AID IN CONTEMPT PROCEEDINGS

9.4 In Chapter 8 we explain that the law of contempt must comply with article 6 of the European Convention on Human Rights ("ECHR") and that contempt is considered a criminal offence for article 6 purposes.[1]

9.5 Article 6 also raises issues regarding access to legal aid because its requirements include the following:

> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

9.6 The courts have held that contempt proceedings are criminal proceedings for the purposes of legal aid.[2]

9.7 We consider here five issues in relation to legal aid.

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1 See paras 8.98 to 8.105 above; *Daltel v Makki* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

2 *Hammerton v Hammerton* [2007] EWCA Civ 248 (QB), [2007] 2 FLR 1133 at [9]; *Kings Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), [2015] 1 WLR 531 at [16].

Permission proceedings

9.8 It is beyond doubt that whether proceedings are for committal for civil contempt or whether they are for committal for criminal contempt, they are criminal proceedings for the purpose of legal aid.[3] What is arguably less clear, and in our provisional view should also be placed beyond doubt, is the status of permission proceedings.

9.9 The procedure for making a contempt application appears to be premised on legal aid being available for permission proceedings. For example, the application form for civil contempt proceedings is an application for committal, and includes notice of the entitlement to apply for legal aid. Though we note that Legal Aid Agency ("LAA") documents refer to applications for committal,[4] we have been told that legal aid is available for permission proceedings. This is because, where permission proceedings are required, they are integral to contempt proceedings. The Civil Procedure Rules state that if permission is needed to make a contempt application then "the application for permission shall be included in the contempt application".[5] As such, permission proceedings are eligible for legal aid.

9.10 Nevertheless, it was argued by the claimant in *Liverpool Victoria Insurance Co v Khan* that permission proceedings were distinct and were not criminal proceedings for the purpose of the Courts and Legal Services Act 1990, which governs conditional fee agreements. The argument was put in terms that might be thought to be more general, the submission being that contempt permission proceedings were not criminal proceedings because:

> [n]o-one is sent to prison at the conclusion of permission proceedings. The subject's liberty is not at stake. None of the form of the proceedings, the process, the substance or the sanction is criminal in nature.[6]

9.11 Costs Judge Leonard rejected this argument, concluding that both permission and committal proceedings were criminal proceedings for the purpose of legal aid.[7]

9.12 Our provisional view is that permission proceedings are currently criminal proceedings for the purposes of legal aid. This seems appropriate because, despite the fact that a decision to permit an application will not of itself carry a risk of prison, the permission application is by its very nature – and as indicated by the application form itself – the commencement of an application to commit the defendant to prison. However, our provisional view is that the uncertainty that emerged in *Khan* should be put to rest. This is particularly important given that in Chapter 8 we propose expanding the circumstances in which permission should be required.

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3 *Kings Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), [2015] 1 WLR 531.

4 Legal Aid Agency ("LAA"), *Apply for legal aid in civil contempt – committal proceedings: Guidance for providers* (June 2022).

5 CPR, r 81.3(6).

6 *Liverpool Victoria Insurance Co v Khan* [2022] EWHC B8 (Costs) at [209].

7 Above at [355].

Consultation Question 92.

9.13 We provisionally conclude that for the purposes of legal aid for the defendant, both permission proceedings and committal proceedings are considered to be criminal proceedings.

Do consultees agree?

Applications to discharge committal orders

9.14 A defendant who has been committed to prison for contempt (whether immediately or suspended) may apply to be discharged and, if in custody, to be released.[8] We have been told by stakeholders that it is unclear whether legal aid is available to a defendant who applies to discharge a committal order. It certainly has been available in at least some instances; in *R (Harris) v Official Solicitor* the court noted that on two occasions the defendant "was represented by solicitors and counsel, having obtained legal aid 'to be represented on an application to purge contempt'".[9] In our pre-consultation engagement we were told by stakeholders that the lack of clarity was a concern.

9.15 Rule 81.10 of the Civil Procedure Rules provides for the procedure to discharge a committal order. The defendant must file an application notice under Part 23 of the Civil Procedure Rules in the contempt proceedings in which the committal order was made.[10] Part 23 is the same part which governs contempt applications in existing High Court or county court proceedings.[11]

9.16 On the one hand, as applications to discharge committal orders are made in the same way as other contempt applications (which are considered "criminal proceedings" for the purpose of legal aid), it seems that legal aid should be available. An alternative explanation for the availability of legal aid to defendants who wish to discharge their committal orders is that a discharge application is an "incidental proceeding" to the original contempt proceedings. Therefore, there is an entitlement to legal aid under section 16(3)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO") 2012. However, we heard from legal aid stakeholders that it should not be necessary to invoke that alternative basis for eligibility.

9.17 On the other hand, there is arguably some uncertainty about eligibility for legal aid. This is because although committal proceedings are criminal for the purpose of legal aid as they amount to a determination of a criminal charge,[12] it might be argued that applications to discharge committal orders are not "criminal proceedings", as the charge and the sanction have already been determined. Moreover, jurisprudence of

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8 See for example Contempt of Court Act 1981, ss 12(4), 14(1).

9 *R (Harris) v Official Solicitor* [2001] EWHC (Admin) 798 at [22].

10 CPR, r 81.10(2).

11 Above, r 81.3(2).

12 Criminal Legal Aid (General) Regulations 2013, reg 9(v); *Kings Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), [2015] 1 WLR 531 at [16].

the European Court of Human Rights holds that where deprivation of liberty is "at stake", the interests of justice call for legal representation under article 6(3)(c).[13] In applications to discharge committal orders, it might be argued that the liberty of a defendant who has had a committal order made against them, and may already be in prison, is no longer "at stake" in the same way it was before the contempt finding was made and sanction imposed. Alternatively, it might be argued that a discharge application would put the defendant's liberty at stake again, either in the sense that they may be released or in the sense that release will be denied and detention will continue.

9.18 Our provisional view is that this issue should be clarified. It is important that contemnors who have had committal orders made against them have certainty about their entitlement to legal aid. Therefore, the eligibility of applications to discharge committal orders for legal aid should be expressly stated, whether in statute or in policy. Further, we provisionally conclude that applications to discharge committal orders are criminal proceedings for the purposes of legal aid, as these applications have significant consequences for the liberty of the defendants.

Consultation Question 93.

9.19 We provisionally propose that eligibility for legal aid for an application to discharge a committal order should be expressly stated, whether in statute or in policy.

Do consultees agree?

Consultation Question 94.

9.20 We provisionally conclude that applications to discharge committal orders are criminal proceedings for the purposes of legal aid.

Do consultees agree?

The Legal Aid framework

9.21 The legal aid framework for contempt has not been without its problems.

9.22 For some time there were difficulties in relation to accessing legal aid for civil contempt proceedings. The judgment of Blake J in *King's Lynn and West Norfolk Council v Bunning*[14] noted that gaps in the legal and administrative framework and the lack of clear guidance were "likely to give rise to very real difficulty within the profession in knowing how to apply for legal aid for contempt proceedings in the High Court and the judiciary in knowing how to determine such applications".[15] Those shortcomings appear to have been resolved effectively; current guidance sets out the

13 *Benham v United Kingdom* [1996] 22 EHRR 293 at 324.

14 *King's Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), [2015] 1 WLR 531.

15 Above at [27].

process clearly.[16] There was also, for a time, a concern that the law left a gap in the provision of legal aid for defendants who were subject to committal proceedings for a breach of an Anti-Social Behaviour Injunction ("ASBI"), but these, too, have been addressed.[17]

9.23 In more recent years, the Civil Justice Council ("CJC") reported that, in spite of the latter gap being addressed, there was a "commonly held misconception", including among practitioners and judges, that legal aid could not be obtained for committals relating to ASBI breaches.[18] We have seen some signs in our pre-consultation engagement that that misconception may remain. Some stakeholders indicated that one reason ASBI defendants could not obtain legal aid is because the lawyers representing clients in civil proceedings – and typically in ASBI proceedings – were not authorised to carry out legally aided criminal work. This, we were told, at times meant that a person facing a committal application on the grounds they have breached an ASBI will need to locate a new lawyer who can carry out legally aided criminal work, in order to secure legally aided representation. This, however, does not appear to accord with LAA guidance.

9.24 The LAA categorises all committal proceedings as criminal for the purpose of legal aid funding.[19] The LAA requires that to represent a client in committal proceedings for contempt the lawyer must:

(1) be authorised to carry out criminal legal aid; and

(2) apply for a criminal representation order.[20]

9.25 Where committal for contempt is concerned, a provider will be authorised to carry out legally aided criminal work if they have either a criminal contract or a 2018 Standard Civil Contract in the relevant area of law.[21]

9.26 Where a lawyer is relying on a 2018 Standard Civil Contract, representation in committal proceedings will be classed as "associated criminal work" under the contract.[22] Representation in committal proceedings "is part of criminal legal aid" but authorised under the contract.[23]

9.27 Under the contract, the lawyer is authorised to provide representation in committal proceedings "where the [proceedings] arise from civil legal services that fall within a

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16 LAA, *Apply for legal aid in civil contempt – committal proceedings: Guidance for providers* (June 2022).

17 Civil Justice Council ("CJC"), *Anti-Social Behaviour and the Civil Courts* (2020) paras 171-173.

18 Above, para 171.

19 LAA, *Apply for legal aid in civil contempt – committal proceedings: Guidance for providers* (June 2022) p 2.

20 Above, p 2.

21 Above, p 2.

22 Above, p 6.

23 LAA, *2018 Standard Civil Contract Specification*, 4.4. Committal proceedings are also stated as being among the "minor civil/criminal overlaps" that may be carried out by both criminal and civil practitioners under the relevant standard contracts: LAA, *Category Definitions 2018 (January 2024)*, paras 18-19.

specific Category of Law" in which the lawyer is authorised to act.[24] The categories of law are set out in the LAA's "Category Definitions 2018".[25] They include, for example: claims against public authorities; community care; debt; housing; mental health; public law; protection from harassment; and, as part of the "miscellaneous work" category, proceedings relating to ASBIs.

9.28 Where a practitioner has neither a criminal contract nor a 2018 Standard Civil Contract, they may apply for an Individual Case Contract ("ICC").[26] The LAA guidance sets out what is required to secure an ICC, stating that:

> The ICC criteria are as follows:
>
> - it is in the interests of justice for an ICC to be granted;
> - the provider has had substantial involvement in the original proceedings (please note, this could include future substantial involvement in proceedings that result from the contempt such as possession proceedings); and
> - continuing to act for the individual represents value for money.[27]

9.29 We have been told by some stakeholders that although the provision for legal aid is there, the systems are not streamlined and matters such as shifting between civil and criminal billing systems (with legal aid for contempt billed under the latter) makes the system "clunky" and results in queries to the LAA.

9.30 Nevertheless, in sum, and consistently with the report of the CJC, there does not appear to be a gap in the law governing the provision of legal aid in relation to committal proceedings for civil contempt which explains a lack of legally aided defence in those circumstances.

Means testing

9.31 Legal aid for contempt proceedings is classified as criminal legal aid, regardless of the court in which proceedings occur and regardless of whether proceedings are for civil contempt or criminal contempt. However, whereas criminal legal aid is means tested when proceedings are in the criminal courts, it is not means tested when in a civil venue. We have been told that some lawyers in civil matters are unaware that legal aid is not means tested and so do not apply for it with the result that some people go unrepresented. Conversely, however, we have been told that in some circumstances the absence of a means test results in substantial legal aid funding benefiting people who would not satisfy a means test. One type of case in which this has been an issue is in contempt proceedings in the High Court against a person who has lied in a witness statement as part of an insurance claim. It may be possible for that person to

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24 LAA, *2018 Standard Civil Contract Specification* (19 January 2021), para 4.3.

25 LAA, *Category Definitions 2018 (January 2024).*

26 LAA, *Apply for legal aid in civil contempt – committal proceedings: Guidance for providers* (June 2022) p 2.

27 Above, p 6.

claim legal aid, even if they have considerable wealth, and bills may run to tens of thousands of pounds.

9.32 The inconsistency in the approach to means testing appears anomalous. In light of what we have been told by stakeholders, the following consultation question focuses on whether legal aid for contempt proceedings in civil venues should continue to have no means test. We recognise that some consultees may take the view that means testing should not apply to any contempt proceedings, whether in civil or criminal venues, or that means testing should apply to some but not all contempt proceedings in either civil courts or criminal courts. In particular, if means testing applies to all contempt proceedings then although it would reduce legal aid exposure to bills in the High Court scenario above, it may have adverse consequences for defendants who fall below the means-testing threshold but are faced with a contempt application made by a well-resourced applicant. It is also important in relation to our provisional proposals in Chapter 6 to expand the contempt protection for tribunals, which on the current position would expand the range of matters in which legal aid would be provided without means testing.

Consultation Question 95.

9.33 We provisionally propose that means testing for legal aid should apply in all contempt proceedings.

Do consultees agree?

9.34 If means testing for legal aid were to apply in all contempt proceedings, are there any categories of cases that should be carved out as exceptions where means testing should not apply?

Access to legal aid: practicalities

9.35 Although there are provisions for legal aid, this does not mean that eligible defendants are receiving legal aid. The CJC give a number of reasons why defendants in ASBI breach cases are not successfully able to access legal aid:[28]

> The Working Party heard a very worrying and consistent account from the Judiciary (including through feedback from the Judicial College injunctions and committals module), supported by the very limited available data and as confirmed by the Legal Aid Practitioners Group, that although legal aid may technically be available, there are areas of the country where it is extremely difficult (if not impossible) to find solicitors who will accept instructions to advise and represent in relation to injunction applications or committals under the 2014 Act: “advice deserts”. …
>
> The Working Party believes the existence of advice deserts is likely to be having a seriously adverse effect upon the delivery of civil justice. …
>
> [Despite changes to the contracts] the Working Party understands that it is still not common for civil practitioners to provide representation at a committal in respect of

[28] CJC, *Anti-Social Behaviour and the Civil Courts* (2020) paras 176-194.

> an order under the 2014 Act, unless they had been involved at an earlier stage of the proceedings (and hence undertaking work in the relevant court). It is likely that the lack of, and pressure of the workload upon, publicly-funded practitioners (given the lack of legal aid provision for 37% of the population), issues of economic viability and the reduced (criminal) rate for work in relation to a committal are causative factors.[29]

9.36 The CJC report makes a number of recommendations in relation to tackling those problems, including in relation to: data gathering to increase knowledge about the number and geographical spread of practitioners who have capacity and willingness to do the relevant work; widening the scope of the duty solicitor scheme; and the merit requirement for legal aid in relation to these applications.[30]

9.37 While the practicalities of obtaining legal advice and representation may not be amenable to law reform that is in the scope of our review, the CJC's observation regarding a case where a defendant was jailed for breach of an ASBI is cause for concern in terms of compliance with article 6(3)(c):

> The Working Party believes that this simply would not have occurred in the criminal courts. A person was deprived of their liberty without the representation despite being eligible for it and seeking it ….[31]

9.38 Although the legal framework for legal aid may be technically suitable, there seems little doubt from the CJC report and from our pre-consultation engagement that some defendants go unrepresented in civil contempt proceedings, and that this is especially acute in proceedings relating to breach of ASBIs. While our provisional proposals would dispense with the distinction between civil and criminal contempt, dispensing with the distinction in law would not of itself solve the problem.

9.39 In our provisional view, should the problem persist – whether in the current framework or in our provisionally proposed new framework – then there would be an ongoing risk that the article 6(3)(c) rights of some contempt defendants are not adequately and practically protected. We would welcome evidence from consultees in relation to the nature and extent of problems associated with access to legal aid for civil contempt proceedings, especially where they relate to a breach of an ASBI. We would also welcome views about how the problem might best be addressed and, in particular, whether changes to law or procedure would be beneficial.

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29 CJC, *Anti-Social Behaviour and the Civil Courts* (2020) paras 176, 178 and 180 (references omitted).

30 Above, paras 187-194.

31 Above, para 180.

Consultation Question 96.

9.40 To what extent are defendants in civil contempt proceedings hampered in their access to legal aid? Are defendants in anti-social behaviour injunction proceedings at a particular or specific disadvantage?

9.41 What changes to the current law or the current processes would remedy problems with access to legal aid for defendants in civil contempt proceedings?

CONDITIONAL FEE AGREEMENTS

9.42 In simple terms, under a conditional fee agreement ("CFA") the fees that a client will owe to their lawyer will be dependent upon the outcome of civil litigation. Sections 58 and 58A of the Courts and Legal Services Act 1990 set out the circumstances in which a CFA will be enforceable. Notably, CFAs will not be enforceable in criminal proceedings or in family proceedings, which means the lawyers would not be paid.[32]

9.43 A question has arisen in the case law as to whether a CFA will be enforceable in relation to a contempt application that is made by a claimant in the course of civil proceedings. The issue was considered in a costs judgment in *Liverpool Victoria Insurance Co v Khan*.[33] A question arose as to whether the contempt proceedings were criminal proceedings for the purpose of the Courts and Legal Services Act 1990; if they were criminal proceedings then the CFA would not be enforceable. The judge concluded that:

> Both the permission proceedings and the committal proceedings were civil proceedings, albeit having the character of criminal proceedings for legal aid purposes. There is no basis for concluding that they were "criminal proceedings" for the purposes of section 58A of the Courts [and] Legal Services Act 1990.[34]

9.44 In reaching the conclusion that they were not criminal proceedings for CFA purposes, the reasoning was set out in plain terms:

> The obvious interpretation would rather be that the "criminal proceedings" referred to in section 58A are proceedings in courts with criminal jurisdiction, governed by the Criminal Procedure Rules. If it had been intended to extend section 58A's prohibition

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32 Courts and Legal Services Act 1990, s 58A(1). With respect to criminal proceedings there is an exception, which are proceedings under s 82 of the Environmental Protection Act 1990.

33 *Liverpool Victoria Insurance Co v Khan* [2022] EWHC B8 (Costs).

34 Above at [355]; see also [339]-[340]. The judgment in *Khan* involved four defendants and some procedural complexity, and we will not attempt to unpack it here. However, one aspect of the disputed costs was that when a defendant is in receipt of civil legal aid then, under s 26 of LASPO 2012, the costs ordered against them "must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including their financial circumstances and their conduct in relation to the proceedings": *Khan* at [10]. If the defendant is in receipt of criminal legal aid then s 26 does not apply, but criminal legal aid rates will still apply. The judgment makes it clear that for both the permission and the committal proceedings the legal aid is to be considered criminal, but that will still leave a gap between what the claimant party might potentially recover from the defendant and what the claimant party may need to pay their lawyers.

on CFAs to proceedings which are, as a matter of law, civil proceedings then section 58A would say so.[35]

9.45 Costs Judge Leonard then set out the policy issue:

> As for public policy, I understand the concerns raised by the proposition that any legal representatives should stand to benefit financially in the event that they succeed on behalf of their client in committing a person to prison, but it is not for me to determine public policy.[36]

9.46 The judge explained the public policy argument in his summary of the applicant's submissions, which referred to the specific fee being sought in *Khan*:

> In *Pirtek (UK) Limited v Robert Jackson* [2018] EWHC 3284 at paragraph 19(i), Nicklin J described the role of the party seeking punishment of the contemnor as, "similar to the role of the prosecution in a criminal court." The role of the prosecution in a criminal court is to present the evidence and make decisions that are "fair and objective" and "always act in the interests of justice and not solely for the purpose of obtaining a conviction" (Paragraph 2.7 of The Code of Crown Prosecutors). If a claimant's legal representative knows that a successful outcome will lead to an increase in its costs by at least £190,939.05, it is not difficult to see how the obligation to act fairly and objectively might conflict with the terms of a CFA. To remove any risk of such a conflict, a CFA is clearly not an appropriate way of funding committal proceedings which, if the claimant were "successful", could lead to the imprisonment of the defendants.[37]

9.47 In our view, it is appropriate that the policy question is considered in this consultation. We have not received any views on this issue in our pre-consultation engagement and we are not aware that it has been raised on other occasions. We are conscious that access to legal services can be enhanced by the availability of CFAs, and that a contempt application may sometimes be a necessary step in civil litigation. However, in our provisional view the arguments presented above raise significant concerns. There are reasons of public policy that should make a CFA unenforceable in contempt proceedings: it should not be the case that a lawyer can stand to benefit financially from the imprisonment of the client's opponents in civil litigation. The following consultation question sets out our provisional proposal and invites any further comments in relation to costs in contempt proceedings where a CFA is in place.

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35 *Liverpool Victoria Insurance Co v Khan* [2022] EWHC B8 (Costs) at [342]; see also [344]-[345] on other interpretation arguments.

36 Above at [343].

37 Above at [229].

Consultation Question 97.

9.48 We provisionally propose that contempt proceedings (including permission proceedings) should be criminal proceedings for the purposes of the Courts and Legal Services Act 1990 and thus any conditional fee agreement should not be enforceable in relation to those proceedings.

Do consultees agree?

COSTS

9.49 Where costs are awarded against a defendant in contempt proceedings, two contentious issues have arisen. Both relate to whether the financial resources of a defendant should be taken into account. The first relates to whether and, if so, how the defendant's means should be taken into account in costs awards in contempt proceedings. The second concerns an inconsistency in the capping of costs in contempt proceedings when a defendant is in receipt of legal aid.

9.50 With respect to both, the issue arises where the contempt proceedings are brought on application in civil courts for breach of order or injunction. In the case law that follows these proceedings are often described as "civil contempt proceedings". Although our provisional proposals would dispense with the distinction between civil and criminal contempt,[38] under the Civil Procedure Rules as they stand, the costs issues would still arise in circumstances where a contempt application was made in a civil court.

The principles that govern costs: the relevance of the defendant's means

9.51 The question of whether and how the defendant's means should be taken into account is particularly acute in cases where the defendant has limited means, but it will be relevant in any matter where a contempt application is made for breach of an order or injunction. Moreover, given the issue arises in any proceedings where costs awards will be governed by the Civil Procedure Rules – including in proceedings commenced by the Attorney General – the questions are of wider concern.

The award of costs: general principles

9.52 Costs awards are ordinarily governed by the statutes, procedure rules and directions which apply in the courts in which the proceedings take place.[39]

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38 See Chapters 2, 3 and 4.

39 *Attorney General v Crosland (costs)* [2021] UKSC 15 (unreported) at [5]. (The costs judgment in *Crosland* is appended to the main judgment published on the UK Supreme Court website as *Attorney General v Crosland* [2021] UKSC 15, commencing at p 17 of that main judgment with paragraphs re-starting at [1]. We provide a link to that publication as it is not appended to the version of the main judgment published on BAILII and it is not appended to the version of the judgment reported as *Attorney General v Crosland* [2021] 4 WLR 103.) Exceptionally, costs in a criminal matter may be determined under the civil costs regime, which was the case in a private prosecution in *Murphy v Media Protection Services* [2012] EWHC 529, [2013] 1 Costs LR 16. However, that approach is likely to be taken only in extraordinary circumstances: *Mojaria v Westminster Magistrates' Court* [2024] EWHC 178 (Admin).

9.53 Where proceedings are governed by the Criminal Procedure Rules, the court will make assessments of costs awards in accordance with the Prosecution of Offences Act 1985,[40] the Criminal Procedure Rules and the Criminal Costs Practice Direction (2015).[41]

(1) When defendants are convicted of a criminal offence or appeal unsuccessfully, the court can order the payment of just and reasonable prosecution costs.[42] In deciding whether to order costs and, if so, what order should be made, the court "must have regard to all the circumstances".[43] In assessing costs the relevant factors will include the conduct of the parties, the complexity of the matter, and the time spent on the case.[44] However, a costs order against a convicted defendant or unsuccessful appellant should only be made "where the court is satisfied that the [person] has the means and ability to pay".[45]

(2) Acquitted defendants or successful appellants may be able to recover some of their costs, with costs paid out of central funds.[46] The court may order payment of "such amount as the court considers reasonably sufficient to compensate [the person] for any expenses properly incurred … in the proceedings".[47] An order "should normally be made … unless there are positive reasons for not doing so".[48]

9.54 Where proceedings are governed by the Civil Procedure Rules then the general rule is that costs are awarded against the unsuccessful party.[49] In deciding whether to make a costs order and, if so, what that order should be, the court will have regard to all the circumstances.[50] When an order is made, and costs are assessed on the standard basis (as opposed to the indemnity basis), the court will have regard to all the circumstances in deciding whether costs were reasonably and proportionately incurred.[51] The court will only allow costs which are proportionate to the matters in

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40 Prosecution of Offences Act 1985, ss 16 to 19B.

41 Above, ss 16-19B; CrimPR, Part 45; Criminal Practice Directions 2015 consolidated with amendment no 13 [2022] EWCA Crim 688; Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 consolidated with amendment no 1 [2016] EWCA Crim 98.

42 Prosecution of Offences Act 1985, s 18.

43 CrimPR, r 45.2(3).

44 Above, r 45.2(7).

45 Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 consolidated with amendment no 1 [2016] EWCA Crim 98, para 3.4. See also *R v Northallerton Magistrates' Court ex parte Dove* [2000] 1 Cr App R 136 at [19] (Bingham LJ): "an order to pay costs to the prosecutor should never exceed the sum which, having regard to the defendant's means and any other financial order imposed upon him, the defendant is able to pay and which it is reasonable to order the defendant to pay".

46 Prosecution of Offences Act 1985, s 16.

47 Above, s 16(6). If a court considers that circumstances warrant it, the order may be for a lesser amount that is just and reasonable: s 16(6A).

48 Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 consolidated with amendment no 1 [2016] EWCA Crim 98, para 2.2.1.

49 CPR, r 44(2).

50 Above, r 44.2(4).

51 Above, r 44.4(1)(a).

issue.[52] Costs will be proportionate if they bear a reasonable relationship to matters including: the monetary sums and non-monetary value of relief in issue, the complexity of the litigation; any additional work generated by the conduct of the paying party; and any additional work or expense due to the vulnerability of a party or witness.[53] Costs which "are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred".[54]

The award of costs in contempt proceedings

9.55 The courts have made clear that costs in contempt cases "are not in some special category".[55] As such, they are decided in line with general principles.

9.56 In criminal courts, this means that costs against a defendant in contempt proceedings will effectively be capped, limited to the amount that the defendant has "the means and ability to pay".[56]

9.57 In civil courts dealing with contempt applications, however, there will be no cap nor is there any requirement that the court consider the defendant's means. The Supreme Court in *Attorney General v Crosland* held that "normally, the sole question will be whether the costs claimed in relation to a contempt application are reasonable and proportionate".[57] The Court also held, however, that "in determining whether the costs are reasonable and proportionate, the court may take into account the respondent's means".[58]

9.58 There may be some consideration of the defendant's ability to pay. However, in *Secretary of State for Transport v Cuciurean*, the Court of Appeal (Civil Division) interpreted *Crosland* to mean that there is no "general proposition … that the means of the contemnor are relevant to the proportionality or reasonableness of the costs claimed".[59] The Court of Appeal noted that the Supreme Court had said that the court "may (not must) take into account the respondent's means".[60]

9.59 In cases where protesters have breached injunctions – and the freedom of expression and freedom of association protections in articles 10 and 11 of the ECHR are engaged – it is more likely that the defendant's means will be considered, though it is not clear whether it is required. In *Crosland,* the Supreme Court noted that when determining

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52 CPR, r 44.3(2)(a).

53 Above, r 44.3(5).

54 Above, r 44.3(2)(a).

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

56 See para 9.53 above; 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 LASPO s 14(g).

57 *Attorney General v Crosland (costs)* [2021] UKSC 15 (unreported) at [9] (references omitted). "Reasonable and proportionate" means "reasonable and proportionate in the [CPR] Part 44 sense": *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [65].

58 *Attorney General v Crosland (costs)* [2021] UKSC 15 (unreported) at [10] (reference omitted).

59 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [44], citing *National Highways v Heyatawin* [2021] EWHC 3093 (QB), [2022] 1 WLR 1521 at [9].

60 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [38].

whether the costs claimed are reasonable and proportionate, the court may take account of the defendant's means, and may also consider the relationship between the value of any costs order and the penalty imposed.[61] However, where ECHR rights are engaged, "the combination of any penal measure and any costs order must be a proportionate interference with such rights".[62] The Court of Appeal in *Secretary of State for Transport v Cuciurean* held that when there is an interference with articles 10 and 11 (in the grant of the initial injunction or the sanctions imposed for breach), it does not necessarily follow that "costs which are proportionate in the [Civil Procedure Rules] sense will necessarily be proportionate in the Convention sense".[63] This is because "proportionality in the Convention sense is a broader concept".[64] Consequently, where there is an interference with ECHR rights, the proportionality assessment requires that the interference as a whole is proportionate, which means the court *must* consider the relationship between costs and penalty. In *Crosland*, the court had regard to the defendant's means in considering proportionality.[65] However, it does not appear from either *Crosland* or *Secretary of State for Transport v Cuciurean* that it is a requirement to consider the defendant's means in determining costs, even where articles 10 and 11 of the ECHR are engaged. Even in the event that costs are considered, the Court of Appeal observed in *Secretary of State for Transport v Cuciurean* that:

> It is no doubt the case that an award of costs against a defendant may cause hardship. It may affect their credit rating and in some cases may drive a defendant into insolvency. Countless unfortunate litigants have been driven into bankruptcy by costs orders made against them. But that has never been a reason either to refuse an order for costs in civil proceedings or (save in those cases where the CPR makes specific provision) to limit the amount of costs to an amount which the defendant can in practice afford to pay.[66]

9.60 The upshot of the current law is that:

(1) where contempt proceedings occur in criminal courts then any award of costs against a defendant will be limited to the amount that they have the ability and means to pay; and

(2) where contempt proceedings occur in civil courts then there is no requirement that the court must consider the defendant's means when making a costs award.

9.61 In our pre-consultation engagement we heard views from stakeholders about the issues that arise in relation to impecunious defendants who are legally aided, and we discuss that in the next section. However, we welcome views from consultees on the freestanding issue of whether and, if so, how the defendant's means should be taken

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61 *Attorney General v Crosland (costs)* [2021] UKSC 15 (unreported) at [10].

62 Above, at [12].

63 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [48], [64].

64 Above at [48].

65 *Attorney General v Crosland (costs)* [2021] UKSC 15 (unreported) at [18].

66 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [65].

into account when a contempt application is made for a breach of order or injunction, or in any other proceedings on application in the civil courts.

Consultation Question 98.

9.62 Where a court is determining costs in contempt proceedings that were commenced on application in a civil court, should there be a requirement that the court consider the defendant's financial resources? If so, how?

The capping of costs for legally aided defendants

9.63 The second costs issue that arises concerns an inconsistency in the protections against costs where defendants are legally aided. The inconsistency arises at least in part from the categorisation of legal aid as either "criminal legal aid" or "civil legal aid".

9.64 A legally aided defendant in the criminal courts will receive criminal legal aid. Defendants in criminal proceedings are protected by a requirement that courts should only make costs orders where the court is satisfied that the defendant has the means and ability to pay.[67] Thus, like any defendant in criminal proceedings, the legally aided contempt defendant in a criminal court has that costs protection.

9.65 A legally aided defendant in civil proceedings (other than for contempt) will receive civil legal aid. This defendant will be protected by section 26 of LASPO, which limits costs to:

> (1) the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including:
>
> (a) the financial resources of all of the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate.[68]

9.66 However, a legally aided defendant in contempt proceedings in the civil courts will not receive civil legal aid but will instead receive criminal legal aid.[69] As a consequence, a contempt defendant in the civil courts will not attract either of the above protections.

9.67 The issue was explained and considered in *Chief Constable of Essex Police v Douherty*, when the court was required to consider costs against a legally aided defendant who had breached the terms of a "gang injunction" made under the Policing and Crime Act 2009.[70] The court stated that:

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67 Practice Direction (Costs in Criminal Proceedings) 2015 [2015] EWCA Crim 1568 consolidated with amendment no 1 [2016] EWCA Crim 98, para 3.4; see also para 9.53 above.

68 LASPO, s 26(1)(a).

69 The logic of this is that an application for committal for contempt is classified as "criminal proceedings" for the purposes of legal aid: see para 9.6 above.

70 *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC); Policing and Crime Act 2009, Part 4.

A party in receipt of civil legal aid will have the benefit of s.26 LASPO. This provides that costs ordered against an individual in 'relevant civil proceedings' must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including (a) the financial resources of all of the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate. … A legally aided defendant only becomes liable to pay costs once the court has applied the test in s.26 and evaluated financial resources and conduct.

Section 26 relates to "costs ordered against an individual in relevant civil proceedings". "Relevant civil proceedings" for this purpose are defined under s.26(2) as "(a) proceedings for the purposes of which civil legal services are made available to the individual under this Part …."

As Section 26 of LASPO only applies to civil legal aid, it must follow that it does not apply in civil committal proceedings where the defendant is in receipt of criminal legal aid. There does not appear to be an equivalent provision for criminal legal aid, no doubt because the criminal courts already take account of an offender's means and ability to pay before making a costs order.[71]

9.68 As the section 26 protection did not apply, the court set out the general principles and noted that although policy reasons may result in limits, there was none that applied in that case:

The overriding objective in CPR Part 1 requires the court to deal with cases "justly" and at proportionate cost. This includes so far as is practicable, dealing with the case in ways which are proportionate to the importance and complexity of the case and "to the financial position of each party". It also includes dealing with the matter fairly.

The ability of a person to pay costs is not usually considered during civil costs assessment. Where there are policy reasons for managing costs exposure, rules or regulations either limit the level of costs (eg small claims, possession cases with fixed costs, etc), refer in explicit terms to means (eg CPR 52.19) or introduce an alternative assessment procedure (eg s.26 LASPO). So far, no such rules have been made in respect of civil committals.[72]

9.69 The inconsistency was summarised by the court:

There appears to be a lacuna. There are mechanisms in place to protect impecunious parties facing costs orders in the criminal courts, and legally aided parties in the civil courts. The exception seems to be civil committal proceedings. There is nothing to suggest such an omission is intentional, rather it appears to have come about because of the general confusion in 2012 about the type of legal aid that respondents to civil committal applications should receive … It does, however, seem unfair to those defendants who are impecunious that in certain respects they

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71 *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC) at [11]-[13].

72 Above at [17]-[18].

are put in a worse position by the decision that they should receive criminal, rather than civil legal aid.[73]

9.70 The problem was noted by the Court of Appeal (Civil Division) in *Secretary of State for Transport v Cuciurean*, but the court took the view that it was not an issue it could take upon itself to resolve:

> I appreciate that because of the way in which LASPO is drafted Mr Cuciurean does not have the protection of section 26 or any of the specific provisions of the [Civil Procedure Rules] that limit liability to pay costs. But that, in my judgment, is a matter for Parliament or the Rules Committee to consider.[74]

9.71 In our pre-consultation engagement we heard concerns from stakeholders about the challenges faced by those seeking legal aid when they are the subject of a contempt application in the civil courts (as we have discussed above).[75] We did not hear any views on this specific matter regarding costs. However, given the judicial statements in the cases and the stakeholder concerns we heard in relation to the position of vulnerable people who are being proceeded against for breaches of ASBIs, our provisional conclusion is that this is an anomaly that should be addressed.

9.72 Our provisional view is that the problem should be resolved by limiting the exposure to costs in contempt proceedings on application in civil courts in the same way as section 26 of LASPO limits costs for relevant civil proceedings.

Consultation Question 99.

9.73 We provisionally propose that where a defendant is legally aided in contempt proceedings in a civil court then the costs should not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including:

(1) the financial resources of all of the parties to the proceedings; and

(2) their conduct in connection with the dispute to which the proceedings relate.

Do consultees agree?

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73 *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC) at [11]-[14].

74 *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 at [24] (Lewison LJ), [70]-[71] (Asplin LJ and Edis LJ agreeing).

75 See paras 9.23, 9.29 and 9.38 above.

Chapter 10: Sanctions

INTRODUCTION

10.1 After a finding of contempt has been made, a court may impose a sanction. The main sanctions available for contempt are committal to prison (immediate or suspended) and fines.[1] The general rule is that "any sanction must be just and proportionate and not excessive".[2] What sanction is appropriate – or indeed whether any sanction is to be imposed at all[3] – will depend on all the circumstances and each case is to be dealt with on its own facts.[4]

10.2 Sanctions typically have either or both punitive and coercive aims. A punitive sanction not only punishes an individual who has committed contempt but is also concerned with specific and general deterrence, sending a message that the courts will not tolerate flouting of orders or other interferences with the administration of justice.[5] A coercive sanction generally aims to secure a defendant's compliance with a court's order, particularly with a view to ensuring that the order is not breached again, but may also have a punitive element.[6] Given that these purposes might be fulfilled and balanced in different ways, it is appropriate that where a finding of contempt has been made, a wide range of options should be available. We take this into consideration throughout this chapter.

10.3 In this chapter we consider the sanctions that may be imposed by both superior courts, as well as those that may be imposed by inferior courts, tribunals and other bodies.[7] The discussion is primarily focussed on superior courts because, having inherent contempt powers, they have the widest range of sanctions available to them. By contrast, inferior courts are more constrained. Most notably, under section 14 of the Contempt of Court Act ("CCA") 1981: a superior court may imprison a contemnor for a maximum of two years but in an inferior court the maximum is one month; and there is no limit on the fine that a superior court may impose but in an inferior court the maximum is £2,500.

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1 Sequestration of assets is often said to be the third main sanction for contempt but in practice it is less significant than committal or fines; see paras 10.120 and 10.131 below.

2 *Cuciurean v The Secretary of State for Transport* [2021] EWCA Civ 357 at [17].

3 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [45].

4 *Lightfoot v Lightfoot* [1989] 1 FLR 414 (Court of Appeal (Civil Division)); *Thursfield v Thursfield* [2013] EWCA Civ 840, [2014] 1 FLR 389 at [33]; *Breen v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405 at [12].

5 *Attorney General v Harkins and Liddle* [2013] EWHC 1455 (Admin) at [28]-[30].

6 *Lightfoot v Lightfoot* [1989] 1 FLR 414 (Court of Appeal (Civil Division)). A contempt penalty may be wholly punitive where securing future compliance is no longer an option: eg *Lim v Ong* [2024] EWHC 373 (Ch) at [71].

7 In Chapter 6 we explain the categorisation of and distinctions between the protection and powers of superior courts of record (on the one hand) and inferior courts, tribunals and other bodies (on the other). We also explain which courts, tribunals and other bodies fall into each of the two categories.

10.4 This chapter focusses on issues that our research and pre-consultation engagement have indicated are contentious and may warrant reform. Many of our stakeholders, including judges, told us that there should be as wide a range of sanctions available as possible as that can be useful to courts to ensure compliance and stave off the need for committal. There is also a need to scrutinise the equality impacts that any of our proposals for reform may have on vulnerable individuals or groups. These considerations underpin our approach throughout the chapter.

10.5 The chapter is divided into eight main parts. The first addresses committal, looking at a range of issues under that umbrella, including measures that may be taken both prior to imposing a sanction (including ordering a pre-sentence report) and after a sanction is imposed (including early release from prison). Our provisional proposals include:

- retaining the current maximum term of committal of two years' imprisonment;
- requiring pre-sentence reports unless the court thinks it is unnecessary in the circumstances; and
- including contemnors among those who are eligible for early release on Home Detention Curfew.

10.6 The next part of the chapter looks at non-custodial options, including fines, sequestration of assets and community sentences. This is followed by a section on mental health orders. The chapter then turns to sanctions in inferior courts, tribunals and other bodies, where we provisionally propose that there should be alignment with respect to the sanctions they may impose. Next it considers the powers to impose sanctions in the devolved tribunals in Wales. We consider guidelines for imposing sanctions, and provisionally propose that sentencing guidelines for contempt of court should be produced, led by a judicial working group. The final two parts of the chapter consider issues that arise after a sanction has been imposed: whether a finding of contempt should appear on a criminal record, and the recording and publishing of data on contempt. A concluding consultation question offers consultees the opportunity to raise issues that are not addressed elsewhere in the chapter.

Terminology

10.7 First, whereas in most chapters we refer to an alleged or potential contemnor as the "defendant", in this chapter we often refer to the "contemnor" because we are addressing the position after a finding of contempt has been made.

10.8 Secondly, we generally avoid using the term "sentencing" to refer to the exercise being undertaken when a court decides what sanction is appropriate following a finding of contempt. Rather, we refer to the imposition of sanctions. This is because the term "sentencing" is strictly to be associated with the criminal courts and criminal offences. Although courts have in the past commonly referred to committal as a "custodial sentence",[8] the Sentencing Code now expressly states that a "'sentence of imprisonment' does not include a committal for contempt of court", and that committal

[8] See for example *Attorney General v Harkins and Liddle* [2013] EWHC 1455 (Admin) at [21]-[31], where a penalty was imposed breach of an injunction.

is not “a custodial sentence”.[9] The courts have frequently observed in the context of civil contempt that penalties are imposed for contempt but contemnors are not “sentenced”.[10] A contemnor is “liable”, not “convicted”.[11] A contemnor may be sanctioned with a custodial order, however we refer to such a sanction as a “term” of “committal”, not a “sentence” of “imprisonment”: “Custody in cases of contempt is known as committal. It is not the same as a prison sentence”.[12]

10.9 All this being said, “sentencing” remains a widely used and well-understood term in contempt. There is frequent reference to sentences being suspended, including in the Civil Procedure Rules, where rule 81 refers to circumstances “where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings”.[13] In *Lovett v Wigan Borough Council,* the Court of Appeal (Civil Division) acknowledged that the term “sentencing” is not technically correct but found the term helpful and so used it.[14]

10.10 The result is that while we largely avoid the term, there are occasions where it is impractical and sometimes unhelpful to avoid it. In particular, the discussion of suspended orders of committal is more straightforwardly addressed using the terminology of suspended sentences. The same can be said of pre-sentence reports. Where we draw on the cases that use the language of sentencing, we do not alter the terminology used by the courts. In the part of this chapter, where we discuss guidelines for the imposition of sanctions, we explain that the term “sentencing guidelines” has a specific statutory meaning under the Sentencing Code, being “guidelines relating to the sentencing of offenders”.[15] However, in keeping with the judicial acceptance that “sentencing” is a helpful term and the frequent referral to criminal sentencing guidelines in contempt cases, we make a provisional proposal for the development of “sentencing guidelines for contempt of court”.[16]

COMMITTAL

10.11 Superior courts of record may sentence a contemnor to imprisonment for up to two years.[17] A sentence may be suspended or immediate.[18]

10.12 We are not aware of a comprehensive list or analysis of sanctions that have been imposed by the courts. However, it is clear from the available data and from what stakeholders have told us in our pre-consultation engagement that courts impose

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9 Sentencing Code, ss 222(2), 305.

10 *Cuciurean v The Secretary of State for Transport* [2021] EWCA Civ 357 at [10]; Civil Justice Council (“CJC”), *Anti-Social Behaviour and the Civil Courts* (July 2020) para 379.

11 *Cuciurean v The Secretary of State for Transport* [2021] EWCA Civ 357 at [10].

12 Above at [11].

13 CPR, r 81.8(8).

14 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [5].

15 Sentencing Code, s 120(1).

16 See paras 10.179 to 10.214 below.

17 CCA 1981, s 14(1).

18 On suspended sentences, see paras 10.36 to 10.47 below.

terms of committal that range from committal until the rising of the court (that is, a person who has been detained under immediate temporary detention powers is released when the court finishes its sitting that day), through to terms numbered in days up to many months. *Arlidge, Eady & Smith* provides a list of examples of sanctions imposed in over 100 cases from 1981 to 2019, mostly ranging from fines of between £1,000 and £330,000, and imprisonment from 28 days to two years.[19] Ministry of Justice data on prison receptions records that between 2020-2022, 107 people were imprisoned for contempt of court.[20] Epstein, Hunter and Meers have compiled a database of over 250 cases where the defendant breached an Anti-Social Behaviour Injunction ("ASBI") or similar injunction and an order of committal was made.[21] They reported that sentences ranged from 0.5 days to 730 days, with a mean average of 95 days, a median of 60 days, and around two-thirds of cases with sentences of 100 days or less.[22] Some of those sentences were suspended and some immediate. For example, in 2021 there were 46 immediate committal orders and a further 28 that were suspended.[23]

10.13 In all, while the maximum sentence of two years is rare, the imposition of substantial sentences is not unusual and the maximum of two years is the benchmark against which terms are set. The imposition of substantial terms reflects the approach of the courts. In dealing with a breach of an order, the Court of Appeal (Civil Division) held in *McKendrick v Financial Conduct Authority* that:

> the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.[24]

10.14 Were the maximum to be higher, it would not merely be the case that a contempt that would currently attract the maximum would then attract the higher maximum. Rather, as "the length of the committal has to bear some reasonable relationship to the maximum of two years which is available", it would be expected that the ranges for

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19 See P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*") Appendix 3. See also the appendix to *North Bristol NHS Trust v White* [2022] EWHC 1313 (QB) for comparisons on custodial sentences.

20 Ministry of Justice and HM Prison and Probation Service, *Offender Management Statistics quarterly: October to December 2022* (27 April 2023), Prison Receptions: 2022, Non-criminal admissions (A2-12).

21 R Epstein, C Hunter and J Meers, "Imprisonment for breach of injunctions: what is happening in the civil courts?" (2024) *Legal Studies* (First View, 1 July 2024). We are grateful to the authors for sharing with us an advance copy of the article and their data.

22 Above.

23 Above.

24 *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524, [2019] 4 WLR 65 at [40].

contempts of differing degrees of seriousness would all increase, as they are set in relation to the maximum term.[25]

The maximum term of committal

10.15 We have considered whether the maximum term of committal of two years should be retained. We did not ask a consultation question on the maximum length of sentence in our 2012 review of contempt of court.[26] However, we do ask a question on this occasion.

10.16 In our pre-consultation engagement we heard some suggestions that the maximum sentence of two years was inappropriate. Some stakeholders told us they were concerned that two years' imprisonment is too extreme for contempt, which is usually a non-violent crime. We heard just one view that committal should never be an option in any circumstances, and some views that it should never be an option for breach of an injunction and, specifically, for breach of an ASBI. We also heard just one view in favour of an increased maximum with the argument being that the availability and imposition of longer sentences may provide greater deterrence against the breach of injunctions by protesters.

10.17 Useful points of comparison for the two years' maximum sentence for contempt may lie in criminal offences that frustrate or hinder the course of justice.[27] Perjury carries a maximum sentence of seven years' imprisonment.[28] Intimidating a witness or juror carries a maximum sentence of five years' imprisonment.[29] There is no set maximum sentence for the common law offence of perverting the course of justice; in theory it could attract a sentence of life imprisonment, but that is because Parliament has not legislated for a maximum sentence rather than because a life sentence is the appropriate maximum. Offences that attract lower maximum sentences than contempt include summary offences of wasting police time (a maximum of six months' imprisonment), impersonating a police officer with an intent to deceive (a maximum of six months' imprisonment) and obstructing a police officer (a maximum of one month's imprisonment).[30]

10.18 More frequently, however, stakeholder concerns were not about removing committal as a sentencing option, but about contemnors being committed to prison inappropriately. In particular, some stakeholders expressed the view that imprisonment was inappropriate for breach of an ASBI or for contempt by publication. We also heard concerns about discrepancies in length of sentences where committal results from breach of orders for payment of debt. Such discrepancies arise because, whereas contempt by breach of order may attract the two-year maximum, the Debtors

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25 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [30].

26 We asked only about the appropriateness of the maximum sentence in relation to contempt by publication (strict and intentional): Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.114-2.115. We return to that particular issue at para 10.28 below.

27 See generally, Crown Prosecution Service ("CPS"), *CPS Legal Guidance: Public justice offences incorporating the charging standard* (revised 4 August 2022).

28 Perjury Act 1911, s 1.

29 Criminal Justice and Public Order Act 1994, s 51.

30 Criminal Law Act 1967, s 5(2); Police Act 1996, ss 89(2), 90(1).

Act 1869 limits the length of committal where the breach constitutes non-payment of a debt. We consider those issues in the next section and ask specific questions about them.[31]

10.19 At this point, we invite consultees' views on whether the maximum of two years' imprisonment is appropriate. Given what we have been told in our pre-consultation engagement, points of comparison and the available data, our provisional view is that the current maximum is appropriate and there should be no change.[32]

Consultation Question 100.

10.20 We provisionally propose that the two-year maximum sentence for contempt of court should remain.

Do consultees agree?

Committal under the Debtors Act 1869

10.21 Several stakeholders directed us to the Debtors Act 1869. The Act preserves the power of a court to imprison a person for failure to pay a debt, though: limits it to specified circumstances; requires that the court is satisfied that the person has the means to pay the debt; limits committal to a maximum of six weeks; and payment of the debt will result in release from custody.[33] With respect to debts owed pursuant to an order or judgment, these powers may only be exercised by the High Court in respect of a High Court maintenance order; the family court or High Court in respect of a family court maintenance order; and the county court in respect of an enforceable judgment that is for payment of tax, social security and pension liabilities.[34] Section 4 permits committal for up to a year for some specific types of debts, including those associated with defaults by trustees.[35]

10.22 In our pre-consultation engagement a number of judges told us that the inconsistency between the two-year maximum sentence permitted by the CCA 1981 and the lower maximums under the Debtors Act 1869 is unsatisfactory. The comments were almost exclusively concerned with the effects as they related to maintenance orders in the family context. Maintenance orders are often made following a divorce. They are orders for one of the separated couple to make payments to the other. They are frequently used to provide financial support for that person and a dependent child.[36]

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31 See paras 10.21 to 10.27.

32 We note that the Independent Review of Disclosure and Fraud Offences is considering whether the sanctions for breach of disclosure rules under s 17 of the Criminal Procedure and Investigations Act 1996 are sufficient (a breach being contempt of court): Independent Review of Disclosure and Fraud Offences, *Preliminary findings and direction of travel* (24 April 2024) para 18.

33 Debtors Act 1869, ss 4-5; *Zuk v Zuk* [2012] EWCA Civ 1871, [2013] Fam Law 536 at [8].

34 Administration of Justice Act 1970, s 11 and sch 4.

35 Debtors Act 1869, s 4.

36 Administration of Justice Act 1970, s 28, sch 8.

10.23 The concern raised was that failure to comply with an order relating to conduct (such as a contact order) or failure to comply with an order for the disclosure of a document would expose a contemnor to committal for up to two years, whereas the failure to comply with a maintenance order would attract a maximum of only six weeks. The Debtors Act provision curtails the sanctions that are available to courts. This is not to say that contempt is the only option available to the courts to coerce or enforce compliance with an order for payment of money; we have previously observed that there are a range of options generally and in the family context.[37] In sum, where contempt is the option that is used then the stakeholders we spoke to were of the view that consistency should prevail and that, at the least, committal for failure to pay in relation to an order in family proceedings should not be limited to six weeks.

10.24 In our 2016 report on Enforcement of Family Financial Orders, we noted that "debtors who have not paid what they owe under a family financial order may be committed to prison for up to six weeks on a judgment summons application".[38] We heard views from members of the judiciary on the question of sentence length under the Debtors Act, which we summarised in the report:

> Some consultees did not comment on the length of the maximum sentence on a judgment summons application and the views of those who commented were mixed. The Judges of the Family Division were of the view that the current maximum period of six weeks is "quite inadequate". The Family Justice Council thought the same. The judges of the Family Division noted that the debtor will, in practice, only serve three weeks and that a significant number of debtors will consider this "a small price to pay". They advocated increasing the period to two years to bring it in line with the maximum sentence for contempt of court. On the other hand, the Family Law Bar Association and Janet Bazley QC considered that the current maximum term of six weeks was "sufficient to ensure compliance." Stone King commented that imprisonment was "never the answer where there are children".[39]

10.25 Despite having heard views that suggested reforming the maximum length of sentence, in the final report we acknowledged that "given the general prohibition on imprisonment for debt, [increasing the length of time for which a debtor could be committed to prison] would be a retrograde step".[40] We decided to "make no recommendations on the issue of the maximum sentence as we consider it is a matter of policy for Parliament, but we suggest it is an issue that should be further considered".[41]

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37 Enforcement of Family Financial Orders (2016) Law Com No 370, chapter 2.

38 Above, para 15.1.

39 Above, para 15.5 (*original footnotes omitted*). The reference to serving three weeks instead of six is explained in a footnote to the text: "Section 258 of the Criminal Justice Act 2003 governs release for contemnors (those imprisoned for contempt of court or "any kindred offence") and provides for automatic unconditional release after half the sentence has been served. We consider that an offence leading to imprisonment on a judgment summons is a "kindred offence"; judgment summonses under section 5 of the Debtors Act are contempt proceedings: *Mubarak v Mubarak (No. 1)* [2001] 1 FLR 698".

40 Enforcement of Family Financial Orders (2016) Law Com No 370, para 15.4.

41 Above, para 15.5.

10.26 Although we appreciate the matters raised by stakeholders in our pre-consultation engagement, we remain alive to the concern that the change they desire may be a step backwards. We are also conscious that, in the family context, the failure to pay maintenance may have a detrimental effect. However, the operation of the Debtors Act 1869 creates a clear anomaly in the sanctions regime for contempt of court, which now falls for consideration given the Terms of Reference of our current project. It is not unusual for the Law Commission to seek consultees' views on maximum sentences.[42] As we explain in the preceding paragraph, in the Enforcement of Family Financial Orders report in 2016, we left the question of maximum sentence for Parliament. Parliament has not acted so the inconsistency remains. Accordingly, it is appropriate that on this occasion we consult on the maximum sentence for contempt resulting from non-payment of debt. We would welcome consultees' views.

Consultation Question 101.

10.27 The Debtors Act 1869 limits to six weeks the period of committal that can be imposed for contempt of court where there is a failure to comply with a family court or High Court maintenance order. We seek consultees' views on whether this limit should remain or whether the maximum period of committal should be the same as that for other forms of contempt (and thus two years).

Committal for contempt by publication when proceedings are active

10.28 When a person's conduct engages the right to freedom of expression then imprisonment for contempt will always be controversial. In our pre-consultation engagement, several academic and media stakeholders expressed doubts about whether prison is appropriate for the type of contempt currently known as strict liability contempt by publication under section 2 of the CCA 1981.[43]

10.29 We heard views that committal is inappropriate for professional journalists who "are doing their jobs". Some stakeholders were concerned about punishing the exercise of freedom of expression with imprisonment; some sanctions, including imprisonment, were described as "draconian" and as having a chilling effect on freedom of expression. Some emphasised that the European Court of Human Rights ("ECtHR") has made it clear that imprisonment should only be an extreme sanction for journalistic activity, even if the activity is unlawful; committal, we were told, should be a sanction of last resort and it is important to have alternative, more flexible, sanctions.[44] One media stakeholder argued that committal of an individual is

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42 For example, we previously consulted on maximum sentences for the offence of hacking in the working paper on Computer Misuse (1988) Law Commission Working Paper No 10, para 6.38, and on maximum sentences for contempt by publication in Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.113-2.115.

43 See Chapter 5 for our provisional proposals on contempt by publication while proceedings are active as the form of contempt that would replace this.

44 *Cumpănă and Mazăre v Romania* (2004) App No 33348/96 at [112]-[115]; *Bozhkov v Bulgaria* (2011) App No 3316/04 at [53].

unnecessary: “the idea that [our organisation] would be fined or suffer reputational damage is enough to make us want to avoid committing contempts”.

10.30 There were also comments about the effects on citizen journalism, which has increased greatly. We heard concerns that the availability of committal for strict liability contempt by publication means that laypeople, who may have committed contempt accidentally, acted in good faith, or may not have been aware of reporting restrictions or their impact, may face imprisonment. We were told by media lawyers that harshly imposing contempt laws on citizen journalists would not “sit right” and that sanctioning with committal individuals who post on social media without appreciating what they are doing is “uncomfortable”.

10.31 In our 2012 consultation paper we observed that it had been more than 60 years since a committal order for contempt was made against a journalist.[45] It is now over 75 years.[46] We noted that there is a contrast between the maximum contempt penalties of imprisonment and the fines that are the maximum penalties for breaching some statutory reporting restrictions.[47] We also noted that where there was an intention to interfere with the administration of justice, an option of imprisonment may be appropriate in “extreme cases”, and article 10 rights and the need for proportionality would mitigate the risk of inappropriate penalties being imposed.[48] We asked whether existing maximum sentences were appropriate in respect of what is currently called strict liability publication contempt, contempt by publication committed at common law, by publication of matters exempt from disclosure under section 11, or by breach of reporting restrictions made under section 4(2) of the CCA 1981.[49]

10.32 In respect of the maximum sentence for strict liability publication contempt, consultation responses diverged. Some consultees said that imprisonment should simply not be an option, with one academic saying that it is not compatible with article 10 of the ECHR. Media lawyers said the maximum should be reduced, with one media academic saying that it should be reduced to one year. The London Criminal Courts Solicitors’ Association said it could be reserved for the most serious cases of contempt. However, many consultees including lawyers and judges told us that the length of the current maximum is appropriate: it has a deterrent effect and reflects the nature, gravity and seriousness of interfering with justice. Others took no view on the length of sentence, though they said that imprisonment should remain an option.

10.33 On sanctions for contempt by publication at common law or by breaching reporting restriction orders made under sections 4(2) or 11 of the CCA 1981, we heard from one

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45 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.113.

46 See *R v Bolam ex parte Haigh* [1949] 3 WLUK 106, in which the editor of the *Daily Mirror* was imprisoned for a period of three months for having published an article which prejudiced the administration of justice.

47 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.113. For example, unlimited fines apply to publishing certain information about children in relation to an alleged offence or about children and young people in relation to non-criminal proceedings in contravention of a court direction: Youth Justice and Criminal Evidence Act 1999, ss 44, 49; Children and Young Persons Act 1933, s 39. Publishing information that may identify a child in family proceedings is punishable by a fine of up to £2,500: Children Act 1989, s 97.

48 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.113-2.115.

49 Above, paras 2.114-2.115.

media academic that imprisonment should remain an option because "a deliberate contempt is more serious and should attract a higher potential penalty", and committal is appropriate in some circumstances. A majority of consultees told us that the maximum two years should remain. However, the National Union of Journalists was of the view that two years for contempt is excessive in respect of an individual journalist.[50] However, we came to the conclusion that it was important that courts have appropriate powers to address the most serious cases and that maximum penalties should be standardised across the different types of contempt. We also noted that courts would need to consider the proportionality of a sanction in all cases involving publication, which was a sufficient safeguard against excessive sanctions for journalists.[51] On the basis of this, our report did not recommend any departure from the two-year maximum.[52]

10.34 Given our pre-consultation stakeholder engagement in this project and the responses in 2012, our provisional view is that committal to prison should remain an option where the conduct involves publication whether as general contempt, contempt by breach of order, or strict liability contempt by publication. Even if committal is rarely used, it should remain available. Sentencing guidelines can be used to ensure the committal power is not used inappropriately or unpredictably. Further, we make provisional proposals below that will expand the range of sentencing options available to the courts, providing other deterrent and punitive measures.[53] However, our provisional view is that those wider options do not displace the need for committal to remain an option.

Consultation Question 102.

10.35 We seek consultees' views on whether committal should remain an option where contempt is committed by publication when proceedings are active?

The power to suspend a sentence

10.36 Immediate committal is not the only option. Sentences may be suspended.

10.37 In the case of a criminal offence, the Sentencing Code provides a detailed regime for suspended sentences.[54] A suspended sentence is a sentence of imprisonment for a fixed term[55] but the person will not be imprisoned if they comply with specified conditions for a set period, known as the "operational period".[56] For example, a sentence of six months' imprisonment, suspended for 12 months, means the person must comply with conditions for a year.

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50 Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com 340, para 2.198.

51 Above, para 2.199.

52 Above.

53 See paras 10.132 to 10.139 below.

54 Sentencing Code, ss 286-305.

55 *Pidduck v Molloy* [1992] 2 FLR 202; *Loseby v Newman* [1995] 2 FLR 754 CA.

56 Sentencing Code, ss 286-288.

10.38 The statutory regime provides for conditions that will require the defendant not to commit any further criminal offences and may include behavioural requirements such as undergoing drug or alcohol treatment, or not entering certain locations.[57] If there is a failure to comply with the conditions attached to the suspended sentence order, or if a further offence is committed during the operational period, then the sentence may be "activated", with the result that the defendant is imprisoned.[58] A suspended sentence is still a custodial sentence.[59] If the person adheres to the conditions for the period of suspension, the sentence will have been fully served at the end of the suspension period.

10.39 A suspended custodial penalty may only be imposed when the custody threshold has been passed. This means a court must first determine whether the conduct warrants a custodial sanction. Only then may it consider whether it should be suspended.[60]

10.40 In the context of contempt, where the custody threshold is met, superior courts have an inherent power to suspend an order of committal "for such period or on such terms or conditions as [the court] may specify".[61] This power is routinely used by courts and suspended sentences are frequently imposed in contempt cases.[62] Suspended sentences are not reserved for exceptional circumstances and in fact, "will usually be the first port of call" in family law cases, for example, as a means of "attempting to secure compliance with a non-molestation order".[63] Whether a court decides to suspend a sentence for contempt will depend upon the objectives of the court and whether the aim is to punish the defendant or coerce compliance.[64]

10.41 When an order of committal is suspended, the conditions will usually include not committing a further contempt, especially where the contemnor is being sanctioned for

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57 Above, s 287.

58 See Sentencing Academy, *Sentencing Explained: Suspended Sentence Orders* (2023) p 3. Not every breach of conditions will result in activation: "the court is not obliged to activate a suspended sentence upon mere proof of breach of the suspensory condition. The judge has a discretion, taking into account both the past and current situation and the gravity of the breach, either to activate the original sentence or to impose a reduced sentence or a fine or not to punish at all": *Villers v Villers* [1994] 1 WLR 493 at 498; for an example, see *Guinness Partnership Ltd v Tierney*, Case JS20SE001, Sheffield County Court, 12 December 2022 (Sadiq HHJ) at [19]-[21]. In the criminal context, see the Sentencing Code, s 303 and sch 16.

59 See Sentencing Council, *Imposition of Community and Custodial Sentences Definitive Guideline* (2016) p 7.

60 Above: "Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not, a non-custodial sentence should be imposed".

61 *Cuciurean v The Secretary of State for Transport* [2021] EWCA Civ 357 at [16]; *Morris v Crown Office* [1970] 2 QB 114 at 125; *Lee v Walker* [1985] QB 1191. See Senior Courts Act 1981, s 45(4) for the powers of superior courts. The power is extended to the county court in respect of non-criminal matters: see County Courts Act 1984, s 38(1); and CCA 1981, s 14(4A).

62 See para 10.12 above.

63 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [31]. See also *Nicholls v Nicholls* [1997] 1 WLR 314.

64 *Arlidge, Eady & Smith* (2019) para 14-57. For an example of suspension aimed at securing compliance, see *Guinness Partnership Ltd v Tierney*, Case JS20SE001, Sheffield County Court, 12 December 2022 (Sadiq HHJ) at [9].

breaching an order or injunction.[65] Other conditions may include attending future hearings and giving evidence,[66] attending a Child Contact Centre meeting to arrange contact between the child and the former spouse,[67] or payment of a fine by a set date.[68]

10.42 Some considerations governing suspended sentences have been identified in contempt cases:

(1) The power to suspend must be exercised at the sentencing hearing; a sentence already imposed cannot be suspended at a later stage (for example, on an application to purge).[69]

(2) The length of the sentence should not be impacted by whether it is suspended.[70]

(3) The period of suspension (that is, the period for which the person must comply with the conditions) cannot be indefinite[71] or excessive[72] (in the sense that it "ought not … to be disproportionate either to the sentence itself … or to the gravity of the contemnor's conduct").[73]

10.43 The power to suspend is an important sentencing tool. It can help secure compliance with orders and injunctions, take account of individual circumstances, and provides flexibility in the ways that courts can sanction contempts. One stakeholder pointed out that suspended sentences reduce reoffending.[74] We were told by another stakeholder

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65 *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 at [99]. It was said in *Aspect Capital v Christensen* [2010] EWHC 744 (Ch) at [49] and *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch) that a sentence may be suspended on condition that a contempt is purged, based on the decision in *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 21. However, that does not seem correct; the decision in *Gulf Azov* concerned a suspension on condition that no subsequent contempts were committed.

66 See, for example, this order on determination of proceedings for contempt of court in the matter of *London Borough of Tower Hamlets v Miah*, ZE2300007, 14 February 2024 (HHJ Lazarus).

67 See for example, *Raza v Gall* Slough Family Court, RG22P00139, 4 October 2023 (HHJ Case) at [33]-[34].

68 *Aviva Insurance Ltd v Kovacic* [2017] EWHC 423 (QB) at [34].

69 *Harris v Harris* [2001] EWCA Civ 1113, [2002] Fam 253. In *Doncaster MBC v Elizabeth Watson* [2011] EWHC 2376 (Fam), [2011] Fam Law 1195 at [15], the court considered the position of a contemnor who was sentenced to nine months' imprisonment. Ten days after commencing her sentence, the court heard her application to purge her contempt on the grounds that she would endeavour to get removed from the internet some material that she had previously passed to a blog and (in the court's words) she had had "a very unpleasant experience in prison". The court initially suspended the remainder of the sentence. Subsequently, *Harris v Harris* was drawn to the judge's attention and on the same day a further judgment [2011] EWHC 2498 (Fam), [2011] Fam Law 1329 was handed down rectifying the error. The suspended sentence was substituted with the applicant's immediate and unconditional release.

70 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [28].

71 *Griffin v Griffin* [2000] 2 FLR 44 at 50.

72 *Loseby v Newman* [1995] 2 FLR 754 at 757 (Balcombe LJ, Hirst and Hoffmann LJJ agreeing).

73 *Harris v Harris* [2001] Fam 502 at 515.

74 There is consistent evidence that suspended sentences and community sentences result in lower reoffending rates than short term custody, though the interaction of different factors and reoffending measures is significant: A Mews et al, *The impact of short custodial sentences, community orders and suspended sentence orders on re-offending* (Ministry of Justice Analytical Series, 2015) pp 18-20, 25.

that suspended sentences are not particularly helpful where a contemnor has limited capacity to understand the order so "giving a suspended sentence is essentially just setting the contemnor up to eventually be committed". Our provisional view is that this concern can most effectively be addressed through pre-sentence reports, which we consider below.[75]

10.44 We have considered whether there may be a case for greater clarity about the options for suspending sentences for contemnors and that these should be set out in statute. The regime in Chapter 5 of the Sentencing Code may be a useful illustration of how a statutory framework may provide certainty and may help ensure fairness and consistency in approach. It specifies, for example:

- the period for which a sentence may be suspended (minimum six months, maximum two years);
- the "community requirements" that may be imposed as conditions (for example, unpaid work, drug and alcohol treatment, residence requirements, foreign travel restrictions); and
- the need to ensure that any conditions are not in conflict with each other or with other orders to which a person may be subject, or with religious beliefs, or with work or education commitments.[76]

10.45 Our provisional view is that certainty is preferable, though we do not propose a specific set of requirements.

Consultation Question 103.

10.46 We provisionally propose that a regime for suspended sentences for contempt should be set out in statute.

Do consultees agree?

10.47 If a regime for suspended sentences for contempt were to be set out in a statute:

(1) What should be the minimum and maximum period of suspension (that is, the period for which a person must comply with conditions)?

(2) What should be the conditions that may be imposed?

(3) What other features should a statutory regime contain?

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75 See paras 10.48 to 10.66 below.

76 See, for example, Sentencing Code, ss 287-288, 292.

Pre-sentence reports

10.48 When an offender is sentenced for a criminal offence, the sentencing decision may be informed by a pre-sentence report ("PSR"). However, when sentencing for contempt, courts currently have no power to order a PSR.

10.49 A PSR is defined by the Sentencing Code as a report "made or submitted by an appropriate officer with a view to assisting the court in determining the most suitable method of dealing with an offender".[77] A court sentencing a criminal offender and considering either a custodial or community sentence "must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report".[78]

10.50 The Government has described the purpose of PSRs as follows:

> The purpose of a [PSR] is to facilitate the administration of justice, and to reduce an offender's likelihood of reoffending and to protect the public and/or victim(s) from further harm. A PSR does this by assisting the court to determine the most suitable method of sentencing an offender (Criminal Justice Act 2003, section 158). To achieve this, the National Probation Service provides an expert assessment of the nature and causes of the offender's behaviour, the risk the offender poses and to whom, as well as an independent recommendation of the option(s) available to the court when making a sentencing determination for the offender.[79]

10.51 In the criminal context the Sentencing Council has noted that:

> In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender.[80]

10.52 Several stakeholders have told us that the absence of PSRs in contempt proceedings is a shortcoming in the regime. We were told that in practice, sometimes vulnerable individuals appear unrepresented before the court for contempt (where in criminal cases, they would be referred to a duty solicitor) and there is no screening process to identify their vulnerabilities or disabilities.[81] If a PSR were required, then any vulnerabilities of an individual and their circumstances would become evident, which would enable courts to determine the most appropriate sanction.

10.53 A PSR requirement for contempt sentencing would help to allay the concerns that people are being sentenced without sufficient regard to their vulnerabilities or what sentence will be most effective and appropriate. Such a requirement would increase

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77 Sentencing Code, s 31(1).

78 Above, ss 30(2), 204, 230-231. When an offender is under 18 then the court has limited discretion to decide that a PSR will be unnecessary: s 30(3).

79 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292 (September 2020) para 151.

80 Sentencing Council, *Imposition of community and custodial sentences* (1 February 2017).

81 Some stakeholders suggested that a mental capacity check as part of the PSR would be useful. Under the Sentencing Code, s 232, where an offender has or appears to have a mental disorder then a medical report will be required unless in the circumstances it is not necessary, but this report is not a capacity assessment. See further paras 10.144 to 10.147 below.

the burden on probation services – a matter pointed out to us by stakeholders – but a PSR will not be necessary in every case. A judge also told us that obtaining a short pre-sentence report from the Probation Service rather than a full pre-sentence report may be a way of limiting the increase in burden.

10.54 Our provisional view is that there is a case for a PSR requirement in contempt sentencing. The benefits are likely to outweigh the burden. There may be significant equality benefits where contemnors have mental health conditions or are otherwise vulnerable and an increased resource burden may be offset by economic benefits that would follow from lower incarceration rates and better compliance.

PSRs for contempt by breach of ASBI

10.55 We were told by many stakeholders that a PSR would be especially valuable where the contempt proceedings are for breach of an ASBI.

10.56 We heard from various lawyers and academics that those who are subject to ASBIs are commonly vulnerable people, living in poverty and/or with mental illness, who may not be able to comprehend the meaning of an ASBI or the consequences of breaching one, and thus, imprisonment is inappropriate and disproportionate. The Civil Justice Council ("CJC"):

> identified mental health and capacity issues of respondents as of particular concern as they underpin a significant proportion of anti-social behaviour and the civil courts lack the facilities, mechanisms and experience available in the criminal courts to address the underlying issues.[82]

10.57 A legal academic, Dr Rona Epstein, told us punishment for contempt by breach of an ASBI often amounts to "punishing destitution" or "punishing mental illness", and that committing people to prison for contempt by breach of an ASBI disproportionately affects "the poorest and most disadvantaged in our society".[83] Reporting research by herself and Professor Caroline Hunter, she found that of 307 judgments in cases for breaching an ASBI, 11 per cent (33) "mentioned mental health issues and/or addiction".[84]

10.58 We would welcome more data in this area on, for example, how many people coming before the courts for ASBI breaches have vulnerabilities, what those vulnerabilities are, what the effects of those vulnerabilities are with respect to the circumstances of a breach and the prospects of future compliance, and how the courts take those vulnerabilities into account. However, our pre-consultation research and engagement has indicated that the case for PSRs in these circumstances is strong.

10.59 Stakeholders also argued there was a need for mental health assessments. We were also told by one stakeholder that a mental health assessment would be a valuable part of a PSR. Another told us that in their experience, when evidence on mental

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82 CJC, *Anti-Social Behaviour and the Civil Courts* (July 2020) para 30.

83 We are grateful to Dr Epstein for sharing with us her work-in-progress research notes and data during our pre-consultation stage.

84 R Epstein, "Punishing mental illness: inequality in the health and justice system", Centre for Crime and Justice Studies (15 June 2023).

health is admitted and the court sees medical reports, it helps to ensure a fairer sentence. There is some provision for this under the CCA 1981. When a defendant has or appears to have a mental disorder and "could otherwise be committed to prison", then the court may order the person to be detained in hospital pending a medical report.[85] In criminal cases, where "the offender is or appears to be suffering from a mental disorder" and "the court passes a custodial sentence",[86] the court "must obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary".[87] There is also a requirement that the court "must" consider "any information before it which relates to the offender's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of such a sentence on that condition and on any treatment which may be available for it".[88]

10.60 We have reached three provisional conclusions in relation to PSRs.

10.61 First, our provisional view is that a PSR would often be valuable where an ASBI has been breached, but that is not the only scenario where a PSR would be valuable. Rather, the better position is that a PSR should be required in every contempt case unless the court decides it is not necessary in the circumstances.

10.62 Secondly, with respect to mental health conditions, our provisional view is that where imprisonment is considered then the protections available in criminal cases should also be available to sentencing for contempt. That is, where a committal order is considered and the contemnor is or appears to be suffering from a mental disorder, then, before that order is made, the court should be required to obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report. Similarly, the court should be required to consider any information before it which relates to the offender's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of committal on that condition and on any treatment which may be available for it.

10.63 Thirdly, we do not make a provisional proposal to remove committal as an option where an ASBI has been breached. There will also be cases of egregious breaches of ASBIs where all other possible sanctions have been explored to no avail, and without an order of committal there might be no effective way of preserving the integrity of ASBIs or the administration of justice. In particular, if a suspended committal order might be an effective and appropriate measure in such circumstances then it is a pre-requisite that committal is an available option.

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85 CCA 1981, s 14(4A).

86 Sentencing Code, s 232(1).

87 Above, s 232(1)-(2).

88 Above, s 232(3).

10.64 There are other sanctions reforms that may also be appropriate where contemnors are vulnerable, including providing options for community sentences. We discuss these below.[89]

Consultation Question 104.

10.65 We provisionally propose that when a committal order (or a community sentence should that option be available) is being contemplated as a contempt sanction, the court should be required to order a pre-sentence report unless the court considers it to be unnecessary in the circumstances.

Do consultees agree?

Consultation Question 105.

10.66 We provisionally propose that where a committal order is being contemplated as a contempt sanction and the contemnor is or appears to be suffering from a mental disorder, before that order is made:

(1) the court should be required to obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report; and

(2) the court should be required to consider any information before it which relates to the contemnor's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of committal on that condition and on any treatment which may be available for it.

Do consultees agree?

Remand in custody prior to sentence

10.67 Courts do not currently have any general powers to remand a person in custody after a finding of contempt but before sentencing.[90] In pre-consultation engagement with stakeholders for this project, while we heard many comments on PSRs (as explained above), stakeholders did not raise the implications for remand. However, were PSRs to be introduced, a logical corollary is that there would also need to be a power to remand in custody in appropriate circumstances. According to Sentencing Council guidance, "ideally a pre-sentence report should be completed on the same day to avoid adjourning the case".[91] However, in some cases, more time may be required for a PSR to be produced.

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89 See paras 10.132 to 10.139 below.

90 *Delaney v Delaney* [1996] QB 387. The notable exception is that the CCA 1981, ss 14(4)-14(4A), provides for detention in hospital in circumstances where a person who has or apparently has a mental disorder "could be committed to prison for contempt of court"; see further paras 10.144 to 10.147 below.

91 Sentencing Council, *Imposition of Community and Custodial Sentences Definitive Guideline* (2016) p 7.

10.68 In 2012, we asked whether a power was needed for courts to remand a person in custody after a finding of contempt but before sentence is decided for reports to be provided to inform sentence.[92] Almost all consultees who responded agreed that there should be such a power. In 2012, many lawyers and judges told us that where the contempt is so serious that a court considers that a custodial sentence is warranted, the court should have the power to remand a person before sentence to ensure the sentence is appropriate. Specifically, we were told that if there is a power to order community sentences, or to obtain PSRs, the court needs to be able to remand a contemnor to enable reports to be prepared and to give the court time to determine the appropriate sentence.

10.69 Any power to remand must comply with the rights to liberty and security that are protected by article 5 of the ECHR. Article 5 provides, in relevant part:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

10.70 In the criminal context, a person "convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence" has a general right to bail.[93] This means the person shall be granted bail except in circumstances specified in schedule 1 of the Bail Act 1976.[94]

10.71 The general exception is in paragraph 2(1) of schedule 1:

> The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or

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92 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.98.

93 Bail Act 1976, s 4(4).

94 Above, s 4(1).

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

10.72 In making the decision under paragraph 2(1), the court "shall have regard to such of the following considerations as appear to it to be relevant", which include:

(a) the nature and seriousness of the offence … (and the probable method of dealing with the defendant for it),

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings, [and]

…

(e) if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would commit an offence while on bail, the risk that the defendant may do so by engaging in conduct that would, or would be likely to, cause physical or mental injury to any person other than the defendant.[95]

10.73 In the contempt context, remanding a person for contempt must comply with article 5. In *R v Jales (Brian)*, the Court of Appeal (Criminal Division) found that the Crown Court had erred in remanding the two appellants in custody for three nights without having made an actual finding of contempt. The Court of Appeal, noting the procedural irregularities of the decision, suggested that if the judge had granted the appellants bail, their rights to liberty would not have been compromised:

> Even if the judge had been justified on the Friday in coming to the conclusion that there was material which entitled him to deal with the matter by way of further enquiry and a formal contempt hearing, the procedure that he adopted in remanding the two appellants in custody was wholly wrong. There was no enquiry by him as to whether it was necessary to remand them in custody. There was no enquiry by him as to whether or not it would have been satisfactory to have granted them bail.[96]

10.74 In the contempt context, our provisional view is that it would be appropriate to provide courts with a power to remand a contemnor in custody prior to sentence so that there is time for PSRs to be obtained. However, our provisional view is that there should be a general right to bail after a finding of contempt and before sentencing, but that bail need not be granted where an immediate order of committal is highly likely (though bail may be granted). Our provisional view is that the provisions of the Bail Act 1976 should not be directly transferred to the contempt context because contempt applies in all courts, whereas the consideration of bail under the Bail Act 1976 is familiar ground only in the criminal courts, and there will only be immediate access to the defendant's

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95 Bail Act 1976, sch 1, para 9. We omit para 9(d) as it does not apply where a convicted person's case is adjourned for a report.

96 *R v Jales (Brian)* [2007] EWCA Crim 393 at [8].

criminal record in criminal courts. There is a great deal to be said for simplicity in this context.

Consultation Question 106.

10.75 We provisionally propose that courts should have the power to remand a contemnor in custody after a finding of contempt but before sentencing only where an order of immediate committal is highly likely.

Do consultees agree?

Taking account of time spent in custody when imposing a sanction

10.76 Where there is a power to remand in custody, how is that to be taken into account when the court imposes a sanction? The question arises where a person is remanded in custody prior to a finding of contempt, for example in proceedings brought by a local authority where protesters have breached an injunction.[97] It would also arise if a power to remand after a finding of contempt and before sentencing (pending a PSR) were introduced. Two specific issues need attention:

(1) where committal is ordered, whether and how time on remand can count against the term of committal; and

(2) where any other sanction is imposed, whether and how time on remand is to be treated.

10.77 The general rule in criminal law is that where an offender is "serving a term of imprisonment in respect of an offence" then any period of time spent remanded in custody before conviction or sentence "is to count as time served by the offender".[98] However, this does not apply to contemnors because any term of imprisonment is not in respect of an offence.[99]

10.78 In *R (James) v Governor of Birmingham Prison*, the claimant was arrested under section 43 of the Policing and Crime Act 2009 for breaching a final gang injunction order which prohibited him from entering a prescribed area.[100] He was remanded in custody for seven days pursuant to section 43(5) of the Act and was committed to prison for three months for contempt of court under section 14(1) of the CCA 1981. It was found that time he had spent on remand could not be deducted from the final

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97 Police and Justice Act 2006, s 27(6); *North Warwickshire Borough Council v Litten* [2022] EWHC 2777 (KB) at [10].

98 Criminal Justice Act 2003, ss 240ZA(1), 240ZA(3).

99 Contemnors are also excluded, at least where the contempt is committed by a breach of order or injunction because a "sentence of imprisonment" "does not include a committal for failure to do or abstain from doing anything required to be done or left undone": Criminal Justice Act 2003, s 305(1) and Sentencing Code, s 397(1).

100 *R (James) v Governor of Birmingham Prison* [2015] EWCA Civ 581, [2015] WLR 4210.

sentence.[101] The Court considered the statutory provision referred to above, and said that "it is clear that Parliament decided some time ago that no credit is to be given to remands pending committal for civil contempt".[102]

10.79 In *R (Sevketoglu) v Sevketoglu*, Hale LJ (as she then was) noted that "everybody present in court forgot that time spent in custody on remand is not deducted from a committal for contempt of court"[103] and thereafter, emphasised that *Delaney v Delaney* had made it quite clear that "a period spent in custody before sentence will not go to reduce the sentence of a contemnor".[104]

10.80 At least two situations may arise which could be considered problematic if time spent on remand does not count against committal for contempt.

10.81 First, where a contemnor spends time on remand and is then sentenced for two years, they would effectively be committed for a period that exceeds the statutory maximum of two years under section 14(1) of the CCA 1981. This point was made in *Delaney*:

> If a contemnor had been held in prison for a period before he was sentenced and then received the maximum sentence of two years – a sentence which could on its face be lawfully passed if the contempt were sufficiently serious – then he would receive a sentence above the statutory maximum and that, Mr. Munby submits, simply cannot be a situation which the legislature contemplated.[105]

10.82 Secondly, where a contemnor spends time on remand pending a PSR, which causes the court subsequently to decide that committal would not be appropriate in the circumstances, the contemnor would have effectively already been sanctioned by committal. The question in that instance is whether the period of remand could count against sanctions other than committal (that is, whether that period may inform the determination of an appropriate fine or, if available, community sentence).

10.83 Despite the fact that there is no requirement to take account of time served on remand in custody, and so time spent is not automatically deducted by prison authorities,[106] courts can, and do, take it into account at the point of sentencing. For example, in *Delaney*, the court took into account that Mr Delaney had served 19 days in custody, as well as the fact that the contempt was his only breach of the relevant order, and ordered his immediate release and a suspended sentence.[107] In *R (James)*, the Court of Appeal (Civil Division) stated that the absence of a requirement to do so does not

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101 Above at [29]. The court also at [29] cited *Delaney v Delaney* [1996] QB 387 as judicial authority for this. In *Delaney*, the court considered the (very similar) provisions of the Criminal Justice Act 1967 (the predecessor to the Criminal Justice Act 2003) and said, at 399, that "the position therefore remains that a period spent in custody before sentence will not go to reduce the sentence of a contemnor".

102 *R (James) v Governor of Birmingham Prison* [2015] EWCA Civ 581, [2015] WLR 4210 at [30].

103 *R (Sevketoglu) v Sevketoglu* [2003] EWCA Civ 1570 at [5].

104 Above at [6] citing *Delaney v Delaney* [1996] QB 387 at 466.

105 *Delaney v Delaney* [1996] QB 387 at 399.

106 In *R (James) v Governor of Birmingham Prison* [2015] EWCA Civ 581, [2015] WLR 4210 at [33] the Court said that the import of the legislation is that there is no power for the prison to make the deduction as they would in ordinary criminal cases.

107 *Delaney v Delaney* [1996] QB 387 at 402-403.

prohibit judges from taking account of time spent on remand for contempt. The court said that the import of the legislation means that it is not mandatory for judges to reflect time spent on remand when committing a person for contempt, however it is open to them to do so.[108]

10.84 In *R (Sevketoglu)*, Hale LJ said that it is precisely because it is not automatically deducted that judges should consider it when sentencing:

> When considering what is the appropriate period of imprisonment to impose in respect of a contempt of court, the judge should bear in mind that any time spent on remand will not be deducted and therefore take it into account, and indeed should take it into account doubly.[109]

10.85 In that case, time spent on remand was taken into account, which resulted in the contemnor's immediate release.[110] Lady Justice Hale also expressly noted that "it may well be that the legislation for consideration in this case has been, or is to be, amended in due course, but for the time being… Judges must take it into account in calculating the period in prison to be imposed".[111] It was confirmed by the Court of Appeal (Civil Division) in *McKnight v Northern* that any reduction should be made at the time of committal.[112]

10.86 Additionally, it seems that there is a lack of consistency and accuracy in the calculations when remand is taken into account, with not all courts factoring in the statutory duty on the Secretary of State for Justice to release contemnors from prison at the halfway point of their sentence. The CJC Working Group found that:

> many judges failed to appreciate that when giving credit for time spend on remand, double the period should be deducted from the term which would have been imposed (as a term of 10 days will result in 5 days served; so a period of 5 days on remand is equivalent to 10 days off the term imposed).[113]

10.87 We have not heard any views from stakeholders on the question of giving credit for time spent on remand. However, our provisional view is that – as the courts have indicated – not only should time spent on remand be taken into account, but this should happen automatically as it does in the criminal context so that it does not need to be manually accounted for in each individual sentencing exercise. This provides an appropriate protection for contemnors and may be especially valuable where committal is ordered by courts that are unfamiliar with how deductions should work.

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108 *R (James) v Governor of Birmingham Prison* [2015] EWCA Civ 581, [2015] WLR 4210 at [38].

109 *R (Sevketoglu) v Sevketoglu* [2003] EWCA Civ 1570 at [7] (Hale LJ).

110 Above at [8] (Hale LJ).

111 Above.

112 *McKnight v Northern* [2001] EWCA Civ 2028 at [17].

113 CJC, *Anti-Social Behaviour and the Civil Courts* (July 2020) para 450. See also *McKnight v Northern* [2001] EWCA Civ 2028 at [17]; *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [42].

Consultation Question 107.

10.88 We provisionally propose that where time has been spent on remand in custody then:

(1) the time spent in custody should be considered in determining what sanction is appropriate in all the circumstances; and

(2) if a term of committal is imposed, then double the time spent in custody should be automatically deducted from the period of committal that is ordered.

Do consultees agree?

Early release

Automatic unconditional early release

10.89 A person committed to prison for contempt of court is entitled to be unconditionally released after serving half of their sentence.[114] This issue did not arise during our pre-consultation engagement with stakeholders. The position is the same for most criminal offences where the offender is serving a determinate (fixed length) prison sentence.[115] Our provisional view is that there is no need for change.

Discretionary early release on Home Detention Curfew

10.90 Home Detention Curfew ("HDC") is a scheme available to many criminal offenders serving sentences of between 12 weeks and four years.[116] Eligible offenders may be released from custody up to 180 days before their automatic release date, electronically tagged, and placed on curfew conditions which, if breached, can result in being recalled to prison.[117] An offender must have served a minimum of 28 days of their sentence (including any time spent on remand) and at least 14 days must have been served in prison after the sentence was handed down.[118]

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114 Criminal Justice Act 2003, s 258(2). This applies to those committed to prison for both criminal and civil contempt: Ministry of Justice, *Operational Guidance for Sentence Calculation Policy Framework: Determinate Sentenced Prisoners , Annex A* (June 2022) para 15.7.

115 Criminal Justice Act 2003, ss 243A, 244. This is not the case for all offences; eg for certain violent or sexual offences a minimum of two-thirds of the sentence must be served in prison: Criminal Justice Act 2003, s 244ZA.

116 Criminal Justice Act 2003, s 246; see also ss 243A(3), 244(3); HM Prison and Probation Service ("HMPPS"), *Home Detention Curfew (HDC) Policy Framework* (6 March 2024) para 4.1.1. Not all offenders will be eligible, including those serving sentences for violent, sexual or terrorism offences: Criminal Justice Act 2003, s 246; HMPPS, *Home Detention Curfew (HDC) Policy Framework* (6 March 2024) para 4.3.1

117 HMPPS, *Home Detention Curfew (HDC) Policy Framework* (6 March 2024) paras 4.1.1 and 4.9.4.

118 Criminal Justice Act 2003, ss 246(2), 246(4)(ha)(i); HMPPS, *Home Detention Curfew (HDC) Policy Framework* (6 March 2024) para 4.1.1. Thus, while time on remand in custody will count towards time served of those 28 days, HDC eligibility still requires a minimum of 14 days served after the sentence has been handed down.

10.91 Contemnors are not eligible for HDC, the explanation being that "they are serving a term of imprisonment, not a sentence of imprisonment".[119] This is the same unhelpful logic which has deprived contemnors of having any time spent remanded in custody prior to sentencing, count against sentence.[120]

10.92 We have not heard any stakeholder views on the issue of HDC for contempt but it appears to us that contempt prisoners are disadvantaged in comparison to other prisoners. That is, a contempt prisoner cannot be considered for release on HDC at all and (unless an application for early discharge succeeds) will serve half their sentence, but another prisoner may be considered for HDC up to 180 days before the halfway point in their sentence.

10.93 In recent years there has been a shift towards increasing the use of HDC; in 2023, the eligibility point was increased from 135 days to 180 days before the automatic release point.[121] The evidence of HDC impact, including its economic impact, is noted in the HDC policy:

> Research evidence about the impact on reoffending rates of using [electronically monitored] curfew with early release is inconclusive but promising, and it appears highly cost effective. The research suggests that the overall outcomes under HDC – especially when costs are taken into account – are preferable to keeping eligible offenders in custody at the end of the custodial element of their sentence.[122]

10.94 In light of this evidence, the fact that contemnors are at a disadvantage, and given that the rationale for excluding contemnors from HDC is not related to the nature of the conduct associated with the contempt, our provisional view is that contemnors should be eligible for HDC.

Consultation Question 108.

10.95 We provisionally propose that contemnors who have been committed to prison for 12 weeks or more should be eligible for early release on electronically monitored Home Detention Curfew up to 180 days before their automatic early release date. Consistently with the criminal regime, contemnors would need to have served at least 28 days of their sentence (14 of which must be served after the sentence is handed down).

Do consultees agree?

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119 HMPPS, *Home Detention Curfew (HDC) Policy Framework* (6 March 2024) para 4.3.3.

120 See para 10.77 above.

121 Criminal Justice Act 2003 (Home Detention Curfew) Order 2023.

122 HMPPS, Home Detention Curfew (HDC) Policy Framework (6 March 2024) para 2.1.

Early release on application for discharge

10.96 Courts may discharge a contemnor from prison at any time during their term of committal.[123] Associated procedural rules in the Civil Procedure Rules, Family Procedure Rules and the Court of Protection Rules state that "a defendant against whom a committal order has been made may apply to discharge it" and "the court hearing such an application shall consider all the circumstances and make such order under the law as it thinks fit".[124] It has been said that the purpose of the rules is "to provide a mechanism by which contemnors can be released … where they have 'purged' their contempt by belated compliance with the Court's order and/or the offer of an undertaking to comply".[125] Though there is no parallel procedural provision in the Criminal Procedure Rules, the power still exists in criminal courts.

10.97 The importance of the right of a contemnor to apply for discharge and to "purge his contempt at any time" has been emphasised by the courts.[126]

10.98 It is at the court's discretion whether to discharge a contemnor. In *CJ v Flintshire Borough Council*, it was held that a court must consider two issues:

> First, despite the fact that the contemnor has not served the term originally imposed … [has] the contemnor demonstrated that he has now received sufficient punishment for his breach of the court's injunction? In this regard, the court will examine, at the least, whether the contemnor now not only accepts that he has been guilty of his contempt, but also that he is genuinely sorry for his misdeeds and repents them… There may be other things to be examined under this first question. If the answer to the question is "no, the contemnor has not so demonstrated that he has received sufficient punishment for the breach", then [a court cannot] consider an early release unless there are other, extenuating circumstances which require that the court consider the exercise of its power to grant an early release.[127]
>
> But, assuming that the answer to the first question is favourable, … secondly: will the interests of justice be best served in permitting his early discharge? The matters that the court will consider will depend on the type of case in hand. In the present type of case, … taking all the circumstances of the particular case into account.[128]

10.99 It was suggested by Wilson LJ that courts should ask eight questions when considering discharge applications:

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123 CCA 1981, ss 12(4) (power of magistrates' courts), 14(1) (power of superior courts), including the county court pursuant to s 14(4); County Courts Act 1984, s 118(2).

124 CPR, r 81.10; FPR r 37.10; CoPR r 21.10.

125 *Jaldhi Mideast DMCC v Al Ghurair Resources LLC* [2023] EWHC 1889 (Comm), [2023] 1 WLR 4509 at [24].

126 *Delaney v Delaney* [1996] QB 387 at 395; *Vaughn v Vaughn* [1973] 1 WLR 1159 at 1163.

127 In *Shalson v Russo*, the court dismissed an application for discharge because, although it accepted committal was not going to achieve compliance, it was not convinced that the defendant had been punished sufficiently: *Shalson v Russo (Contempt: Application to Purge)* [2002] EWHC 399 (Ch) at [21].

128 *CJ v Flintshire Borough Council* [2010] EWCA Civ 393, [2010] 2 FLR 1224 at [28]-[29] (Aikens LJ).

(1) Can the court conclude that the contemnor has suffered punishment proportionate to his contempt?

(2) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge?

(3) How genuine is the contemnor's expression of contrition?

(4) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?

(5) Has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?

(6) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

(7) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release?

(8) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?[129]

10.100 However, as it is an exercise of discretion, discharge will not always be granted:

> The success of an application for an order for early discharge does not depend on favourable answers to all the questions. Nevertheless the first is a general question which … probably needs an affirmative answer before early discharge should be ordered. The second will surely require a negative answer. An affirmative answer to the third will usually … be necessary but may not be sufficient. …[130]

10.101 We have not heard any stakeholder views about applications for discharge or how accessible the factors are to those applying for discharge. However, we observe that although the approach to determining discharge applications has been thoroughly developed by the common law, the case law is not readily accessible to a contemnor or a lay person. Our provisional view is that it would be helpful if the criteria for assessing applications for discharge were clearly set out in statute or official guidance. Given that it would be in the interests of justice for courts to have some flexibility to determine each case on its own facts, we are of the view that any list of factors should not be exhaustive.

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129 *CJ v Flintshire Borough Council* [2010] EWCA Civ 393, [2010] 2 FLR 1224 at [21] (Wilson LJ).

130 Above at [22] (Wilson LJ).

Consultation Question 109.

10.102 We provisionally propose that, in deciding whether to discharge on application by the contemnor, courts should consider the following factors:

(1) whether the contemnor has suffered punishment proportionate to the contempt;

(2) whether the interest of the state to uphold the rule of law would be significantly prejudiced by early discharge;

(3) the extent to which the contemnor's expression of contrition is genuine;

(4) whether the contemnor has done all they reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early;

(5) whether the contemnor has done all they reasonably can (bearing in mind the difficulties of doing so while in prison) in order to construct proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of committing a further breach;

(6) whether the contemnor has made any specific proposal to augment the protection against any further breach of those whom the order which they breached was designed to protect;

(7) the length of time already served in prison, including its relation to (a) the full term imposed and (b) the term which the contemnor would otherwise be required to serve prior to release; and

(8) any other factors the court thinks relevant.

Do consultees agree?

Vulnerable contemnors committed to prison

10.103 Until 2012, the Official Solicitor ("OS") had a protective role in relation to contemnors committed to prison.[131] The duty of the OS was originally found in the Court of Chancery Act 1860 and then replaced by an order of the Lord Chancellor. The Court of Appeal (Civil Division) in *Devon County Council v Kirk* reproduced the terms of the 1963 order and explained the practice. The President of the Family Division explained that the order required 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."

[131] On the Official Solicitor's role, see Senior Courts Act 1981, s 90.

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

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.

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 ….[132]

10.104 The President also offered the following observation in that case: "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".[133]

10.105 Since the revocation of the order in 2012, the OS will only act in proceedings where the person does not have capacity and where there is a security of funds.[134] There is no longer an effective requirement to notify the OS of people who are committed for contempt.[135] *Arlidge, Eady & Smith* states that "a judge might at any time call upon the Official Solicitor for assistance in carrying out investigations as to the circumstances of persons imprisoned for contempt".[136] However, the OS would be unable to intervene unless the criteria to act are met.

10.106 The result is that where a vulnerable person is committed to prison, the OS may act if that is brought to her attention by, for example, prison services and provided that the criteria to act are met. In contempt, there will ordinarily be security of funds because legal aid is provided. We have been told that it is "not uncommon" for people without capacity to be in prison for contempt in cases where there has been a breach of an

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132 *Devon County Council v Kirk* [2016] EWCA Civ 1221, [2017] 4 WLR 36 at [47]-[49] (President of the Family Division). The 1963 order was "at the request of the Official Solicitor, revoked, as obsolete": Official Solicitor and Public Trustee Annual Report 2012-13, para 1.4.

133 *Devon County Council v Kirk* [2016] EWCA Civ 1221, [2017] 4 WLR 36 at [44] (President of the Family Division).

134 See Practice note: Official Solicitor and Public Trustee, *The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings Under the Inherent Jurisdiction in Relation to Adults: Practice Note* (January 2017).

135 The prison service orders state that the OS should be notified but the law does not require it. As we understand it, the OS receives some notifications from prisons, as well as from the judiciary. Typically, however, the notifications are not requesting that the OS acts but are instead sent because the sender is under the impression the OS should be notified. We understand that the prison service order will soon be updated to reflect the change in law. See HM Prison Service, *Prison Service Order Number 4600, Unconvicted, Unsentenced and Civil Prisoners* (first issued 10 February 2003, revised 27 January 2020) para 3.4.

136 *Arlidge, Eady & Smith* (2019) para 14-9.

ASBI. The introduction of PSRs may reduce the circumstances in which this arises.[137] However, there is arguably a gap in the protection of contempt prisoners, especially where those prisoners are vulnerable. In our pre-consultation engagement, the office of the OS agreed that there is a gap. It is not clear to us, for example, how and when (if at all) contempt prisoners are notified about their right to apply for discharge. We were told that there are contemnors in prison who have capacity but are nonetheless vulnerable (for example, due to mental health conditions) and that vulnerability renders them unlikely or unable to seek an application for discharge. It is entirely conceivable that a vulnerable contemnor may have had capacity at the time of the contempt proceedings and therefore would not have been able to secure OS representation, but their health subsequently deteriorated while in prison. If they are vulnerable but have not lost capacity, they may not be in an effective position to exercise a right to apply for discharge. If they have lost capacity whilst in prison, then the OS may not become aware of them.

10.107 Arguably, contempt prisoners are not in a different position to prisoners serving sentences for criminal offences; the OS will still be limited in the circumstances in which they can act, though contempt prisoners will not have had all the same procedural protections that the justice system provides for defendants in criminal cases. Our provisional proposals in Chapter 8 regarding procedure may close that gap to a significant extent.

10.108 Overall, our provisional view is that there may be a gap in the protection of vulnerable contemnors, but we have not seen evidence that enables us to form any stronger provisional view one way or the other about a gap or about whether (keeping in mind our provisional proposals to introduce PSRs) some monitoring or other measures may be needed. We would welcome evidence from consultees with respect to these matters.

Consultation Question 110.

10.109 Do consultees have evidence about whether there is a gap in the protection of contempt prisoners who lack capacity or who have capacity but are otherwise vulnerable? If so, keeping in mind our provisional proposals to introduce pre-sentence reports, how might such a gap be addressed?

NON-CUSTODIAL SANCTIONS

Fines

10.110 Fines may be imposed as a sanction for contempt. As indicated earlier in this chapter, there is no maximum fine that may be imposed by the superior courts, while inferior courts are limited to fines of up to £2,500.[138]

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137 Diversionary or support schemes at the point at which ASBIs are issued also appears likely to be beneficial, helping ensure that any conditions attached to an ASBI are understood and that the defendant is able to comply.

138 CCA 1981, s 14(2); see para 10.3 above. On fines in inferior courts, see paras 10.153 to 10.161 and 10.167 to 10.170 below.

10.111 In some instances a fine will not be adequate to reflect the gravity of the contempt and committal will be appropriate.[139] A fine may also be imposed alongside a sanction of imprisonment.[140] In other circumstances a fine alone may be the most appropriate sanction. When determining whether to order a fine, courts will consider the seriousness of the contempt and will take into account the means of the contemnor to pay the fine.[141]

10.112 The role of fines in relation to media organisations and journalists is a somewhat contentious issue because a sentence of imprisonment is very rare for strict liability contempt by publication and the sanction is usually a fine imposed on the individual or media organisation.[142] On the one hand, a media academic told us that fines may be ineffective: for large organisations fines are merely "the cost of doing business". The danger, we were told, is that if a judge does not want to use committal – and they often want to avoid committing journalists – a fine may be a weak form of deterrent.[143] On the other hand, we also heard that in European countries, fines are much smaller than in the UK, and in the UK fines can have a significant impact where individual journalists are held liable. One media stakeholder told us the unlimited nature of a fine is "worrying" because "young journalists are often confused or distressed" when they learn that a fine may be unlimited, and this may have a chilling effect on freedom of expression.

10.113 We have not heard any comments about whether fines on publishers might be set at a percentage of turnover, though this was a question we asked in our 2012 consultation. In the 2012 CP, we said:

> In respect of proceedings against media organisations rather than individual publishers, we consider that current powers of the courts to deal with contempt by publication may be inadequate given the disparity between the financial resources of different media organisations and the importance of ensuring a deterrent effect. We consider that it may be sensible to allow the courts to impose a fine set at a percentage of the turnover of a particular publisher. We consider that, if such system were introduced, the Sentencing Council could provide guidance to the judiciary in order to ensure that the penalties imposed are consistent. This would also provide greater clarity for media organisations.[144]

10.114 On that basis, we asked consultees whether they agreed that a sentencing power allowing the courts to impose a fine set at a percentage of the turnover of the

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139 *Attorney General v Harkins and Liddle* [2013] EWHC 1455 (Admin) at [21].

140 *Arlidge, Eady & Smith* (2019) para 14-118 citing *Ex parte Fernandez* (1861) 10 CB (NS) 3; *R v Castro, Skipworth's Case* (1873) LR 9 QB 219; *The Bahama Islands Re* [1893] AC 138.

141 *Attorney General v Harkins and Liddle* [2013] EWHC 1455 (Admin) at [21].

142 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.107. A journalist is usually indemnified by the media organisation and generally, in determining the fine, the court should consider the means of the defendant and not the employer who is likely to pay (see *Arlidge, Eady & Smith* (2019) para 14-125).

143 On committal of journalists, see paras 10.28 to 10.35 above.

144 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.116.

publisher should be introduced.[145] Responses were mixed. A significant number of consultees ranging from laypersons and academics to lawyers, agreed with the proposal. However, many (most of whom were media lawyers or academics) were opposed to the proposal, citing various reasons including that setting fines as a percentage of turnover may lead to disproportionately large fines, be draconian – especially where a fine is coupled with legal costs – or have a chilling effect on editorial decision-making. One academic pointed out that there is a danger that publishers might simply "take this cost into account when deciding whether to press ahead with publication", thereby limiting the deterrent effect of the fine. The Council of Circuit Judges said that although it seems to be an appealing idea, it would not be practicable: "it would lead to lengthy proceedings and probably an appeal".

10.115 With respect to unlimited fines, we have not heard sufficient views to suggest that the maximum should be capped. There is no maximum on fines for breaches of reporting restrictions under various legislative provisions, including the Judicial Proceedings (Regulation of Reports) Act 1926, the Children and Young Persons Act 1933, and the Youth Justice and Criminal Evidence Act 1999.[146] An unlimited fine for contempt of court is therefore not anomalous. We provisionally propose that there remain no maximum to the fines that may be imposed by superior courts. Further, our provisional view is that in contempt matters there is not a case for a percentage-based approach for large fines for media organisations. This provisional conclusion is informed by the mixed responses in 2012 and by the fact that stakeholders have not raised the issue in our pre-consultation engagement.[147]

Consultation Question 111.

10.116 We provisionally propose that there should remain no maximum limit on the fines open to superior courts in contempt cases.

Do consultees agree?

Power to suspend a fine

10.117 Courts in England and Wales do not have the power to suspend a fine in contempt cases (nor in criminal cases).[148] Were there to be such a power it would enable a court to impose a fine, where the threshold for imposing an immediate fine is met, but

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145 Above.

146 Judicial Proceedings (Regulation of Reports) Act 1926, s 1(1)-(2), restricting the publication of reports of certain material in judicial proceedings; Children and Young Persons Act 1933, s 39(1)-(2), restricting the publication of material relating to a child or young person concerned in proceedings; Youth Justice and Criminal Evidence Act 1999, ss 45(3), 45A(2), 46(2) and 49(5), restricting respectively the reporting of criminal proceedings involving persons under 18, the reporting of criminal proceedings for lifetime of witnesses and victims under 18, and the reporting of material relating to certain adult witnesses eligible for protection in criminal proceedings.

147 We have noted that the Online Safety Act 2023, sch 13, para 4(1) has introduced maximum financial penalties of 10% of global revenue but as a regulatory system it is markedly different from the contempt context.

148 *Arlidge, Eady & Smith* (2019) para 14-119. In criminal cases a fine is payable in full on the day it is imposed, though periodic payments may be set: Sentencing Council, *Fines and Financial Orders* (undated).

the person would not need to pay any part of that fine unless they commit a further offence or breach a condition attached to the suspension, during the operational period.[149]

10.118 Although stakeholders did not raise this as an issue, we note that courts in some other jurisdictions may suspend fines for contempt or have indicated that it may be a useful option. The High Court of Australia expressed the view regarding sanctions in a contempt case that "there is much to be said for securing to a superior court a wide range of remedies so that it will be better able to meet the exigencies of particular circumstances" and noted that suspended fines are "well known" in the United States, where they have been used in contempt matters to coerce compliance with orders.[150] The option would add to the flexibility of the sanctions regime and the ability of courts to find options that may most effectively secure compliance with orders or prevent the repetition of contemptuous conduct.

Consultation Question 112.

10.119 We provisionally propose that the superior courts should have the power to suspend a fine in contempt cases.

Do consultees agree?

Sequestration of assets

10.120 Sequestration of assets is often identified as the third principal sanction for contempt.[151] It is commonly referred to in the case law and in the procedure rules (where it is now described as "confiscation of assets").[152]

10.121 Sequestration allows assets to be seized to secure compliance with an order of the court. It is primarily a coercive sanction, directed at securing the defendant's compliance with a court order. However, it will also have a punitive dimension to it insofar as the defendant will not have access to or control over the sequestered assets, nor access to any benefits (such as rent, interest) that may accrue from those assets, and is at risk of losing the assets.

10.122 Sequestration is not used commonly as a sanction for contempt. Where it is used then it appears to be used to coerce compliance with a court order with which the defendant has failed to comply. Sequestration does not generally appear to be used to deter future breaches of orders, nor used as a sanction for contempts that are not

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149 See for example, the Sentencing Act (1995) (Western Australia) Part 8A, which provides for suspended fines.

150 *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 114, citing *Doyle v London Guarantee Co* (1907) 204 US 599 and *United Mine Workers of America* (1947) 330 US 258.

151 For example, it is commonly said that a court "may impose an immediate or suspended custodial sentence, an unlimited fine, or an order for sequestration of assets" (eg *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) at [116]); see also CPR, r 81.9, FPR r 37.9 and CoPR r 21.9 (all referring to "confiscation of assets"); *Arlidge, Eady & Smith* (2019) para 14-1. Though often referred to as a sequestration order, the court grants the applicant permission to issue a writ of sequestration.

152 CPR r 81.9(1), FPR r 37.9(1), CoPR r 21.9(1). It is not referred to at all in the CrimPR.

related to court orders. It does not appear to be an option where proceedings have been commenced of the court's own motion.

10.123 The case law indicates that on the occasions where sequestration is used, it is used in commercial and family contexts. Sequestration is not typically used against individuals, as committal is ordinarily an option where punishment is appropriate.[153] However, it does seem to be sought where the defendant is not in the jurisdiction and so cannot be imprisoned, or in the case of a corporate defendant. It may be that there are no assets in the jurisdiction at the time the order is made but were assets (such as money, aircraft or boats) to enter the jurisdiction then they could be sequestered.[154] In family contexts sequestration may be used where one parent has taken a child out of the jurisdiction.[155] There have previously been sequestration orders against trade unions.[156]

10.124 The commercial cases provide some illustration of the rationale and the practical difficulties. An applicant who wants a defendant company and its controlling individuals to comply with a court order is likely to ask the court to make a committal order against the individuals who have breached the original court order and to grant permission to issue a writ of sequestration against the company and the individuals in breach.[157] In these circumstances, the exercise may be both coercive and punitive (the court being unable to commit the company and its directors being out of the jurisdiction). Permission may be granted even if there are apparently no assets in the jurisdiction at the time; just as an individual outside the jurisdiction will be subject to committal on entering the UK if a committal order has been made, when a sequestration writ is issued then assets that come to light or which enter the jurisdiction (for example, an aeroplane) will be subject to sequestration. In *Touton Far East Pte Ltd v Shri Lal Mahal Ltd*, the court took the principles that applied to committal of an individual located outside the jurisdiction and applied them to sequestration against a company without assets in the jurisdiction:

> In the case of *Vis Trading Co Ltd v Nazarov*, on an application seeking committal to prison for contempt of court against an individual who was not within the jurisdiction of the court, Whipple J said at [58]:

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153 In *Touton Far East Pte Ltd v Shri Lal Mahal Ltd* [2017] EWHC 621 (Comm) at [33] the court made committal orders against four individuals who were not in the jurisdiction and who had no assets in the jurisdiction, but declined to give permission for writs of sequestration on the grounds that they would serve no additional purpose to committal.

154 See for example, *Trafigura v Emirates General Petroleum Corporation* [2010] EWHC 3007 (Comm); *Jaldhi Mideast DMCC v Al Ghurair Resources LLC, Essa Abdullah Ahmed Al Ghurai* [2022] EWHC 2481 (Comm) at [26]-[27] (sequestration not ordered but will be considered if there is a continued failure to comply and if assets are in the jurisdiction).

155 *CH v RN* [2009] EWHC 640 (Fam), [2009] Fam Law 577; *Bhayana v Bhayana* [2019] EWHC 3587 (Fam) at [7], [43]. In the family context, see also *Richardson v Richardson* [1989] Fam 95 and *Romilly v Romilly* [1963] WLR 732

156 *Con-Mech (Engineers) v Amalgamated Union of Engineering Workers (Engineering Section)* [1974] ICR 464; *Goad v Amalgamated Union of Engineering Workers (Engineering Section)* (No.3) [1973] ICR 108.

157 The grant of permission is commonly referred to as a sequestration "order". In particular, it is commonly said that a court "may impose an immediate or suspended custodial sentence, an unlimited fine, or an order for sequestration of assets" (eg *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) at [116]).

> I do not accept that the imposition of a sentence is futile. The court cannot just stand by in the face of disobedience to its orders just because the contemnor is outside the jurisdiction. The fact that a committal order has been made will be public and may have reputational or business consequences for [the defendant] and his companies; it will not be meaningless. Further still, the claimant is entitled to point to the breaches of the [freezing] order, and to seek committal as a step towards eventual compliance, which still remains possible. This is not a redundant exercise.
>
> [These comments] have equal application in relation to the issue of a writ of sequestration against the [defendant company's] assets. The court cannot in this case just stand by and allow the deliberate and flagrant breach of its orders to go unmarked. A writ of sequestration outstanding against the [defendant company] in this country will not be a meaningless order. It is an order which I consider just and appropriate in the circumstances of this case. It is an order which I shall make.[158]

10.125 This does not mean that sequestration will always be appropriate. In *Olympic Council of Asia v Novans Jets LLP*, assets were not in the jurisdiction and sequestration was not ordered as, were they to enter the jurisdiction, a writ of sequestration might cut across other legitimate interests of liquidators.[159] It was observed by Foxton J that although contempt applications have become increasingly common in the commercial courts and, as sequestration may be one of the orders sought:

> a litigant considering whether to embark on this complicated and onerous process may want to first consider whether there might be other means of giving effect to the court's order, or achieving the purpose which the order was intended to serve, and what the practical consequences of a successful committal application against any particular respondent are likely to be.[160]

10.126 In our pre-consultation engagement, we were not made aware of specific instances where sequestration had been used, whether coercively or punitively, but it was clear that stakeholders considered it to be a sanction that a court may impose. It appears sequestration is not typically used punitively for contempt by corporations, where fines may be imposed as punishment and, if unpaid, can be enforced. Where sequestration does not secure compliance then it appears that it is possible the writ may be discharged with the assets realised and proceeds going to the applicant (and not to the state as a fine would). This makes the punitive dimension of sequestration different from that of a fine. However, we are not aware of any case in which this has happened and would welcome views from consultees as to whether this would be the consequence.

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158 *Touton Far East Pte Ltd v Shri Lal Mahal Ltd* [2017] EWHC 621 (Comm) at [21]-[22]; citing *Vis Trading Co v Nazarov* [2015] EWHC 3327 (QB), [2016] 4 WLR 1.

159 *Olympic Council of Asia v Novans Jets LLP* [2023] EWHC 276 (Comm), [2023] 1 WLR 1462 at [100]-[101].

160 *Olympic Council of Asia v Novans Jets LLP* [2023] EWHC 276 (Comm), [2023] 1 WLR 1462 at [102]; *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm) at [26].

10.127 In summary, based on the case law and what we have been told in pre-consultation, our provisional conclusion is that sequestration operates in the following way as a sanction for contempt:

(1) Sequestration will be available as a sanction in any contempt proceeding that has been commenced on application (but not in proceedings instituted of the court's own motion).

(2) Before making an application for sequestration, litigants should consider whether there may be other, better options. This is especially so in the commercial context where sequestration may cut across other interests.[161]

(3) Under the Civil Procedure Rules, where an applicant seeks confiscation of assets in contempt proceedings then they must apply for a writ of sequestration under Part 81.[162] We expect an application for confiscation of assets under other rules would operate in a similar way.

(4) Permission for a writ of sequestration may be granted (and such permission is sometimes referred to as a sequestration order).[163] Having been granted permission, the applicant will be able to have the assets sequestered.

(5) The assets will be under the control of the sequestrators, who take possession of the assets as officers of the court, collecting rents and profits, and (where relevant) making disbursements and realising property. They may on occasion be used for the benefit of the applicant; for example, they may be used to cover legal costs involved in seeking to secure the return of a child who has been taken abroad.[164]

(6) Assets will be sequestered until the defendant complies with the order or until the court makes a further order.

(7) In the event that there is not compliance then the writ of sequestration may be discharged with assets realised in favour of the applicant.

10.128 In our pre-consultation engagement and research we have not been made aware of specific issues that may warrant reform but we invite consultees to address sequestration of assets as a sanction for contempt. We would welcome views and evidence in relation to whether our understanding of its operation is correct as well as any evidence of how it is used, how often, and its effectiveness.

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161 *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm) at [26].

162 CPR r 83.2(3)(g) states that permission is required for a writ of sequestration and CPR r 83.14A(1)(b) states that a writ of sequestration must be applied for using Part 23. However, this is qualified by r 83.1(3): "This Part does not apply where an application is made seeking confiscation of assets as a punishment for contempt of court. Any such application must be made under Part 81 and not under [Part 83]".

163 Eg *Trafigura Pte Ltd v Emirates General Petroleum Corporation* [2010] EWHC 3007 (Comm) at [15].

164 See for example *CH v RN* [2009] EWHC 640 (Fam), [2009] Fam Law 577 at [2].

Consultation Question 113.

10.129 Do consultees agree with our understanding of how sequestration functions?

10.130 Do consultees have evidence of how sequestration is used in contempt cases and whether it is effective as a coercive and/or punitive sanction?

10.131 Do consultees have views about whether there should be any clarification of or reform to sequestration as it applies in contempt proceedings?

Community sentences

10.132 A community sentence is an order that a convicted person do or refrain from doing certain things. For example, there may be a requirement to do unpaid work, adhere to a curfew or residence requirement, undergo mental health or drug and alcohol treatment, or restrictions and monitoring of whereabouts.[165] The probation service is responsible for supervising offenders in the community. Community sentences have long been useful alternatives to imprisonment in the criminal context. However, courts cannot order community sentences as a sanction for contempt of court.[166]

10.133 In our 2012 consultation paper, we explored extending community penalties for contempt of court in the limited context of contempt by publication under the CCA 1981. Consultation responses showed a strong support for community sentences to be an option for "strict liability" contempt by publication under the CCA 1981, and moderate support for it as an option for intentional common law contempt by publication.[167]

10.134 Since that time there has been research into community sentences in the contempt context. The CJC Working Group found that because there is no option to impose community sentences for contempt, and because fines are not always appropriate where those who breach ASBIs do not have sufficient means to pay, the only options left for civil court judges sentencing for breach of an ASBI are custodial penalties (either suspended or immediate) or taking no action.[168] Community sentences may also be valuable where contemnors are young. In *Birmingham City Council v Pearmain*, the county court imposed a suspended sentence for breach of an order by a 19-year-old, and said that:

> if the option of making a community order was open to the County Court in a case such as this, then this is one of those cases where plainly the court would have welcomed that option. But it isn't, and that, it seems to me, is a gap in the sentencing provisions.[169]

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165 Sentencing Code, ss 174 (youth rehabilitation orders), 201 (community orders).

166 *R v Palmer* [1992] 1 WLR 568.

167 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 2.114.

168 Civil Justice Council, *Anti-Social Behaviour and the Civil Courts* (July 2020) para 38.

169 *Birmingham City Council v Pearmain* [2016] 11 WLUK 156 at [7].

10.135 In our pre-consultation engagement we were told by judges and numerous stakeholders from across the legal profession and civil society organisations that the inability to impose community sentences for contempt is a significant gap in the options available to the courts. These comments were most frequently made in the context of sanctions for breaches of ASBIs and contemnors with mental health problems or drug and substance abuse challenges, which "could be addressed by having more rehabilitative-focused sentencing options" or diversionary schemes that addressed behavioural issues. Some stakeholders cautioned against community sentences. For example, we were told by two legal professional bodies that whilst alternatives to imprisonment are useful, non-custodial penalties like community sentences or curfews are difficult to enforce and lead to delays in the system. Though there was occasional scepticism as to their effectiveness, there is evidence to suggest they are effective.[170] This evidence underpinned the Government's 2020 *Smarter Approach to Sentencing* White Paper that proposes the further development of community sentencing and supervision.[171] The Sentencing Council has recently consulted on its guidelines in this area.[172] On the whole, the overwhelming view in pre-consultation was that community sentences should be available in contempt cases.

10.136 The costs associated with custodial sanctions are a relevant consideration. Community sentences are less costly than prison.[173] According to data cited by the National Audit Office, "in 2021-2022, MoJ spent £3.75 billion on overall prison running costs, which equates to an average cost of £47,434 to hold one prisoner for the full year or around £4,000 per month".[174] In 2020, a parliamentary briefing compared the cost of a prison sentence with a community sentence for the years 2016-2018:

> In 2017/18, the average cost of custody was £37,543 per prisoner (not including costs after release, such as probation). The cost for a community order in 2016/17 (the latest available data) was between £2,500–£4,000 per person.[175]

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170 A Mews et al, *The impact of short custodial sentences, community orders and suspended sentence orders on re-offending* (Ministry of Justice Analytical Series, 2015) pp 22-26.

171 Ministry of Justice, *A Smarter Approach to Sentencing*, CP 292 (September 2020) pp 37-38.

172 Sentencing Council, *Imposition of community and custodial sentences guideline – revised: consultation* (November 2023). The consultation closed in February 2024.

173 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) p 12 at para 25. See also, Parliamentary Office of Science and Technology (POST), *Non-custodial sentences*, (No 613) (January 2020) p 4; and Probation Institute, *Written evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0015)* (July 2023) p 5 : "The cost of a prison place averages £48,162 per year; The cost of a high-intensity Community Order including 80 hours of unpaid work and programmes costs between £4,000 and £12,000 (depending on the range of requirements)".

174 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) p 10 at para 20, citing Ministry of Justice and HM Prison and Probation Service, *Prison performance data 2021 to 2022: Costs per prison place and costs per prisoner by individual prison 2021-2022 summary*.

175 Parliamentary Office of Science and Technology (POST), *Non-custodial sentences*, (No 613) (January 2020) p 4, citing Ministry of Justice *Cost per Place and Costs per Prisoner by Individual Prisoner 2017 to 2018* (2018) and House of Commons Library, *Estimates Day: Ministry of Justice Spending* (2018).

10.137 Both the executive and the judiciary have expressed concern about the general demand for prison places.[176] As at the end of May 2023, the prison estate was operating at 99% of its total capacity.[177] The Court of Appeal (Criminal Division) has held that when considering a short custodial sentence, courts may consider the impact of current prison population levels as a reason to order a community sentence instead of a custodial sentence.[178]

10.138 Our provisional view is that the absence of community sentences from contempt sanctions represents a significant gap in the suite of options available. The absence of community sentence options is also costly. We provisionally propose that courts should be able to impose community sentences.

Consultation Question 114.

10.139 We provisionally propose that community sentences should be available as a sanction for contempt of court.

Do consultees agree?

Children and young people

10.140 Children are understood as those under the age of 18. Young people are those between the ages of 18 and 21. The current law sets limits with respect to the sanctions that may be imposed for contempt where the contemnor is under 21. No person under 21 may be imprisoned, and anyone aged 18-20 may not be detained unless the court "is of the opinion that no other method of dealing with [the young person] is appropriate".[179] As a result, for anyone under the age of 18, the only available sanction is a fine, though it may ultimately be payable by the parent or guardian rather than by the contemnor.[180] In respect of contempt, section 14(2) of the CCA 1981 states that a person under 17 may not be ordered to attend an attendance centre, though this provision seems to have no practical effect as such orders would not be available as a contempt sanction even without this provision.[181] Some recent contempt matters involving young people have received substantial media

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176 See, for example: *R v Ali (Arie)* [2023] EWCA Crim 232 at [18]-[20]; The Rt Hon Alex Chalk KC MP, Lord Chancellor and Secretary of State for Justice, *Hansard* (HC), 16 October 2023, vol 738, col 58-62 (on prison capacity, early release and short sentences).

177 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) para 11.

178 *R v Ali (Arie)* [2023] EWCA Crim 232 at [18]-[22]. See also Statement by the Chairman of the Sentencing Council, *The application of sentencing principles during a period when the prison population is very high – statement from the Chairman of the Sentencing Council* (20 March 2023).

179 Sentencing Code, s 227(2); Powers of Criminal Courts (Sentencing) Act 2000, s 108. This does not only relate to contempt, but for all criminal offences.

180 Sentencing Code, s 380.

181 Under the Powers of Criminal Courts (Sentencing) Act 2000, s 60, an attendance centre order may be made for default on payment of a fine, but contempt is not mentioned.

attention.[182] The Criminal Justice Bill that was before Parliament in 2024 but lapsed when Parliament was dissolved ahead of the general election included provisions that would have enabled the courts to order an offender to attend court for a sentencing hearing, with a breach of the order being contempt, and there were specific provisions that would have applied to children.[183]

10.141 In our pre-consultation engagement, other than one comment that fines are not appropriate where the contemnor is a child, we did not hear stakeholder views in relation to the sanctions options available for contempt committed by children or young people. However, we do not presume this means there are no concerns.

10.142 Consultees may wish to comment on contempt law in relation to children and young people, including in relation to any equality impacts. We would particularly welcome responses from individuals or organisations with experience of the way that contempt laws operate with respect to children and young people.

Consultation Question 115.

10.143 With respect to children and young people, are there aspects of the law regarding sanctions for contempt that are satisfactory or unsatisfactory? Where the law is unsatisfactory, what changes should be made?

We would welcome evidence of the way that the law has operated with respect to children and young people.

MENTAL HEALTH ORDERS

10.144 Under the CCA 1981, superior courts have the power to remand a person in hospital for a report on their mental condition, where the person could otherwise be committed for contempt.[184] They also have the power to make an order for detention in hospital in the case of a person suffering from a mental disorder who could otherwise be committed for contempt.[185]

10.145 In the discussion of PSRs (above) we consider the powers in relation to medical reports, noting the comparable position in the criminal context where there are mandatory requirements, and asked a consultation question.[186]

10.146 In that discussion we outlined the concerns raised by stakeholders about these powers in the contempt context. We have not been made aware of any further concerns but we would welcome consultees' views about whether there are other

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182 For example, a young person (aged 19), who breached a criminal behaviour order was sentenced to 18 weeks' detention in a young offender institution: BBC News, "Mizzy: TikTok prankster detained for posting videos without consent" (21 November 2023).

183 Criminal Justice Bill 2023-2024, cl 28.

184 CCA 1981, s 14(4A).

185 Above, s 14(4).

186 See paras 10.48 to 10.66 above.

aspects of powers regarding mental health orders in the contempt context that warrant attention. In particular, we would welcome evidence of any impact that these provisions have on vulnerable individuals or groups, including (but not only) where protected characteristics are engaged.[187]

Consultation Question 116.

10.147 Do the superior courts have appropriate powers with respect to mental health orders in the context of contempt?

SANCTIONS IN INFERIOR COURTS, TRIBUNALS AND OTHER BODIES

10.148 In Chapter 6 we consider the contempt protection of courts, tribunals and other bodies. We explain there that, under the current law, the protection will vary dependent on which of two groups a body falls into: first, superior courts of record; and secondly, bodies that are inferior courts for the purposes of the law of contempt (whether or not they are also courts of record, and whether or not having the title of "court", "tribunal" or any other name). In that chapter we then consider the powers of these bodies to deal with contempt. We explain that the existing law distinguishes between the powers of superior courts of record, on the one hand, and inferior courts that are also courts of record for the purposes of contempt, on the other hand. The superior courts, of course, have greater powers than inferior courts of record. An inferior court that is not a court of record does not have any power to deal with contempt itself.

10.149 In Chapter 6 we provisionally propose that the protection and powers of a body should instead depend on whether it is either: a superior court of a record; or an inferior court, tribunal or other body.[188] In that chapter we also provisionally propose that all inferior courts, tribunals and other bodies should have the same powers to deal with contempt.[189]

10.150 So far in this chapter we have considered the powers of the superior courts of record to impose sanctions for contempt. Now, we turn to inferior courts, tribunals and other bodies, and consider what powers they should have to impose sanctions for contempt. Given our provisional proposals as to consistency in the powers to deal with contempt, we consider in particular whether there should be consistency in the power to impose sanctions.

What are the inferior courts, tribunals or other bodies?

10.151 In Chapter 6 we provisionally propose that any court, tribunal or other body should be protected by the law of contempt if it is exercising the judicial power of the state and

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187 Protected characteristics under the Equality Act 2010, s 4, are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. See further Chapter 12.

188 We explain in Chapter 6 which bodies fall into which categories: see para 6.13 above. We note for convenience here that of the many tribunals, the Upper Tribunal and the Employment Appeal Tribunal are superior courts of record.

189 See paras 6.133 to 6.140 above.

we included a non-exhaustive list of those which we thought would be protected on that basis. The inferior courts, tribunals and other bodies on that non-exhaustive list are:

(1) the following inferior courts: the county court, family court, coroners' court, magistrates' courts, election court, consistory courts, Service Civilian Court, and Summary Appeal Court;

(2) all chambers of the First-tier Tribunal;

(3) the Employment Tribunals (England and Wales); and

(4) the Parole Board for England and Wales.

10.152 We also consider a range of other possible tribunals and bodies and ask consultees which if any of those should be included.

Powers to impose sanctions

Committal and fines

10.153 Under the current law, inferior courts may order committal or impose a fine for contempt.[190] The CCA 1981 gives the county court the same powers as superior courts have to order committal and fine a contemnor (that is, a maximum of two years' imprisonment and an unlimited fine).[191] In all other inferior courts the maximum period of committal is one month and the maximum fine is £2,500.[192] No tribunals or other bodies (as we define them in Chapter 6) have previously had any power to impose sanctions for contempt; even if they have been protected by the law of contempt, they have not generally had the power to deal with it themselves and so the question of sanctions has not arisen.

10.154 In the literature there has been criticism of the position under which superior courts have the option of sentencing a contemnor for up to two years whilst the maximum sentence available to inferior courts is one month. Brown has argued that this gives rise to a "location lottery", meaning that the severity of the sanction for contempt depends not on the nature of the contempt, but on where the contempt took place.[193] One suggested option is to create cohesion between the sanctioning powers of magistrates and those of judges by removing the difference in maximum sentences.[194]

10.155 In our pre-consultation engagement stakeholders have not suggested removing the limits. We have heard views that more significant penalties should be open to the courts so that the sanctions will be both greater punishments and greater deterrents, with the threat of a sanction being a significant deterrent to disruptive conduct and non-compliance. With respect to the sanctions powers that might be available to tribunals and other bodies that have not previously been protected and/or had the

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190 Sequestration is not available as it requires a High Court writ.

191 CCA 1981, s 14(4A).

192 Above, ss 12, 14(1)-(2); see also County Courts Act 1984, s 118.

193 R Brown, "Contempt in the Face of the Court — A New Perspective?" (2013) 177 JPN 149, 150.

194 Above.

powers to deal with the contempt themselves, stakeholders have generally been cautious. In some instances stakeholders have indicated that it is the ability to deal with a matter as contempt that is particularly significant, rather than suggesting lengthy sanctions must be threatened.[195]

10.156 While inferior courts of record have the inherent power to suspend a sentence for contempt under the existing law, it has been suggested in the literature that magistrates' courts (which are not courts of record) also have this power, because they may suspend a sentence for a criminal offence.[196] However, the better view is that magistrates' courts do not have the power to suspend a sentence for contempt. We were told by stakeholders that the magistrates' courts work on the basis that they do not have such a power because there is no statute that grants it. The distinction between "committal" and "imprisonment" is well established, and the CCA 1981 empowers the magistrates' court to commit (rather than imprison) a person for contempt.[197] Parliament has granted the magistrates' courts' powers to suspend imprisonment in other circumstances but has not done so with respect to contempt in magistrates' courts. Accordingly, the power to suspend a sentence of imprisonment cannot be interpreted as granting magistrates' courts a power to suspend an order of committal.

10.157 In our 2012 consultation paper we provisionally proposed that there should be such a power:

> A power to suspend an order of committal could be useful, say as a deterrent to repeated contempts, and so we provisionally propose that magistrates should have power to suspend an order of committal made under section 12 of the 1981 Act.[198]

10.158 We have heard from one senior stakeholder within the magistrates' courts that a power to suspend a sentence for contempt would be helpful. We have not heard any view expressed that magistrates should not have such a power. Given that the magistrates' courts have the power to order committal, it seems appropriate that there should be a power to suspend committal.

10.159 Where there is a contempt in an inferior court and the judge or magistrates are of the view that it is so serious as to warrant greater punishment, it may be referred to the AG for consideration for contempt proceedings in the High Court, or to the police if it is also a criminal matter and the penalties for the offence are greater than those available to the inferior court if it is treated as contempt.

10.160 In Chapter 6 we make provisional proposals that inferior courts, tribunals and other bodies should be able to refer a potential contempt to a superior court so that it can be

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195 See para 6.114 above.

196 See *Arlidge, Eady & Smith* (2019) para 14-52.

197 CCA 1981, s 12.

198 Contempt of Court (2012) Law Commission Consultation Paper No 209, para 5.109.

dealt with by that court. That would ensure that any serious contempt could be dealt with by a court that had the power to impose the full range of possible sanctions.[199]

10.161 With that in mind, our provisional view is that the powers to impose sanctions should be the same across all inferior courts, tribunals and other bodies (with the exception of the county court, which is dealt separately below, from paragraph 10.163). This would see consistency in the powers to deal with contempt and, where a contempt is dealt with, there would be consistency in the powers to impose sanctions. As we observe in Chapter 6, the exercise of the powers to deal with contempt might be informed by guidance from the leadership judge in any given tribunal or chamber so that there is consistency and fairness in approach and so that powers are being exercised practically in line with the needs of any particular court, tribunal or other body.[200] The same considerations apply in the exercise of powers to impose sanctions.

Powers to impose sanctions other than committal or fine

10.162 We have made provisional proposals in this chapter that the superior courts should have the power to require pre-sentence reports, order community sentences, and suspend fines. We have not heard stakeholders' views on whether these sanctions should also be available to inferior courts, tribunals and other bodies. However, as the option to refer matters to superior courts will be available under our provisional proposals, our provisional view is that these options should only be available to superior courts and not available to protected inferior courts, tribunals and other bodies (with the exception of the county court, to which we now turn).

The county court as a superior court for contempt sanctions

10.163 As explained above, the county court is currently treated as a superior court for the purpose of imposing sanctions for contempt, subject to any specific statutory limits.[201] This means that the county court can secure compliance with its orders without recourse to the High Court. We have not heard any suggestions that the county court should lose its status as a superior court with respect to contempt sanctions. In that light, our provisional view is that it should retain that status.

10.164 However, as committal and fines are the only sanctions that may currently be imposed, the question arises as to whether the county court powers should be expanded were the superior courts to obtain a wider range of sentencing options (as we provisionally propose they should). Given that (as explained earlier in this chapter) there is a strong call for wider sentencing options in relation to ASBI breaches, and those are dealt with in the county court, we provisionally propose that the county court should be treated as a superior court for the purpose of all sanctions.

10.165 There are specific statutory limits on the county court where an officer of the court has been assaulted, with penalties of up to 3 months' imprisonment and an unlimited fine.[202] There are also limits of one month's imprisonment and a £2,500 fine where the contempt is committed by a wilful insult directed at a judge, juror, witness or court

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199 See paras 6.133 to 6.140 above.

200 See for example para 6.144 above.

201 CCA 1981, ss 14(1)-(2).

202 County Courts Act 1984, s 14; see also paras 3.140 to 3.143 above.

officer.[203] There have been criticisms that the available sentences should be higher. In *Ramet*, in 2014, the (then) President of the Family Division saw the powers as inadequate:

> I have to express serious concerns about the adequacy – in fact, in my opinion, the utter inadequacy in modern conditions – of the statutory penalties available under the [County Courts Act 1984]. So far as concerns the family justice system I accordingly invite the Family Procedure Rule Committee to consider whether there is some way in which, compatibly with the provisions of the Crime and Courts Act 2013, District Judges, Circuit Judges and Recorders can be given powers more extensive than those currently available to them in these cases.[204]

10.166 We are not aware that there has been any change that remedies these concerns. The inconsistencies remain. However, one way of addressing the concerns would be through our provisional proposals in relation to referral to a superior court. That would ensure that any contempt could be referred up to be dealt with by a court with the full range of powers available to it. Accordingly, the effect of our provisional proposal for uniformity in powers to impose a maximum sentence of one month's committal and a £2,500 fine would see the maximum sentences for these contempts reduced if dealt with in the county court, but increased when referred up.[205] However, we provisionally propose a simpler alternative, namely that the county court should become a superior court for the purpose of all sanctions in contempt proceedings. This would result in a clear and consistent sanctions regime in the county court.

Consultation Question 117.

10.167 We provisionally propose that the county court should be treated as a superior court for the purpose of imposing sanctions for contempt.

Do consultees agree?

10.168 Are there any circumstances in which consultees think the county court should not be treated as a superior court for the purpose of imposing sanctions for contempt?

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203 County Courts Act 1984, s 118.

204 *Chelmsford County Court v Ramet* [2014] EWHC Civ 56 (Fam), [2014] Fam Law 435 at [31].

205 Regarding the scope of conduct that may be caught by the County Courts Act 1984, s 14 assault provisions, see para 3.140 to 3.143 above, where we provisionally propose that non-physical assault and threats should also fall within the scope of that section.

Consultation Question 118.

10.169 We provisionally propose that with the exception of the county court, all protected inferior courts, tribunals and other bodies should have the following powers in relation to contempt:

(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.

Do consultees agree?

10.170 Do consultees consider that any protected inferior courts, tribunals and other bodies should be treated differently? If so, why?

SANCTIONS IN THE DEVOLVED TRIBUNALS IN WALES

10.171 In Chapter 6 we provisionally propose that the devolved tribunals in Wales should have contempt protection. We make these proposals in the context of the expected change to the Welsh tribunals system such that the protected tribunals would be:

(1) the Appeal Tribunal for Wales ("ATW"), which may be a superior court of record; and

(2) all chambers of a First-tier Tribunal for Wales ("FtTW").[206]

10.172 If the ATW is identified in statute as a superior court of record then it will have all the powers that the superior courts have in England and Wales, including all the sanctions powers described in this chapter.

10.173 The FtTW would not be a superior court but would fall under the umbrella of inferior courts, tribunals and other bodies.

10.174 With respect to the powers to impose sanctions, as we indicate in Chapter 6 we have heard from Welsh judicial and government stakeholders that there is a caution about the contempt powers that may be given to the FtTW, but consistency with the FtT and tribunals that deal with reserved matters is also valued.

10.175 Just as we provisionally propose consistency with respect to the powers of the FtTW to deal with contempt, we again propose that the FtTW should have the same powers to impose sanctions as the FtT would in England and Wales. That is, the powers we provisionally propose should be common to all inferior courts, tribunals and other bodies. We also observe in Chapter 6 that guidance from the President of Welsh Tribunals or the chamber judicial leads might be used to ensure consistency and fairness and deployment of powers to deal with contempt. The same would apply with regard to the powers to impose sanctions. With respect to the ATW, while we do not

[206] See para 6.71 and 6.80 to 6.84 above.

know yet if it will be a superior court of record, it would be practical if it had contempt powers of such a court, and we provisionally propose that it should.

Consultation Question 119.

10.176 We provisionally propose that the First-tier Tribunal for Wales should have the following powers:

(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.

Do consultees agree?

10.177 Do consultees consider that any specific chambers of the First-tier Tribunal for Wales should be treated differently? If so, why?

Consultation Question 120.

10.178 We provisionally propose that the Appeal Tribunal for Wales should have the contempt powers of a superior court of record.

Do consultees agree?

GUIDELINES FOR IMPOSING SANCTIONS

10.179 This part of the chapter examines the guidance that is available to courts when they impose sanctions for contempt. It begins by explaining how the Sentencing Council produces sentencing guidelines that the criminal courts must follow, but that these do not apply in contempt cases. Instead, judges imposing sanctions for contempt must rely on guidance that has been provided by appellate courts. Next, it explains what that guidance is and the extent to which it is informed by sentencing guidelines for criminal offences. Thirdly, it considers reform options and makes a provisional proposal for the expansion of the Sentencing Council's remit and the development by the Council of sentencing guidelines for contempt.

Sentencing guidelines issued by the Sentencing Council for criminal cases

10.180 When offenders are sentenced in criminal cases, the courts refer to sentencing guidelines that are produced by the Sentencing Council for England and Wales. The Sentencing Council is a statutory body that has responsibility for developing sentencing guidelines for offences, and these must be followed by judges and magistrates.[207] The Sentencing Council has produced over 200 guidelines for different

[207] Coroners and Justice Act 2009, s 118; Sentencing Code, s 59.

offences.[208] Guidelines for specific offences "describe … different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed".[209] In doing so, they:

> provide guidance on factors the court should take into account that may affect the sentence. They set out different levels of sentence based on the harm caused to the victim and how blameworthy the offender is (referred to in the guidelines as 'culpability').[210]

There is also a "general guideline" with overarching principles, which is used both in conjunction with guidelines for specific offences and where there is no offence-specific guideline.[211] There are other overarching guidelines on specific issues, such as the sentencing of offenders with mental disorders, developmental disorders or neurological impairments, and the sentencing of children and young people.[212] Sentencing guidelines help promote consistency in sentencing, as well public confidence in the criminal justice system.[213]

10.181 There are, however, no Sentencing Council guidelines for contempt because contempt is not a criminal offence and so the courts are not sentencing an offender.[214] The Court of Appeal (Civil Division) has cautioned against the general application of statutory guidelines:

> I would not wish to suggest that there should be any general principle that the statutory provisions relating to sentencing in ordinary criminal cases should be applied to sentencing for contempt. The circumstances surrounding contempt cases are much more various and the objectives underlying the court's actions are also much more various.[215]

10.182 In these circumstances, the courts have attempted to lay down general principles to be applied when sentencing for particular types of contempt, including for criminal contempt, civil contempt, and contempt in family law cases. Different sets of guidance have been developed in and for different contexts. These are set out below for the purposes of illustrating the factors taken into account when sentencing for contempt.

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208 All guidelines are published: Sentencing Council, *Magistrates' court sentencing guidelines* (undated); Sentencing Council, *Sentencing guidelines for use in the Crown Court* (undated).

209 Sentencing Code, s 121(2).

210 Sentencing Council, *About sentencing guidelines* (2024).

211 Sentencing Council, *General guideline: overarching principles* (1 October 2019).

212 See for example, Sentencing Council, Overarching guidelines for sentencing in the Crown Court, *Sentencing Children and Young People* (1 June 2017); Sentencing Council, *Sentencing offenders with mental disorders, developmental disorders or neurological impairments* (1 October 2020).

213 See further Sentencing Code, s 120(11).

214 Coroners and Justice Act 2009, ss 118, 120; *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [82]; *R v Montgomery* [1995] 2 Cr App R 23; *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [23].

215 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [24].

As will become clear, there are similarities between the different sets of guidance.[216] There are also similarities between guidance for contempt and the Sentencing Council's General Guideline.[217] In spite of the fact that the statutory guidelines for criminal offences are not applicable to contempt, the courts regularly make reference to them.

Guidance from the courts for contempt cases

10.183 In this account of the guidance on sentencing that has been provided by the courts, we begin with the statements of the Supreme Court with respect to sentencing in criminal contempt. We then turn to civil contempt, first in the family context, then more generally (as the general approach is informed by the family cases), and then in the Court of Protection.

Criminal contempt

General principles

10.184 The Supreme Court in *Attorney General v Crosland* summarised the principles to be applied when sentencing for a criminal contempt, drawing on the statements of the Court of Appeal (Civil Division) in *Liverpool Victoria Insurance Co v Khan*:

> That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:
>
> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
>
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
>
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
>
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children [or] vulnerable adults in their care.
>
> 6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

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216 Naturally there are small differences between the guidelines which have been developed incrementally at common law. A notable difference between the guidelines for civil contempt and criminal contempt is that committal is an option of last resort for civil contempt.

217 See Sentencing Council, *General Guideline: Overarching Principles* (1 October 2019).

7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.[218]

10.185 There has been particular emphasis in the case law on the first of these points. In *Re Yaxley-Lennon*, the Court of Appeal (Criminal Division) drew "specific attention to the need to give consideration to the twin elements of culpability and harm".[219] With respect to harm, the court also noted some of the particular consequences of breaching reporting restrictions.[220]

Making false claims

10.186 Where proceedings have been based on false claims made to the court, such as in personal injury cases, it has been made clear that prison will be a likely sanction. In *Fairclough Homes Ltd v Summers* the Supreme Court approved the approach taken by the Divisional Court in *South Wales Fire and Rescue Service v Smith*:[221]

> For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.
>
> They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.
>
> Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to

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218 *Attorney General v Crosland* [2021] UKSC15, [2021] 4 WLR 103 at [44] citing *Liverpool Victoria Insurance Co v Khan* [2019] EWCA Civ 392, [2019] 1 WLR 3833 at [57]-[71]. The approach of the court is notably different from that in *R v Montgomery* [1995] 2 Cr App R 23 at [27] where it was said that "where a person interferes with the administration of justice, an immediate term of imprisonment is the only appropriate sentence, unless the circumstances are exceptional". In *Breen v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405 at [6], a civil contempt case where a protestor had breached an injunction, the Court of Appeal (Civil Division) described the summarised principles in *Crosland* as "the correct approach to sanctions in contempt cases".

219 The court referred to the guideline in force at the time, which was "Overarching Principles: Seriousness": *Re Yaxley-Lennon* [2018] EWCA Crim 1856, [2018] 1 WLR 5400 at [82].

220 Above.

221 *Fairclough Homes Ltd v Summers* [2012] UKSC 26, [2012] 1 WLR 2004 at [56]-[58]; *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [2]-[7].

emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.

Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice.

The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both them and their families, are likely to be ruined.

But the prevalence of such temptation and of those who succumb to that temptation is such that nothing else but such severe condemnation is likely to suffice.[222]

Civil contempt in the family courts

10.187 In the context of family law matters, guidance was provided in *Hale v Tanner*.[223] The case concerned breach of non-molestation orders made under the Family Law Act 1996. Before setting out the factors, Hale LJ (as she then was) emphasised that family law matters are different from other civil contempt matters because they involve "heightened emotional tensions that arise between family members and often the need for those family members to continue to be in contact with one another because they have children together or the like".[224]

(1) The court may order immediate committal, but committal is not to be regarded as the automatic consequence of a breach of an order.[225]

(2) The full range of sanctions available for criminal sentencing is not available for contempt of court.[226]

(3) The court may fine the contemnor, make an order of sequestration, or suspend a sentence and these should be considered particularly where the court has not found any actual violence.[227]

(4) If committal is deemed appropriate, a sentence should not be made longer merely because it is suspended.[228]

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222 *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [2]-[7].

223 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377.

224 Above at [25].

225 Above at [26].

226 Above at [27].

227 Above.

228 Above at [28].

(5) The length of the sentence depends on the objectives of the court, the two objectives being to emphasise the court's disapproval of any breach of an order and secure compliance with the order.[229]

(6) Suspended sentences are often more appropriate in ensuring compliance. Circumstances do not have to be exceptional to warrant suspension.[230]

(7) The length of the committal must "bear some reasonable relationship" to the maximum sentence available, being two years.[231]

(8) The court will consider whether the context of the contempt is aggravating or mitigating.[232]

(9) The court will consider whether there are parallel proceedings in another court dealing with at least some of the same facts, and whether their outcome impacts the contempt proceedings to avoid punishing the contemnor twice for the same offence.[233]

(10) The court should explain briefly the reasons behind ordering a specific sanction in order to enable the contemnor to understand the sanction[234] and appreciate the importance of complying with court orders.[235]

Civil contempt in the civil courts

10.188 The archetypal civil contempt is a breach of an order made by a court and it may arise in a wide range of circumstances. We outline three here that are both common, significant and where appellate courts have provided substantial guidance.

Breaches of Anti-Social Behaviour Injunctions (ASBIs)

10.189 In respect of sanctions for civil contempt of court, the Court of Appeal (Civil Division) provided substantial guidance in *Lovett v Wigan Borough Council*.[236] In doing so it drew on the above principles stated in *Hale v Tanner*. The court in *Lovett* was dealing with a breach of an ASBI and in that regard drew extensively on the guidelines suggested by the Civil Justice Council for ASBI breaches.[237] However, at least the first three of the following overarching points are expressed in terms that may apply to civil contempt more generally.

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229 *Hale v Tanner* [2000] EWCA Civ 5570, [2000] 1 WLR 2377 at [29].

230 Above at [31].

231 Above at [30].

232 Above at [31].

233 Above at [34].

234 Above at [35].

235 Above at [36].

236 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [31]-[57].

237 Above, referring to CJC, *Anti-Social Behaviour and the Civil Courts* (July 2020).

10.190 First, the court emphasised that securing future compliance is the principal objective when sentencing for civil contempt:

> [Lady Justice Hale in *Hale v Tanner*] took care to distinguish between the principles relating to sentencing in ordinary criminal cases and those applicable to sentencing for contempt. Although [that] was a family case, this distinction is just as relevant to contempt in the context of breaches of orders made by the civil court. … A key difference is that the objectives underlying penalties for contempt are different from those in crime, at least in the sense of the relative significance of punishment as compared to ensuring future compliance with the order. … This places the emphasis in civil contempt case on the importance of the objective of ensuring future compliance.[238] …
>
> The objectives in sentencing for breach … applicable to civil contempt [are] namely (in this order):
>
> i) Ensuring future compliance with the order;
>
> ii) Punishment; and
>
> iii) Rehabilitation.[239]

10.191 Secondly, the court adopted the ten principles set out by Hale LJ in *Hale v Tanner*, "all of which remain applicable to civil cases, with suitable modifications of examples given a family context".[240]

10.192 Thirdly, the court made an observation that sentencing may be adjourned to give the contemnor an opportunity to comply:

> A first option in many cases will be to adjourn the consideration of a sentence. The court can use this as an opportunity to speak directly to the contemnor about their behaviour. An indication of what sentence would have been imposed if the matter had not been adjourned is likely to be appropriate, together with a clear statement of what the consequences of good or bad conduct in the intervening period will be. … If a sentence is adjourned and there is no evidence of breaches of the order or any other relevant bad conduct in the interim, the ultimate sentence should usually be a lesser sentence than would be imposed if the case had not been adjourned. In some cases the court may conclude that a fine will be sufficient. In the most minor cases the court may decide that the impact of the proceedings is likely to achieve the purposes of the contempt jurisdiction, and that it may be appropriate to make no order, save for the finding of breach. All of these means of disposal will mean that any future breach of the order will be treated as substantially more serious.[241]

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238 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [32]-[33], citing also *Breen v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405 at [8]; *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519 at [103]-[108].

239 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [39].

240 Above at [35].

241 Above at [45].

10.193 Fourthly, while cautioning that "Sentencing Council guidelines can only be relevant in the very broadest and generalised sense", the court held that "[t]he approach in crime of giving distinct consideration to the degree of harm and the degree of culpability also has application here, again bearing in mind the civil context".[242] The court then set out the schema for harm and culpability contained in the Civil Justice Council's guideline for ASBI breaches, which itself was modelled on the Sentencing Council guideline for the breach of criminal behaviour orders.[243] Here, the court explicitly cautioned that the discussion of harm and culpability is specific to the ASBI context.[244] The schema and approach were set out by the court:

> The three levels of culpability are:
>
> A High culpability; very serious breach or persistent serious breaches
>
> B Deliberate breach falling between A and C
>
> C Lower culpability; Minor breach or breaches
>
> The level of harm is determined by weighing up all the factors of the case to determine the harm that was caused or was at risk of being caused by the breach or breaches. In assessing any risk of harm posed by the breach(es), consideration should be given to the facts or activity which led to the order being made. The three levels of harm are:
>
> Category 1 Breach causes very serious harm or distress
>
> Category 2 Cases falling between categories 1 and 3
>
> Category 3 Breach causes little or no harm or distress
>
> The analytical approach based on separately identifying culpability and harm allows the court to determine a starting point for the sentence and a range within which the sentence can be adjusted taking into account additional elements which increase or decrease the seriousness of what has happened or amount to personal mitigation. It is impossible to identify all the factors of this kind which might apply. Examples of factors increasing seriousness include a history of disobedience and the particular vulnerability of any victim of the behaviour concerned. Persistent breaches of the injunction are likely to amount to an important aggravating factor. Examples of mitigating factors include genuine remorse, ill health, and age or lack of maturity

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242 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [46].

243 *Above*, citing the CJC report (CJC, *Anti-Social Behaviour and the Civil Courts* (July 2020)). Courts had previously had regard to the sentencing guideline on breach of a criminal behaviour order when sentencing for contempt. The Court of Appeal in *Cuadrilla* considered a matter where the defendants had breached an injunction that had been issued to prevent trespass, nuisance and an economic tort, and the sentencing judge had drawn on the guideline. Though stating that the criminal sentencing guideline "does not apply to proceedings for committal... [it] provides, at most, a useful comparison … [and] caution is needed in any such comparison", the appellate court observed that the same approach had been taken in previous cases and found no error in the approach taken in this instance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 at [10]-[18], [34]-36], [102]-[103]; *Venables v News Group Newspapers* [2019] EWCA Civ 534 at [26].

244 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [57].

when it affects the responsibility of the contemnor. An early admission of contempt (together with an appropriate apology) will usually serve as a significant mitigating factor.[245]

10.194 Turning to harm and culpability when sentencing for breach of an ASBI under the Anti-Social Behaviour, Crime and Policing Act 2014, the court adopted the grid proposed by the CJC for this purpose:[246]

Harm	**Culpability**	**Culpability**	**Culpability**
	A	B	C
Category 1	Starting point: 6 months Category range: 8 weeks to 18 months	Starting point: 3 months Category range: Adjourned consideration to 6 months	Starting point: 1 month Category range: Adjourned consideration to 3 months
Category 2	Starting point: 3 months Category range: Adjourned consideration to 6 months	Starting point: 1 month Category range: Adjourned consideration to 3 months	Starting point: Adjourned consideration Category range: Adjourned consideration to 1 month
Category 3	Starting point: 1 month Category range: Adjourned consideration to 3 months	Starting point: Adjourned consideration Category range: Adjourned consideration to 1 month	Starting point: Adjourned consideration Category range: No order/fine to two weeks

10.195 The court stressed, however, that:

> It cannot be over emphasised that the task of sentencing a defendant for breach of orders in contempt of court is a multifactorial exercise of judgment based on the particular facts and circumstances of the case before the judge. Any sentence must be just and proportionate. Nothing in what has been said above is intended to detract from that. However, the approach set out above should allow judges to

[245] *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [47]-[49].

[246] Above at [54], [57], adopting the grid found at p 146 of the CJC report: Civil Justice Council, "Anti-Social Behaviour and the Civil Courts" (July 2020).

approach the task of sentencing in cases like these in a relatively systematic manner.[247]

Breaches of freezing orders

10.196 In other contexts, the guidance from the courts is consistent with the general approach in *Lovett*, though often noting the seriousness of the conduct will warrant imprisonment. Breach of a freezing order is one such example.[248]

10.197 Where there has been a breach of a freezing order (which is an order that prevents a person from removing, disposing of or reducing the value of assets), the principles stated by Popplewell J (as he then was) in *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management* have been approved and applied by the Court of Appeal (Civil Division).[249] Reviewing the authorities, Popplewell J derived six principles:

(1) In contempt cases the object of the penalty is to punish conduct in defiance of the court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to achieve.

(2) In all cases it is necessary to consider (a) whether committal to prison is necessary; (b) what is the shortest time necessary for such imprisonment; (c) whether a sentence of imprisonment can be suspended; and (d) that the maximum sentence which can be imposed on any one occasion is two years.

(3) A breach of a freezing order, and of the disclosure provisions which attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount.

(4) Where there is a continuing breach the court should consider imposing a long sentence, possibly even a maximum of two years, in order to encourage future cooperation by the contemnors.

(5) In the case of a continuing breach, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches; and (b) what portion of a sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive but not binding upon a future court. If it does so, the court will keep in mind that the shorter the punitive element of the sentence, the greater the incentive for the contemnor to comply by disclosing the information required. On the other hand, there is also a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element

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247 *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [56].

248 See also *Aspect Capital v Christensen* [2010] EWHC 744 (Ch) at [49]-[51] where there was a breach of a search and seizure order.

249 *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3478 (Comm) at [7]; *Sellers v Podstreshnyy* [2019] EWCA Civ 613 at [27]; *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524, [2019] 4 WLR 65 at [32], [39].

of the sentence both punishes the contemnors and deters others from disregarding court orders.

(6) The factors which may make the contempt more or less serious include those identified [in *Crystal Mews Ltd v Metterick*], namely:

(a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;

(b) the extent to which the contemnor has acted under pressure;

(c) whether the breach of the order was deliberate or unintentional;

(d) the degree of culpability;

(e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;

(f) whether the contemnor appreciates the seriousness of the deliberate breach;

(g) whether the contemnor has co-operated;

to which I would add

(h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward.[250]

Protest cases

10.198 In protest cases it will be relevant to sentencing whether the breach of an injunction has occurred as part of a peaceful protest:

> the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing.[251]

10.199 The rationale was further explained in *National Highways Ltd v Heyatwin*:

> In some contempt cases, there may be scope for the court to temper the sanction imposed because there is a realistic prospect that this will deter further law-breaking or, to put it another way, encourage contemnors to engage in the dialogue described

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[250] *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3478 (Comm) at [7]; *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch) at [9]-[13]. The factors from point (6) were cited in *Patel v Patel* [2017] EWHC 3229 (Ch) at [25] where false evidence of a forged will was given in probate proceedings.

[251] *R v Roberts* [2018] EWCA Crim 2739, [2019] 1 WLR 2577 at [34] (Burnett LCJ); *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 at [88].

in *Cuadrilla* with a view to mending their ways or purging their contempt. However, it is always necessary to consider whether there is such a prospect on the facts of the case. In some cases, there will be. In some cases, not.[252]

10.200 But nothing precludes committal:

> There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used.[253]

Civil contempt in the Court of Protection

10.201 In *P v Griffith*, decided before *Lovett*, the Court of Protection adopted principles that had been set out in civil contempt cases. The judge in that case, McDonald J, began by identifying the functions of a penalty in contempt cases, making reference to the particular circumstances before the court:

> A penalty for contempt has two primary functions. First, it upholds the authority of the court by marking the disapproval of the court and deterring others from engaging in the conduct comprising the contempt. Secondly, it acts to ensure future compliance. Whilst in some cases therefore, and in particular those cases where the contempt arises from the breach of a court order, a penalty will have the primary objective of ensuring future compliance with that order. In this case however, the proceedings are concluded. In the circumstances, in this case the objective of any penalty for the contempt is to uphold the authority of the court by marking the disapproval of the court of the contemnors actions and to deter others from engaging in the conduct comprising the contempt.[254]

10.202 The judge then set out "the principles applicable" when sentencing:

i) The penalty chosen must be proportionate to the seriousness of the contempt.

ii) Imprisonment is not the starting point and is not the automatic response to a contempt of court.

iii) Equally, there is no principle that a sentence of imprisonment cannot be imposed on a contemnor who has not previously committed a contempt.

iv) In circumstances where the disposal chosen must be proportionate to the seriousness of the contempt, where an immediate term of imprisonment is appropriate it should be as short as possible having regard to the gravity of the contempt and must bear some reasonable relationship to the maximum sentence of two years' imprisonment that is available to the court.

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252 *National Highways Ltd v Heyatwin* [2021] EWHC 3078 (QB) at [53].

253 *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 at [91].

254 *P v Griffith* [2020] EWCOP 46 at [42], citing *Patel v Patel* [2017] EWHC 3229 at [22]-[23].

v) Where a term of imprisonment is the appropriate sentence, the length of the term should be determined without reference to whether the term is to be suspended or not.

vi) Having determined the length of the term of imprisonment, the court should expressly ask itself whether a sentence of imprisonment might be suspended.[255]

Options for reform: sentencing guidelines for contempt of court

10.203 It is clear from the guidelines that apply to sentencing in criminal cases and from the guidance in the case law for sentencing in contempt that guidance helps ensure that sentencing is consistent, transparent and fair. However, as the account of the existing law shows, though the guidance from the courts strives for principles of general application, there is frequent caution about the extent to which guidance may apply in circumstances other than those that were before the court. Unlike in criminal cases, where the Criminal Division of the Court of Appeal can provide general guidance, no single court can do so for contempt, since contempt occurs in a range of different courts. Many stakeholders have told us that a consequence of the absence of clear, comprehensive guidelines for contempt sentencing is that there are inconsistencies in sentencing.

10.204 In our pre-consultation engagement a general consensus emerged that clear guidelines are needed on sentencing for contempt. We were told that given the high maximum period of committal, proper sentencing guidelines for contempt are essential. According to one stakeholder, inconsistencies between different judges are obvious from reading contempt judgments: some judges treat contempt as minor whilst others consider it to be grave and impose longer sentences. Others, including a judge, have told us that in practice, judges draw on sentencing guidelines that exist for criminal offences and apply them to contempt cases, which sometimes leads to overly severe sentences for contempt. Another stakeholder told us that "it is hard to know if a sentence is manifestly excessive on appeal where there is no guideline and variation exists depending on the facts of each case".

10.205 Our provisional view is that there is a strong case for the development of guidelines for sentencing for contempt. It is unsatisfactory that courts are left to apply guidance which has been set out in the case law, sometimes permissibly drawing on criminal sentencing guidelines as points of reference but without any precise or predictable approach as to how that is to be done. The guidance is also not easily accessible to the public because it exists only in case law. The availability and clarity of guidance may be particularly important where there are injunctions, as that may encourage compliance with injunctions where guidance indicates the penalties for a knowing or deliberate breach. Cost savings may follow if counsel and courts are not required to spend time identifying the authorities and the appropriate principles to be applied in a case and instead are able to go directly to sentencing guidelines.

10.206 We provisionally propose that sentencing guidelines should be produced for contempt of court.

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[255] *P v Griffith* [2020] EWCOP 46 at [43]; *Sunderland City Council v MacPherson* [2024] EWCOP 8 at [32].

10.207 The question then arises as to who should be responsible for preparing such guidelines. We have considered whether the Sentencing Council should be responsible given that the Council prepares guidelines for criminal offences and so has expertise in sentencing guideline development.[256]

10.208 This is not the first time we have considered the suitability of the Sentencing Council to prepare guidance in respect on contempt of court. In our 2012 consultation paper, we asked consultees whether courts should be able to impose a fine set at a percentage of the turnover of a particular publisher.[257] We suggested that "if such system were introduced, the Sentencing Council could provide guidance to the judiciary in order to ensure that the penalties imposed are consistent".[258] In response to this question, consultees explored whether such a system should be introduced, but did not comment on the suitability or appropriateness of the Sentencing Council. In response to other questions that we asked in 2012 on community sentences for contempt by publication,[259] many consultees said community sentences should be available and the Sentencing Council could produce guidance for community sentences to facilitate consistency in sentencing. However, we did not make any recommendations in the final report on the involvement of the Sentencing Council. As a result, we did not engage with questions of logistics or appropriateness of making recommendations that would require the Council to involve itself in matters of contempt.

10.209 In considering whether the Council should be responsible for preparing guidelines for sentencing for contempt, we provisionally conclude that it would not be appropriate. Contempt of court does not currently fall within the statutory remit of the Sentencing Council. The Coroners and Justice Act 2009 tasks the Sentencing Council with developing guidelines for the sentencing of offenders.[260] It may prepare sentencing guidelines and allocation guidelines.[261] Preparing guidelines for the sentencing of offenders does not include contemnors as contempt is not a criminal offence. Accordingly, the Council cannot develop guidelines for sentencing for contempt and for the Sentencing Council to be the responsible body, the Coroners and Justice Act 2009 would require reform.

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256 The Sentencing Council must consult the Lord Chancellor, such persons as the Lord Chancellor directs, the Justice Select Committee of the House of Commons, and such other persons as the Council considers appropriate: Coroners and Justice Act 2009, s 120(6).

257 Contempt of Court (2012) Law Commission Consultation Paper No 209, paras 2.116 and 6.22.

258 Above, para 2.116. We did not address the appropriateness or inappropriateness of the involvement of the Sentencing Council. We pointed out that the benefits of guidance from the Sentencing Council would be consistency in penalties and greater clarity for media organisations.

259 Above, paras 6.20-6.21.

260 The Coroners and Justice Act 2009, s 120(4) provides that the Sentencing Council may prepare guidelines for the sentencing of offenders; s 120(1) defines sentencing guidelines as "guidelines relating to the sentencing of offenders".

261 This is not mandatory. The Sentencing Council "may" exercise the power to prepare sentencing or allocation guidelines: see Coroners and Justice Act 2009, ss 120(4) and 122(2). In narrow circumstances set out in s 120(3)(a) and (b), the Sentencing Council *must* prepare sentencing guidelines (in respect of reduction in sentences for guilty pleas, and the totality of sentences).

10.210 Given the Sentencing Council's expertise, however, we sought its views on how guidelines might best be developed. The Sentencing Council told us that "it would not be workable" for it to take on the task,[262] and gave strong reasons why the expansion of its statutory remit to make it responsible for contempt would not be appropriate:

> The membership of the Council is predicated on its role as a body concerned with criminal sentencing. The judicial experience of the Council is predominantly criminal. The non-judicial members provide expertise in relation to other participants in the criminal justice system. Whilst we could consider co-opting judges with cross-jurisdictional expertise, such an ad hoc approach would be difficult to reflect in any amendment to the Council's statutory role. Moreover, there are likely to be others with an interest in sentencing for contempt in relation to civil, family and tribunal proceedings e.g. HMCTS. The Council has no current route through which it could engage with those interested in non-criminal proceedings.
>
> Perhaps more important, the creation of any Council guideline is heavily dependent on the expertise of the policy officials, the analysts and the statisticians who work for the Council. Their expertise is in relation to criminal proceedings. That is why they work for the Council. The team is a small one and is fully occupied with the creation of new guidelines and the monitoring of current guidelines.[263]

10.211 We find the Council's position persuasive and do not provisionally propose that the statutory remit of the Sentencing Council should be expanded.

10.212 However, the Sentencing Council agreed that the creation of guidelines for the sentencing of contempt is "both sensible and necessary".[264] The Council discussed options with the senior judiciary and told us the agreed view was that guidelines should be prepared. Specifically, the Council suggested that guidelines could be prepared by:

> a working group nominated by the Lady Chief Justice in consultation with the Master of the Rolls, the President of the King's Bench Division, the President of the Family Division and the Senior President of Tribunals.[265]

10.213 We are aware of several examples of judicial working groups.[266] Our provisional view is that this would be an appropriate and effective way of bringing together the expertise needed to prepare guidelines for contempt, and so provisionally propose below that the task be undertaken by a judicial working group. We note that a judicial working group would be carrying out a judicial function and would determine its own composition and working methods.

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262 Letter from Sentencing Council to Law Commission, 18 April 2024.

263 Above.

264 Above.

265 Above.

266 See for example: the final report of Judiciary, *The Employment Appeal Tribunal Rules and Practice Direction Consultation* (25 September 2023); Family Procedure Rule Committee, *Vulnerable Witnesses Practice Direction Consultation Outcome* (23 February 2017, updated 1 August 2018).

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10.214 We provisionally propose that a working group nominated by the senior judiciary should be established to prepare guidelines for sentencing for contempt

Do consultees agree?

CRIMINAL RECORDS

10.215 Should a finding of contempt appear on a person's criminal record? In considering this question, we explain the criminal records system and the current position regarding contempt, and then turn to what the position should be.

The criminal records system

10.216 Criminal records are retained on "central records", which is in practice the Police National Computer ("PNC").[267] The PNC contains records of:

(a) convictions for; and

(b) cautions, reprimands or warnings given in respect of

any offence punishable with imprisonment and any offence specified in the Schedule to [the] Regulations.[268]

10.217 This means that not every conviction or caution, reprimand or warning will be recorded. An offence that is not punishable with imprisonment or otherwise specified in the schedule to the regulations may be described as a "non-recordable" offence. However, where a person is convicted of a recordable offence and in the same proceedings is also convicted of "any other offence" (a non-recordable offence), then the non-recordable offence may be entered into the PNC.

10.218 A criminal record certificate is provided by the Disclosure and Barring Service ("DBS").[269] There are different levels of certificates: basic, standard, and enhanced (of which there are two types). A certificate may be required by employers in certain circumstances.[270] A certificate gives details of every "relevant matter" relating to an individual which is recorded in the PNC or states that there is no such matter recorded there.[271] A "relevant matter" is defined under the Police Act 1997 and, though the

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267 Police Act 1997, s 113A(3); Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371, paras 2.27-2.29. The PNC is not the same as the Police National Database, which records intelligence, including investigations and allegations that did not result in a charge. For an overview, see J Beard, *The Retention and Disclosure of Criminal Records*, House of Commons Library Briefing Paper CBP6441 (10 February 2021). A short overview is available at J Beard and L Meade, *Criminal Records*, House of Commons Library Constituency Casework (13 July 2023).

268 National Police Records (Recordable Offences) Regulations 2000, reg 3(1). The schedule does not include any matters under the CCA 1981.

269 Police Act 1997, s 113A(1); Protection of Freedoms Act 2012, s 87.

270 Above, ss 113A-113B; DBS, Disclosure and Barring Service – About Us.

271 Police Act 1997, s 113A(3).

definition is complex, for adults it includes convictions: for various specified serious offences; where a custodial sentence was imposed; that were recorded within the last 11 years; and are not "spent convictions" under the Rehabilitation of Offenders Act 1974.[272] The inclusion only of "relevant matters" means that not every criminal conviction or caution entered into the PNC will appear on a criminal record certificate.

10.219 With respect to a "conviction in respect of which a custodial sentence … was imposed" (which is a relevant matter),[273] a custodial sentence has the same meaning as it does in the Rehabilitation of Offenders Act 1974.[274] That Act states that a "custodial sentence" includes "a sentence of imprisonment".[275] A "sentence of imprisonment" is not defined in that statute, other than to say it "includes a sentence of penal servitude".[276]

The current position for contempt

10.220 On the face of the statutory regime for criminal records, it seems from the wording of regulation 3(1) of the National Police Records (Recordable Offences) Regulations that contempt should never be entered into the PNC because there is no conviction, as contempt is not a criminal offence. Even if it were entered into the PNC, it also seems that it should not appear in a criminal record for the same reason: there has been no conviction for an offence. If the conviction point were put to one side, then it might be argued that the position is less clear where there has been a committal, because "sentence of imprisonment" is not defined under the relevant statutes. However, it has been frequently observed in other contexts that a committal for contempt is not a sentence of imprisonment.[277] While this is what the statutory framework suggests, in practice the position is different.

10.221 We do not have access to the PNC so our understanding of data entry into the PNC is based on the information in the PNC User Manual, assisted by conversations with stakeholders who have PNC access. The User Manual indicates that when entering data into the PNC, "CJS" offence codes are used.[278] A CJS code is a "code to represent an offence (where offence is used in the generic sense covering the reasons for bringing a court case against a defendant)".[279] That is, the fact that a CJS code exists for a matter that goes to court does not necessarily mean a matter is a criminal offence. There are several codes for contempt. Each has an "offence title", associated legislation (if any), an indicator as to custody (which we expect means whether it may attract a custodial sentence) and an indicator as to whether it is recordable on the PNC (which we understand means whether it may be entered on

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272 Police Act 1997, s 113(6).

273 Above, s 113A(6)(a)(ii).

274 Above, s 113A(6E)(e).

275 Above, s 113A(6E)(e); Rehabilitation of Offenders Act 1974, s 5(8).

276 Rehabilitation of Offenders Act 1974, s 5(8).

277 See, for example, paras 10.91 and 10.156 above.

278 Home Office, *PNC User Manual v20.01 (redacted)* (October 2020) part 7.7 p 440. There are also "Offence Numbers": part 7.2 p 439.

279 HM Government, *Criminal Justice System Exchange Data Catalogue*, version 6.0 (24 January 2020) para 3.11.

the PNC as an offence on its own without the need for any other offence) or not recordable (in which case it may be entered on the PNC only if associated with a recordable offence).[280] In the last of the rows below we include the codes for taking photographs in court, which is an offence under the Criminal Justice Act 1925.[281]

[280] We used as our starting point the list of offence codes published by a civil society organisation, the Criminal Justice Hub: CJS Offence Codes, which provides a spreadsheet current at September 2022 that includes custodial and recordable indicators. The codes are also published by the Ministry of Justice, but we have not seen a version with the custodial and recordable indicators. We have confirmed with PNC stakeholders the recordable or non-recordable status of the codes listed. On entering recordable offences, the User Manual states that if a non-recordable offence is entered then a warning prompt will require confirmation that (relevantly here) it "led to a conviction resulting in a prison sentence" or "it accompanies one or more recordable offences": Home Office, *PNC User Manual v20.01 (redacted)* (October 2020) part 7 p 438.

[281] We do not include in this list CC81011 Use/publish a recording of legal proceedings in contravention of legal proceedings. This appears on a list of CJS codes that we have seen but we have been told by a PNC stakeholder that it is not on the PNC.

CJS offence code	Offence title	Legislation	Custodial indicator	Recordable (R) or Not Recordable (NR) on PNC indicator
CC81001	Publish matter likely to cause contempt of court	CCA s 1[282]	N	R
CC81003	Tape record proceedings without permission	CCA ss 9, 14	Y	NR
CC81006 CC81007 CC81008 CC81009 CC81010	Wilfully interrupt proceedings, otherwise misbehave, or insult magistrate, court officer, witness or counsel	CCA ss 12(1)(a), (b), 12(2)	Y	R
CC81501	Application to revoke committal order (contempt)	CCA s 12(4)	N	NR
CP96001	Contempt of court by breach of s 17 of the Criminal Procedure and Investigations Act 1996	Criminal Procedure and Investigations Act 1996 s 18	Y	R
CJ25002 CJ25004 CJ25005 CJ25007	Take / attempt to take / publish a photograph / portrait / sketch in a civil / criminal court of a judge / juror / witness / party	Criminal Justice Act 1925 s 41	N	NR

[282] This does not appear in the Criminal Justice Hub spreadsheet but we have been told by a PNC stakeholder that CCA s 1 is associated with this CJS code.

10.222 None of the contempts above is identified in the text of the associated legislative provisions as being "an offence". However, it is conceivable that confusion arises in some instances because, for example, the title of section 12 of the CCA 1981 is "Offences of contempt of magistrates' courts" and the provision refers to an "offender".[283] Section 18 of the Criminal Procedure and Investigations Act 1996 refers to a person being "guilty of a contempt" and to a "finding of guilty".[284] We have not been able to ascertain the basis on which the indicators for custody or recordable on the PNC have been created.

10.223 Where a person is imprisoned then the PNC User Manual (which does not mention contempt) states that the prison service will pass the information to police, who then enter that into the PNC:

> If following an appearance at court the offender is sentenced to a term of imprisonment, the Prison Service will become responsible for supplying certain information to the police regarding the subject. Examples of this data are the type of establishment the sentence has been served at, its duration, and details regarding the release….[285]

We do not know if the effect of this is that where a committal follows from a contempt finding it will potentially make its way on to the PNC, or whether police do not enter the information because contempt is not a conviction and committal for contempt not a "sentence" in the criminal sense. Our understanding from a PNC stakeholder is that this information is passed to police when a person is released so that licence conditions (if there are any) can be recorded, which may lessen the likelihood of contempt being recorded.

10.224 In at least some circumstances, guidance is explicit that contempt is not a criminal or recordable offence. Domestic Violence and Protection Notices and Domestic Violence Protection Orders are issued under the Crime and Security Act 2010.[286] The statutory guidance states that a breach of a notice or order "is not a criminal or recordable offence".[287]

10.225 Our pre-consultation engagement has indicated that at present there is no systematic or principled approach to how and when a contempt will be entered into the PNC, and nobody could speak with confidence about when contempt will be recorded. A representative from one of the legal professional bodies told us that there is inconsistency. A stakeholder from a civil society organisation told us, "in most cases, contempt does not leave a criminal record". Not all comments distinguished between records on the PNC and a criminal record certificate, but we will do so here.

10.226 We were told that there are established processes for the entry onto the PNC of matters disposed of in the criminal courts, but whether data is entered when matters

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283 CCA 1981, s 12(2), (4).

284 Criminal Procedure and Investigations Act 1996, s 18(2)-(7).

285 Home Office, *PNC User Manual v20.01 (redacted)* (October 2020) pp 410; 449-450.

286 Crime and Security Act 2010, ss 24-31.

287 Home Office, *Domestic Violence and Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) guidance* (8 November 2022) paras 5.4.11, 5.9.10, and Annex B Process Map, p 30.

are disposed of in other courts is "haphazard".[288] A police officer consulted with colleagues who worked with the PNC and told us that whether contempt will appear on a criminal record (by which they appeared to mean the PNC records) will depend on whether it occurs in a criminal court or a civil court.

10.227 There seems to be more consistency with regard to when contempt will appear on a criminal record certificate. We have heard from several stakeholders that contempt may appear on a criminal record certificate where it is accompanied by a recordable offence. By a recordable offence, stakeholders meant a recordable criminal offence; all held the view that contempt of itself was not recordable. For example, a civil society stakeholder told us:

> If you are convicted of a recordable offence and a non-recordable offence is linked to that, then the non-recordable offence will also show up on the record.[289] I am not sure how that relates to contempt [but] it looks like contempt is included on someone's criminal records only when it is attached to another offence (one that is recordable). So, by itself, contempt is not considered recordable and therefore is not included on the main criminal record.

10.228 Uncertainty is also problematic because people may be required to "self-disclose" their criminal record. When responding to a question about whether they have a criminal conviction, they may be uncertain about whether a contempt finding is a conviction, especially if the sanction was imprisonment.

10.229 We can only surmise that the explanation for the confusion over when contempt may be entered on to the PNC and appear on a record may lie in a lack of understanding about contempt, which may substantially be brought about by the use of terminology. Phrases such as "criminal contempt", "prosecution" for contempt, "guilty" of contempt, or "sentenced" for contempt are in common parlance. When a contemnor is imprisoned it could well be that a person entering data from criminal court disposals will enter the recordable offence and, where a contempt results in committal in the same proceedings, will assume that that should also be entered alongside the recordable offence.

Should contempt appear on a criminal record?

10.230 A criminal record can have significant implications for a person. It is well known that it may affect employment opportunities, but it may also be a consideration in decision-making in other areas, such as foreign travel, immigration or bail applications. The impact of records was a common theme in views we received from civil society organisations about whether contempt should appear on a criminal record. One stakeholder told us that "people might not appreciate that their contemptuous behaviour might result in a criminal record – they might not be aware of the repercussions". Another told us that having a criminal record is extremely disruptive and prohibitive to a person's life and future opportunities, and it would be

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288 The PNC User Manual states that "the police force owning the Arrest/Summons is responsible for the update to PNC with the details of the adjournment or disposal": Home Office, *PNC User Manual v20.01 (redacted)* (October 2020) and there is detailed guidance on entering information: pp 410; 453-457.

289 National Police Records (Recordable Offences) Regulations 2000, reg 3(3).

inappropriate for contempt to appear on criminal records. They suggested making contempt "non-recordable":

> You have recordable and non-recordable criminal offences, and I think most are non-recordable (eg road traffic offences). So, you could make this non-recordable. Having a criminal record is a huge problem for people in terms of moving forwards in their life, eg with housing, employment, general stigma, etc.

10.231 Based on our analysis above, however, were it to be "non-recordable" for the purpose of the PNC, that would not necessarily effect significant change as it might still be recorded along with an offence that is recordable.

Options for reform

10.232 Our provisional view is that the current position is unsatisfactory. There is not enough practical clarity in relation to entering findings of contempt into the PNC or in relation to the appearance of contempt on a criminal record. There should be clarity and consistency in the law.

10.233 In the current criminal records system this may be achieved by, for example, statutory provisions to the effect that contempt is a finding made by a court or tribunal and:

(1) it is *never* to be entered into the PNC (and so would never appear on a criminal record certificate), or

(2) it *may* be entered into the PNC and specifying in what circumstances when this may occur, and if entered into the PNC then contempt is either:

  (a) *never* to appear on a criminal record certificate, or

  (b) *may* appear on a criminal record certificate and specifying the circumstances when this may occur.

10.234 Our provisional view is that the first of these is to be preferred: contempt should never be entered on to the PNC and it should never appear on a criminal record. Contempt is not a criminal offence. Our provisional view is that contempt should continue not to be a criminal offence. Police cannot investigate it, nor can it be prosecuted by prosecuting authorities. Its appearance in the criminal records system is anomalous and inappropriate.

10.235 Finally, we note that in our 2017 report on criminal records disclosure on non-filterable offences, we said: "We strongly believe that a wider review of the system of criminal records disclosure is required in order to create a coherent set of principles upon which offences could be selected for inclusion".[290] Contempt could form part of a wider review but, in the absence of any planned wider review, our provisional view is that it should be addressed in this current contempt project.

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290 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371, para 6.1.

Consultation Question 122.

10.236 We provisionally propose that a finding of contempt and any associated sanction should never be entered into the Police National Computer.

Do consultees agree?

Consultation Question 123.

10.237 We provisionally propose that a finding of contempt and any associated sanction should never appear on a criminal record certificate.

Do consultees agree?

RECORDING AND PUBLISHING DATA ON CONTEMPT FINDINGS AND SANCTIONS

10.238 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. It sits in contrast to the range of data that is published in respect of criminal offences.[291]

10.239 There are many reasons why it would be valuable to have such data. Analysis of such data would help provide insights into consistency and fairness, including in sanctions, which is important to understand and address equality impacts; Epstein, Hunter and Meers have argued that the published judgments on committals for breach of injunction show evidence of discrimination against Roma, Romani Gypsies and Irish Travellers ("GRT").[292] Analysis of the data would also provide insights into what sanctions are and are not effective when contempt powers are deployed; effective sanctions may carry significant economic benefit, especially if they secure compliance. During pre-consultation we heard from stakeholders that the paucity of data on contempt means that measuring consistency in, or the effects of, sanctions for contempt is hard to do in the civil justice system, and that data collection for contempt should be more systematic.

10.240 The most reliable source of data may relate to contemnors who are committed to prison and serve at least some of their sentence in prison. Detailed data has occasionally appeared in the cases; for example, in *Justice for Families v Secretary of State for Justice* the annual figures for one year were given:

> 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

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[291] See for example Home Office, *Crime Statistics*.

[292] R Epstein, C Hunter and J Meers, "Imprisonment for breach of injunctions: what is happening in the civil courts?" (2024) *Legal Studies* (First View, 1 July 2024).

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).[293]

10.241 Presently, there is no available breakdown by courts, but the Ministry of Justice regularly publishes information about how many people are received into prisons for contempt.[294] The data on contemnors received into prison is helpful, but it is the tip of the iceberg. Our provisional views in relation to data are the following.

10.242 First, there should be annual publication of data in relation to contemnors received into prison, including for each contemnor the court that sentenced them, the number of days expected to be served before their automatic release date, and number of days actually served in prison.

10.243 Second, the recording of court data should be considered in two respects. We do not make provisional proposals on these matters but seek consultees' views on them:

(1) Should data be recorded when contempt proceedings are instituted? If so, what data?

For example, data such as the following data might be recorded on each occasion when contempt proceedings are instituted: date; court; judge; defendant; applicant (if any); type of contempt (for example, general contempt, breach of order, strict liability contempt by publication); legal aid (criminal, civil, none); finding; PSR (if any); sanction (if any); costs order (if any); and appeal outcome (if any).

(2) Should anonymised and disaggregated data be published?

10.244 There would clearly be a resource commitment involved in recording and publishing such data. However, there may be benefits that would flow from recording and publishing data. For example, the Law Officers should have access to such data, as it would assist them in deciding whether to institute proceedings against a potential defendant and the courts in deciding what sanction should be imposed on a contemnor. The publication of anonymised and disaggregated data would also enhance transparency in an area of the law that has been opaque. Thirdly, the data may result in economic and equality benefits by providing insight into the resources that are devoted to contempt across the justice system, which in turn may shed light on needs, effectiveness and efficiencies.

10.245 We welcome evidence from consultees in relation to both the potential costs and potential benefits of recording and publishing data.

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293 *Justice for Families v Secretary of State for Justice* [2014] EWCA Civ 1477, [2015] Fam Law 140 at [44].

294 See para 10.12 above.

Consultation Question 124.

10.246 We provisionally propose that there should be annual publication of data in relation to contemnors received into prison, including for each contemnor the court that sentenced them, the number of days expected to be served before their automatic release date, and number of days actually served in prison.

Do consultees agree?

Consultation Question 125.

10.247 Should data be recorded when contempt proceedings are instituted? If so, what data?

10.248 Should such recorded data be published in anonymised and disaggregated form?

FURTHER ISSUES AND IMPACTS

10.249 In this chapter we have considered a wide range of issues and asked more than 20 consultation questions. However, we are conscious that there may be issues in relation to the sanctions regime which have not been raised in the chapter. In any responses to the last consultation question in this chapter we would especially welcome evidence or views about aspects of sanctions that engage affected individuals or groups with whom, for the most part, we have not been able to speak directly during our pre-consultation engagement. This may include issues relating to contemnors who are or have been imprisoned, or which relate to vulnerable groups that we have not already considered. In addition, consultees may wish to comment on wider economic impacts of our provisional proposals in relation to sanctions.

Consultation Question 126.

10.250 Are there any issues in relation to sanctions for contempt of court that have not already been addressed? We would particularly welcome views and evidence in relation to:

- contemnors who are or have been imprisoned;
- positive and negative equality impacts on vulnerable groups that we have not already considered; and
- economic costs and benefits associated with the sanctions regime and our provisional proposals.

Chapter 11: Appeals

INTRODUCTION

11.1 In this chapter, we explore the framework for appeals in contempt cases. The chapter comprises three parts. First, we explain the current routes of appeal and consider some of the inconsistencies, uncertainties and problems within the existing framework. We conclude this part by presenting provisional proposals and reform options with a view to establishing a clearer, more consistent and more coherent appeals framework. Secondly, the chapter turns to when permission to appeal is and should be required, and also considers the tests for permission. The third part of the chapter looks at the position of the Attorney General ("AG") in relation to appeals, considering the circumstances in which the AG may appeal a decision, and whether in some circumstances the AG should be able to refer a point of law to the Court of Appeal.

ROUTES OF APPEAL: THE CURRENT LAW AND THE NEED FOR REFORM

11.2 When a court makes a finding of contempt and imposes a sanction, the routes of appeal are primarily set out in section 13 of the Administration of Justice Act ("AJA") 1960. However, the provisions in section 13 must be read alongside other statutes, including the Contempt of Court Act ("CCA") 1981, the Magistrates' Court Act ("MCA") 1980, the Bail Act 1976, and procedure rules.

11.3 Section 13 of the AJA 1960 states the law in terms of the court to which appeals lie and we adopt that approach in presenting the routes of appeal.

Appeals to the High Court and the Crown Court

11.4 Under section 13(2)(a) and (b) of the AJA 1960, an appeal lies to the High Court from an order or decision of any inferior court other than "the county court or any other inferior court from which appeals generally lie to the Court of Appeal".

11.5 As magistrates' courts are inferior courts, appeals will lie to the High Court unless there are provisions to the contrary.[1] However, depending on the nature of the contempt, the position is more straightforward in some circumstances than in others, and there may be a case for reform of the routes of appeal from magistrates' courts.

Appeals from magistrates' courts

11.6 Three aspects of appeals from magistrates' courts are of particular note.

11.7 First, there are express provisions for an appeal to the High Court where, under section 63 of the MCA 1980, a magistrates' court exercising its civil jurisdiction makes an order other than for payment of money and the person subject to the order

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1 AJA 1960, s 13(5); *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [33].

disobeys that order.[2] Examples include a failure to comply with a child contact order[3] or a contingent dog destruction order.[4] Section 13 of the AJA 1960 explicitly indicates that an appeal will lie to the High Court.[5] It appears that the appeal would be by way of rehearing.[6]

11.8 Secondly, in most other circumstances the appeal will also lie from the magistrates' court to the High Court pursuant to section 13 of the AJA 1960 even though there are no express provisions to that effect. For example, appeals from contempts dealt with by magistrates under the following provisions would all go to the High Court:

(1) section 9 of the CCA 1981, which empowers a magistrates' court to deal with any person who records proceedings or the like;[7]

(2) section 97(4) of the MCA 1980, which empowers a magistrates' court to deal with a person who has refused to give evidence or produce a document or thing in contravention of an order to do so;[8]

(3) sections 17 and 18 of the Criminal Procedure and Investigations Act 1996, which empower a magistrates' court to deal with unauthorised disclosure of material in criminal proceedings;[9] and

(4) section 6(5) of the Bail Act 1976, where a person on bail has failed to surrender to custody and the matter is punished as if it were contempt.

11.9 The last of these is unusual because, although a failure to surrender to custody is "punishable either on summary conviction or as if it were a criminal contempt of court", it has been held that it is not of itself a contempt and only the statute makes it so.[10]

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2 *Chief Constable of Merseyside v Doyle* [2019] EWHC 2180 (Admin); MCA 1980, s 63; CCA 1981, s 17, sch 3.

3 *Re H (A Minor) (Contact: Enforcement)* [1996] 1 FLR 614.

4 *Chief Constable of Merseyside v Doyle* [2019] EWHC 2180 (Admin).

5 AJA 1960, s 13(2)(a), s 13(5)(c).

6 Under s 111 of the MCA 1980, appeals to the High Court are made by way of case stated (under which the aggrieved person "may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction") but the person "shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court". Under s 13(2)(a) and s 13(5)(c) of the AJA 1960, it is clear that an appeal lies to the High Court. However, we do not discount the possibility that a judicial review application may be brought: see *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [41].

7 CCA 1981, s 9(1); CrimPR r 48.5; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

8 MCA 1980, s 97(4); CrimPR rr 48.5, 48.16; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

9 Criminal Procedure and Investigations Act 1996, ss 17-18; CrimPR r 48.9; CPS Guidance, *Contempt of Court, Reporting Restrictions and Public Access to Hearings* (updated 5 December 2023).

10 *R v Reader (Brian Henry)* (1987) 84 Cr App R 294 at 297-298 (Leggatt J): "The offence of absconding whilst on bail has never constituted a contempt of court. If there were any doubt about this point, one has only to refer to the language of the Bail Act section 6(5) itself, which provides that the offence of absconding whilst on ball shall be punishable 'as if it were a contempt of court.' No such provision would be needed if

We explain in Chapter 6 that where the court initiates proceedings of its own motion for a failure to surrender then it seems that it is taken to be dealing with the matter as a contempt (rather than as a summary offence, for which proceedings would be initiated by the CPS). As a result, if treated as a summary offence, the appeal would lie to the Crown Court (pursuant to section 108 of the MCA 1980), but if treated as a contempt, the appeal would lie to the High Court (pursuant to section 13 of the AJA 1960).

11.10 This appears something of an anomaly because in at least two respects the offence and the contempt are indistinguishable. First, the maximum penalties are the same whether it is dealt with as contempt or as an offence: a maximum of 3 months' imprisonment may be imposed in a magistrates' court (and/or a fine) and a maximum of 12 months may be imposed in the Crown Court (and/or a fine).[11] Secondly, there is a sentencing guideline that applies to failure to surrender offences.[12] However, we are not aware that sentencing is approached differently where a matter is treated as contempt.

11.11 Finally, due to specific provisions in the CCA 1981, there is just one set of circumstances where an appeal lies to the Crown Court.[13] This is the position where a contempt is committed by wilfully insulting those involved in the proceedings of a magistrates' court, wilfully interrupting the proceedings, or otherwise misbehaving in court, contrary to section 12 of the CCA 1981. In these circumstances, an appeal will lie to the Crown Court because the CCA 1981 states that section 108 of the MCA 1980 also applies to section 12 contempts, and section 108 of the MCA 1980 provides for an appeal to the Crown Court upon conviction of any offence.[14] The appeal will be by way of rehearing.[15] No appeal lies to the High Court in these cases, reflecting what the Divisional Court in *Haw v City of Westminster Magistrates' Court* described as the "clear legislative intent"[16] for appeals from an order or decision made under section 12 of the CCA 1981 to follow the typical route of appeal from convictions in magistrates' courts. All this being said, it is not the only option available in a section 12 contempt case. The Divisional Court in *Haw* also held that an alternative would be to appeal to

absconding already was a contempt of court, and the phrase 'as if it were' shows that it is not a contempt of court".

11 Bail Act 1976, s 6(7). Where the defendant is convicted in a magistrates' court then the matter may be sent to the Crown Court for sentence if the circumstances are such that the offence warrants greater punishment that the magistrates' court can impose: s 6(6).

12 Sentencing Council, *Failure to surrender to bail* (1 October 2018). See also CrimPR, Practice Direction 14B and 14C.

13 MCA 1980, s 108; CCA 1981, s 12(5); *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [27].

14 CCA 1981, s 12(5).

15 *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [8].

16 Above at [17]. When the clause which became section 12 of the CCA 1981 was being considered by Parliament, the then Lord Chancellor commented that it would allow appeals to the Crown Court "as indeed appeals to the Crown Court are universally allowed from magistrates": see *Hansard* (HL), 9 December 1980, vol 415, col 64.

the High Court by way of case stated, or to bring judicial review proceedings.[17] However, the usual route would be an appeal to the Crown Court.

11.12 While the route of appeal from a section 12 contempt is thus clear following the decision in *Haw*, the Divisional Court made several observations about why an appeal to the High Court would be inappropriate for these appeals. The discussion took place in the context of whether an appeal from an order under section 12 of the CCA 1981 lies under section 108 of the MCA 1980 in respect of sentence only or also conviction. Nevertheless, the court's observations about why an appeal lies to the Crown Court in these circumstances are relevant to the more general question of where appeals from magistrates' courts should lie:

> [I]t is clear that [when deciding that section 12 contempt appeals should go to the Crown Court] Parliament must have known that the only other possible right of appeal … was to the High Court under section 13 of the 1960 Act. Parliament would have known that such a right of appeal would present difficulties; there are no transcripts of the proceedings in the magistrates' courts as neither the reasons for the judgment of the court nor the evidence is recorded or transcribed. Thus if the High Court were to hear an appeal … there would be no transcript of the judgment and no complete record of the evidence; the court would have to rely on the notes of the clerk. Furthermore, Parliament would have known that the ordinary route of appeal on a conviction by a magistrates' court was to the Crown Court; it appears from the researches of counsel that there are no summary offences from which there is no right of appeal to the Crown Court. Although it may be debatable whether a conviction for contempt under section 12 is a conviction for a criminal offence …, a conviction under section 12 carries some of the indicia of a criminal offence (as it is recorded on the police national computer). Parliament would have known that an appeal at the Crown Court was conducted by the form of complete rehearing to which we have referred … and not the form of rehearing usual in the higher courts; it was therefore a far more suitable form of appeal than an appeal to the High Court. Moreover, Parliament would no doubt have had regard to the efficient use of resources; where an offence carried a maximum term of imprisonment of one month, there would be no good reason why the time of a judge of the High Court would be taken up in an appeal from such a decision when appeals on decisions where penalties could be up to six months were heard by judges and justices at the Crown Court. It is difficult therefore to think of any reason why Parliament may have considered a right of appeal to the Crown Court would have been appropriate in the case of sentence and inappropriate in the case of conviction [for a section 12 contempt].[18]

11.13 While the court's comments in *Haw* may have reflected the reasons underlying Parliament's approach at the time of enacting the AJA 1960, there is a question of whether this remains the best system now. Indeed, the Divisional Court noted that:

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17 *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [42].

18 Above at [25].

> at the time [section 13 of the AJA 1960] was enacted the magistrates' courts had no power to deal with contempt in the face of the court and Parliament therefore could not have contemplated providing a route of appeal by section 13.[19]

As this has since changed and magistrates' courts now have such powers, the law may be outdated and the points raised in *Haw* may no longer be persuasive.

11.14 Perhaps the best justification for the current appeal route under section 108 of the MCA 1980 is that magistrates' courts are not courts of record, so appeals must operate by way of a rehearing. This is typical for appeals to the Crown Court, whereas appeals to the High Court do not ordinarily operate that way.

11.15 Taking these types of contempt cases in magistrates' courts together, it is difficult to conclude that there is a coherent, clear and consistent approach to appeals. Whereas it may be possible to achieve simplicity and clarity by making all contempt appeals from magistrates' courts lie to one court – whether the High Court or the Crown Court – there may be good reasons for preserving the right of appeal to the Crown Court when appealing decisions or orders made under section 12 of the CCA 1981. It may also be thought that appeals against failure to surrender under the Bail Act 1976 should also go to the Crown Court regardless of whether they are dealt with as a summary offence or as contempt. Some consultees may also be of the view that appeals should not lie from a magistrates' court to the High Court in either of the circumstances above. It is not clear at this point that there is any reason to remove the ability to challenge magistrates' courts decisions by way of a case stated appeal or judicial review. We seek views from consultees below.

Appeals to the Court of Appeal (Criminal Division)

11.16 Appeals from first instance contempt decisions of the Crown Court lie to the Court of Appeal (Criminal Division).[20] Although these are the only contempt cases where appeals go to the Court of Appeal (Criminal Division), there is a logic to this route insofar as the appeal of the first instance decision of a criminal court normally lies to a criminal appeals court.[21] However, as contempt is not a criminal offence it is arguable that appeals from Crown Court contempt cases do not need to be dealt with by a specialist criminal appeals court. That being said, ordinarily the principle would be that a matter arising in the criminal jurisdiction would stay in that jurisdiction, and thus go to the Court of Appeal (Criminal Division).

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19 *Haw v City of Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [36].

20 AJA 1960, s 13(2)(c). By virtue of the Senior Courts Act 1981, s 53(2)(b) and (3), an appeal from an order or decision of the Crown Court that lies to the Court of Appeal under section 13 of the AJA 1960 is to be heard by the Criminal Division.

21 The exception is appeals by way of case stated from either a magistrates' court or the Crown Court, which lie to the High Court.

Appeals to the Court of Appeal (Civil Division)

Appeals from the county court, family court, and other inferior courts

11.17 Contempt appeals from the family court,[22] the county court and "any other inferior court where appeals generally lie to the Court of Appeal" lie to the Court of Appeal (Civil Division).[23] A significant qualification to this is that where in the county court the contempt finding was made by a District Judge or Deputy District Judge then the usual route of appeal will be first to a Circuit Judge in the county court.[24] The Circuit Judge may refer it directly to the Court of Appeal (Civil Division).[25]

Appeals from first instance decisions in the High Court and any court having the powers of the High Court

11.18 An appeal from a first instance contempt decision of a single judge of the High Court will lie to the Court of Appeal (Civil Division).[26]

11.19 An appeal from a decision of any other court having the powers of the High Court or of a judge of such a court, will also lie to the Court of Appeal (Civil Division).[27] This category includes the Court of Protection ("CoP").[28] It appears it also includes the Employment Appeal Tribunal ("EAT")[29], the Upper Tribunal ("UT")[30] and the Special Immigration Appeals Commission ("SIAC").[31]

Appeals to the Supreme Court from the High Court and the Court of Appeal

Appeals from the High Court

11.20 In contrast to the first instance contempt decisions of a single judge of the High Court, where appeals lie to the Court of Appeal (Civil Division), appeals from other High Court contempt decisions will lie to the Supreme Court. These include decisions of the

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22 AJA 1960, s 13(2A), which also makes this subject to any provision made under section 56 of the Access to Justice Act 1999, which empowers the Lord Chancellor to, by order, prescribe alternative destinations for appeals.

23 Above, s 13(2)(b).

24 Access to Justice (Destination of Appeals) Order 2016, art 5; CPR, Practice Direction 52A, para 3.4; *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, [2023] 1 WLR 1443 at [30].

25 CPR, r 52.23.

26 AJA 1960, s 13(2)(b).

27 Above.

28 Mental Capacity Act 2005, s 47(1). An appeal also lies from the CoP to the Court of Appeal by virtue of the Mental Capacity Act 2005, s 53(1).

29 Employment Tribunals Act 1996, s 29(2). Further, s 37(1) provides that an appeal on any question of law lies from the EAT to the Court of Appeal with the leave of either the tribunal or the court. Subsection (4) states that this section is without prejudice to s 13 of the AJA 1960. The procedure for appeals under s 37 is governed by Part 52 of the CPR: see CPR, Practice Direction 52, para 11.1.

30 Tribunals, Courts and Enforcement Act 2007, s 25(1)(a) and (2). In any case, s 13(1), (2), and (12)(a) of the TCEA 2007 provides for a right of appeal from the UT to the Court of Appeal on any point of law arising from a decision made by the UT (with some exceptions). The procedure for such appeals is governed by the Tribunal Procedure (Upper Tribunal) Rules (see r 41).

31 Special Immigration Appeals Commission Act 1997, s 7.

High Court where it decides an appeal and decisions of the Divisional Court.[32] The logic to this may be that in "a criminal cause or matter", appeals cannot go to the Court of Appeal (Civil Division) and thus they should leapfrog the Court of Appeal and go to the Supreme Court (though a matter must involve a point of law of general public importance before the Supreme Court will hear it).[33] However, as it does not seem that contempt is a criminal cause or matter for the purpose of appeal routes (as an appeal from a contempt decision of single judge of the High Court goes to the Court of Appeal (Civil Division)), the case for preventing the Court of Appeal (Civil Division) from hearing contempt appeals from all decisions of the High Court is not strong. On the contrary, the Court of Appeal (Civil Division) has considerable contempt expertise. In non-contempt matters where the route of appeal lies from the High Court (including the Divisional Court) to the Court of Appeal (Civil Division), the appeal may be permitted to "leapfrog" the Court of Appeal (Civil Division) and go directly to the Supreme Court, but only provided certain criteria are satisfied.[34] Taken together, the different routes of appeal from the High Court in contempt matters present an unnecessary inconsistency.

Appeals from the Court of Appeal (Civil Division)

11.21 Under section 13 of the AJA 1960, an appeal from an order or decision of the Court of Appeal (Civil Division) lies to the Supreme Court.[35] This means that both first instance decisions of the Court of Appeal (Civil Division) and decisions made on appeal in the Court of Appeal (Civil Division) lie to the Supreme Court.

Appeals from the Court of Appeal (Criminal Division)

11.22 Section 13 of the AJA 1960 does not expressly set out the route of an appeal from an order or decision of the Court of Appeal (Criminal Division). However, the legislative history has led the courts to conclude that these appeals lie to the Supreme Court. While this may seem to be a necessary and obvious conclusion, the path to it was not straightforward and there is a case for clarifying the current position in statute.

11.23 When the AJA 1960 was enacted, there existed the Court of Appeal, which dealt with civil cases, and the Court of Criminal Appeal, which dealt with criminal cases. The relevant provision as originally enacted, section 13(2)(c), therefore referred to these two courts separately. It stated that an appeal would lie "from an order or decision of the Court of Criminal Appeal or the Courts-Martial Appeal Court, to the House of Lords" (the predecessor to the Supreme Court).[36]

11.24 The Criminal Appeal Act 1966 later abolished the Court of Criminal Appeal and provided that the Court of Appeal would consist of a civil and criminal division.[37] It also provided that any reference in pre-existing legislation to the Court of Criminal Appeal should be construed as a reference to the criminal division, and any reference to the

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32 AJA 1960, s 13(2)(c).

33 Senior Courts Act 1981, s 18(1)(a); AJA 1960, s 1(1)-(2).

34 Administration of Justice Act 1969, s 12(2)(a), (c).

35 AJA 1960, s 13(2)(c).

36 Above as originally enacted.

37 Criminal Appeal Act 1966, s 1(1) and (2).

Court of Appeal should be construed as a reference to the civil division.[38] Consequently, section 13(2)(c) of the AJA 1960 continued to provide a route of appeal from (what was now called) the Court of Appeal (Criminal Division) to the House of Lords (as it then was), though the wording of section 13(2)(c) was unchanged.

11.25 However, the Armed Forces Act 2006 amended section 13(2)(c) of the AJA 1960 and, though concerned with the part of the section that referred to the Courts-Martial Appeal Court, the amendment removed the reference to the Court of Criminal Appeal.[39] As a result, section 13(2)(c) no longer expressly mentions the Court of Criminal Appeal or the Court of Appeal (Criminal Division). Subsequently, the reference to the House of Lords was replaced by the Supreme Court.[40] Thus, section 13(2)(c) now states that an appeal from the Court of Appeal lies to the Supreme Court, but makes no reference to the Court of Appeal (Criminal Division), which raises a problem because (as explained at paragraph 11.24 above) references to the Court of Appeal are to be construed as referring to the civil division.

11.26 The issue of whether, and to which court, an appeal under section 13 of the AJA 1960 lies from the Court of Appeal (Criminal Division) was considered in *OB v Director of the Serious Fraud Office*.[41] In that case, the Court of Appeal (Criminal Division) held that, by "applying common law principles of statutory construction, [it should] rectify the statute by re-inserting words that provide a right of appeal from the [Court of Appeal (Criminal Division)] to the Supreme Court".[42] This was in part based on the fact that the court was:

> wholly unable to accept that the legislature had any intention, when enacting the [Armed Forces Act] 2006, of removing the right of appeal from the [Court of Appeal (Criminal Division)] to the Supreme Court in cases of contempt of court.[43]

11.27 The court noted that neither the long title of the Act nor the Explanatory Notes make reference to removing this right of appeal. It concluded that Parliament and the drafter had done this inadvertently "because of a mistaken – but wholly understandable – assumption"[44] that the reference to the Court of Appeal in section 13(2)(c) included both the civil and criminal divisions. Finally, the court held that rectifying section 13(2)(c) in this way would be neither too far-reaching nor unconstitutional; "[t]o the contrary, it preserves an important right of appeal and avoids an outcome which has

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38 Criminal Appeal Act 1966, s 1(6)(a) and (c). See also Senior Courts Act 1981, sch 4, para 3(a) and (c).

39 Armed Forces Act 2006, s 378 and sch 16, para 45(2). The amendment substituted the words in section 13(2)(c) of the AJA 1960 "and from an order or decision of the Court of Criminal Appeal or the Courts-Martial Appeal Court" with "and from an order or decision (except one made in Scotland or Northern Ireland) of the Court Martial Appeal Court".

40 Constitutional Reform Act 2005, sch 9, para 13(7).

41 *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 901, [2012] 1 WLR 3188 at [19].

42 Above at [14] and [24]. See *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592 (Lord Nicholls).

43 *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 901, [2012] 1 WLR 3188 at [25].

44 Above at [28].

no rational justification – crucially, an outcome which was not intended by the legislature".[45]

11.28 Our provisional view, consistent with the existing law, is that the Supreme Court is the correct destination for appeals against first instance and appellate decisions of the Court of Appeal (Civil Division) and Court of Appeal (Criminal Division).

Appeals from first instance decisions of the Supreme Court

11.29 Where a contempt finding is made by a first instance panel of the Supreme Court then section 13 of the AJA 1960 is silent on the route of appeal. It was argued in *Attorney General v Crosland* that "section 13 contains a complete statutory code for appeals" in contempt cases and therefore no such right of appeal exists in these instances.[46] However, the Supreme Court rejected that submission.[47]

11.30 The Court considered the principles in relation to appeals and found that a right of appeal against a first instance decision was both essential and well-established:

> If there were no right of appeal from the decision on contempt of the First Instance Panel, that would represent a serious lacuna in the law. That is because it is well-accepted that there ought to be a right of appeal by the defendant in a contempt matter that may result in imprisonment or a fine. This was expressed in very strong terms by the 1959 Report entitled *Contempt of Court* by *Justice* (chaired by Lord Shawcross). The *Justice* Report preceded section 13 of the Administration of Justice Act 1960 and said, at p 35:
>
> > At present there is no right of appeal against any decision or punishment for any criminal contempt whether it is committed in the presence of the court or out of court. As no human being is infallible, and as any sentence of imprisonment involves a basic question of civil liberty, it is not surprising to find that in every system of law of any civilised State there is always a right of appeal against any sentence of imprisonment. For contempt of court alone can an Englishman be sent to prison by a court from whose decision there is no appeal. … Even in enemy-occupied territory in time of war, there must, under the Hague Convention, always be some right of appeal or petition against any sentence of imprisonment …[48]

11.31 With respect to the effect of article 6, the Court took the view that:

> although it may be that article 6 ECHR does not dictate that there is a right of appeal, we consider that, if at all possible within the bounds of ordinary statutory interpretation, we should strive to interpret the relevant statutory words of section 13

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45 *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 901, [2012] 1 WLR 3188 at [30].

46 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [42] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

47 The decision was by majority (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose), with Lady Arden dissenting at [96]-[153].

48 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [33] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

of the Administration of Justice Act as affording a right of appeal from a panel of the Supreme Court when it is exercising its contempt jurisdiction at first instance.[49]

11.32 Turning then to the AJA 1960, the Court held that as section 13(1) confers a right of appeal from an order or decision of a court in general terms, and "court" is broadly defined, there is a right to appeal first instance decisions of the Supreme Court:

> Bearing in mind the potentially draconian consequences of [a contempt] order or decision, we would expect to see an express exclusion of orders and decisions of the Supreme Court, if an appeal against them were to be excluded, of the type to be found for example at the end of subsection (5) and in subsection (6) in relation to orders made under certain specified statutes. In that context silence, in the absence of any exclusionary reference to the Supreme Court, points towards rather than away from, the existence of a right of appeal from orders or decisions of the Supreme Court made in the exercise of its undoubted original contempt jurisdiction.[50]

11.33 Consequently, the court concluded that there is nothing in the statute to suggest that appeals from an order or decision of the Supreme Court are excluded from the right of appeal provided by section 13 of the AJA 1960. Moreover, the court rejected the argument that it would be a "conceptual impossibility" for an appeal to lie "from one organ of the Supreme Court to another".[51] This is because in this context the Supreme Court is exercising its original jurisdiction by dealing with a contempt in the first instance, as opposed to its appellate jurisdiction.

11.34 The question arises of how an appeal would operate in practice where the number of judges is more limited than in the Court of Appeal. In some circumstances it would be unproblematic. As we discuss in Chapter 8 on procedure in the higher courts, a contested contempt application made in respect of proceedings in the Supreme Court is to be dealt with by a panel of three justices. An appeal against an order or decision of such a panel therefore could be heard by a panel comprised of more than three Justices. Given that the Supreme Court Rules 2009 "do not prescribe how an appeal under section 13(1) [of the AJA 1960] from a panel of justices exercising the Supreme Court's jurisdiction to punish for contempt should be heard,"[52] the court may act in accordance with rule 9(7). This rule states that "[i]f any procedural question arises which is not dealt with by [the] Rules, the Court or the Registrar may adopt any procedure that is consistent with the overriding objective, the Act and [the] Rules". It was held in *Crosland* that this means that effect can be given to the right of appeal

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49 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [33] at [34] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

50 Above at [43] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose). See also [44]. Subsection (5) of s 13 of the AJA 1960 excludes the application of s 13 from certain orders made under s 5 of the Debtors Act 1869; any provision of the MCA 1980; and certain provisions of the County Courts Act 1984. Subsection (6) excludes the application of s 13 to convictions or sentences in respect of which an appeal lies under Part I of the Criminal Appeal Act 1968, or to a decision of the criminal division of the Court of Appeal under that Part of that Act.

51 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [46] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

52 Above at [48] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

from one panel to another, but that it will be "necessarily in an unusual way".[53] In *Crosland* the court noted that in that case it was "practically possible for there to be an enhanced non-conflicted panel of Justices to hear [the] appeal" in that matter.[54]

11.35 Where, however, an alleged contempt occurs before a panel of (for example) nine Justices and the court initiates contempt proceedings on its own motion (rather than proceedings being initiated on application by a party) then it may not be possible to have an enhanced non-conflicted panel for an appeal. One option may be to adopt a procedure in such cases that is akin to the aforementioned procedure for contested contempt applications whereby the matter would be referred to a panel of three non-conflicted Justices. This would be consistent with our provisional proposals relating to procedure in the higher courts. In Chapter 8 we provisionally propose that a court that observes an alleged contempt should not be the same court that conducts the contempt proceedings in circumstances where the allegation is contested, and that the matter should be referred to a different judge.[55]

11.36 It is possible that a non-conflicted panel of three Justices could not be composed. For instance, if the contempt had been before a panel of more than nine Justices then, even using supplementary or acting justices, it would not be possible to compose a non-conflicted panel.[56] This is because although the Constitutional Reform Act 2005 provides for the appointment of acting judges,[57] section 42(1) requires that panels are uneven, consist of a minimum of three judges, and more than half the judges are permanent judges. It might be argued that no appeal should lie at all in that instance. The circumstances are likely to be so rare as to be only theoretical and the consideration of the contempt by more than nine Justices of the highest court can be seen to conclude the matter without any unfairness. However, it may also be that the better approach is that the Supreme Court only make first instance contempt decisions with panels of no more than five Justices so that it would always be possible to compose a non-conflicted panel to hear an appeal. There may also be an argument that there should be an exception to the requirement that more than half the judges must be permanent judges for appeals against first instance contempt decisions of the Supreme Court, which may not enable a larger non-conflicted panel, but would enable a non-conflicted uneven panel of more than three judges.

ROUTES OF APPEAL: OPTIONS FOR REFORM IN CONTEMPT CASES

11.37 With a view to resolving some of the unsatisfactory aspects of the existing routes of appeal, and with a mind to establishing routes of appeal from tribunals and other bodies that would have new contempt powers (given our provisional proposals in Chapter 6), we now set out some provisional proposals and options for achieving clarity, consistency and coherence in contempt appeal routes.

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53 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [48].

54 Above at [46] (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose).

55 See para 8.241.

56 Constitutional Reform Act 2005, ss 39-40, 42(1).

57 Above, s 38.

Appeals from first instance decisions of the Court of Appeal and the Supreme Court

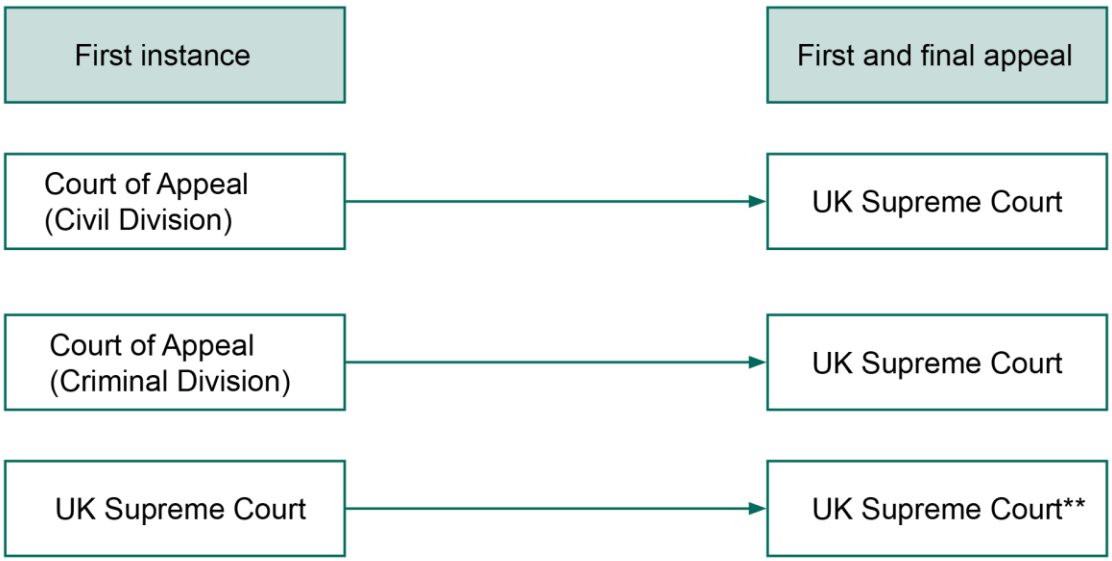
11.38 Where contempt decisions are made at first instance in either division of the Court of Appeal, we provisionally propose that the first appeal should be to the Supreme Court. This would not change the current position.

11.39 Where a contempt decision is made by a First Instance Panel of the Supreme Court, our provisional view is that an appeal should lie to a non-conflicted panel of the Supreme Court, though without a requirement that the non-conflicted appeal panel be larger than the First Instance Panel. To facilitate this, the requirement in section 42(1) of the Constitutional Reform Act 2005 that more than half the judges on a panel are permanent judges would need to be suspended.[58] These approaches would help ensure that there are suitable rights of appeal but without unnecessarily or impractically burdening the highest appellate courts.

11.40 We present the existing and proposed routes of appeal in the following two charts.

Figure 1

Existing routes of appeal from the Court of Appeal and the Supreme Court

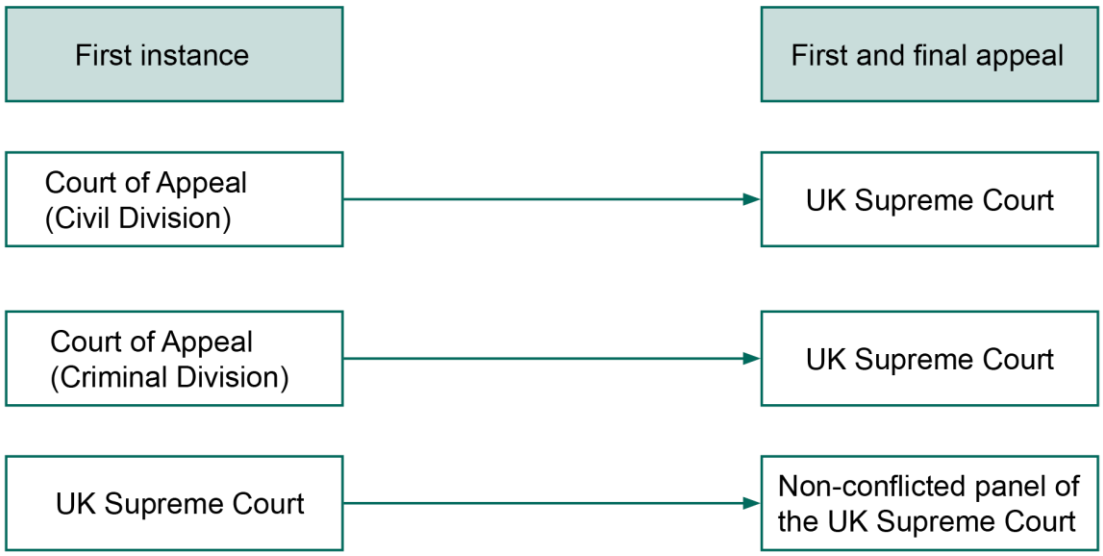


In **Attorney General v Crosland [2021] UKSC 15, the Supreme Court found that it was practically possible in that case for an appeal from a panel of the Supreme Court to lie to an enhanced non-conflicted panel and that this was the appropriate route. However, the Supreme Court did not consider the position where it would not be possible to constitute an enhanced non-conflicted panel.

58 See para 11.36 above.

Figure 2

Provisionally proposed routes of appeals from the Court of Appeal and the Supreme Court



Consultation Question 127.

11.41 We provisionally propose that appeals from first instance contempt decisions of either division of the Court of Appeal should lie to the Supreme Court.

Do consultees agree?

Consultation Question 128.

11.42 We provisionally propose that appeals from first instance contempt decisions of the Supreme Court should lie to a non-conflicted (though not necessarily larger) panel of the Supreme Court.

Do consultees agree?

Appeals from first instance decisions of courts other than the Court of Appeal or the Supreme Court

11.43 Where first instance decisions are appealed from other courts, we present two options. In presenting these options we use the same approach that is taken in Chapter 6 where we set out the courts, tribunals and other bodies that have contempt protection. That is, in these options we name specific bodies and their routes of appeal, though for the purposes of simplicity we do not in this discussion name every

protected body.[59] In addition, rather than using a residual category of courts that have the powers of the High Court (as section 13 the AJA 1960 does) we use a residual category of superior courts of record. We also include in our options the routes of appeal from tribunals and other bodies that do not currently have contempt protection and powers, but which would have protection and powers under our provisional proposals in Chapter 6.[60]

11.44 We are open to consultees' views that would vary these options, but we do not provide variations in the consultation questions below. Rather, we set out two general alternatives. Both options avoid the "leapfrog" appeals (for example, avoiding appeals going directly from the High Court to the Supreme Court) for which the AJA 1960 provides. Both options seek to achieve simplicity and clarity so that all court users and those who advise them (including non-legal professionals, such as advisers from Citizens Advice) will find it easier to understand the court to which an appeal lies.

Option 1: A simple, vertical structure

11.45 In this option:

(1) appeals from first instance contempt decisions in all inferior courts (including magistrates' courts in all circumstances) and other bodies that have contempt protection (for example, the Parole Board) and the Crown Court would lie to the High Court.

(2) appeals from first instance decisions of the First-tier Tribunal and the Employment Tribunals would lie to the UT and EAT respectively.

(3) appeals from first instance or appellate decisions of the High Court (whether of a single judge or of the Divisional Court), the Court of Protection, UT, EAT and SIAC and any other superior court of record, would lie to the Court of Appeal (Civil Division), and from there would lie to the Supreme Court.

11.46 The advantage of this option is its simplicity and consistency. Unlike the current law, where there are multiple variations of appeal routes depending on the type of contempt (for appeals from magistrates' courts), and the court in which the first instance decision was made, contempt appeals under this option would all follow the same route. Matters from magistrates' courts would go to the High Court whether by way of rehearing, case stated or judicial review. When matters go to the Court of Appeal, they would go to the Civil Division, reflecting the fact that contempt is not a criminal offence and building on the existing core of expertise and consistency in the Court of Appeal (Civil Division).

11.47 The disadvantage of this option is that it may place considerable strain on the resources of the High Court, with all contempt appeals lying to the High Court. Those resources would already be subject to greater demands given our provisional proposals in Chapter 8 that protected inferior courts, tribunals and other bodies, as

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[59] In Chapter 6 we set out the inferior courts and other bodies, such as the Parole Board, that have contempt protection: see from para 6.68 above.

[60] See para 6.68 above.

well as some senior courts, should be able to refer matters to the High Court for first instance decisions.

11.48 There may be ways of retaining the simplicity of this option but reducing some strain on the High Court by, for example, sending appeals from the Crown Court to the Court of Appeal (Criminal Division), and/or sending to the Court of Appeal (Civil Division) any appeals from first instance decisions of tribunals or other bodies that are superior courts of record. It may also be possible to ease the burden on the High Court by sending to the Crown Court appeals from contempt findings in magistrates' courts, which would replicate the usual route of appeal for criminal matters heard in magistrates' courts, though it would move the burden to the Crown Court. This variation is a feature of option 2. However, we present this proposal in its simplest form in the consultation question below.

Option 2: Mirror the ordinary routes of appeal in civil and criminal courts

11.49 This option would see contempt appeals follow the same routes of appeal that ordinarily apply in criminal and civil courts. In this option:

(1) appeals from first instance decisions of inferior civil courts (including from magistrates' courts exercising their civil jurisdiction) and other bodies that have contempt protection (for example, the Parole Board) would lie to the High Court, and from there to the Court of Appeal (Civil Division), and then to the Supreme Court.

(2) appeals from first instance decisions of magistrates' courts (other than when exercising their civil jurisdiction) would lie to the Crown Court, and from there to the Court of Appeal (Criminal Division), and then to the Supreme Court.

(3) appeals from first instance decisions of the First-tier Tribunal and the Employment Tribunals would lie to the UT and EAT respectively.

(4) appeals from first instance decisions of superior civil courts, including the High Court (whether from a single judge or from the Divisional Court), the Court of Protection, UT, EAT and SIAC would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.

(5) appeals from first instance decisions of the Crown Court would lie to the Court of Appeal (Criminal Division), and then to the Supreme Court.

11.50 The advantage of this option is that it reflects the current routes of appeal in other areas of law. It would not place the same demand on High Court resources as option 1 would, but it would potentially increase demands on the Crown Court if more cases may be appealed there from magistrates' courts. A disadvantage in terms of clarity and simplicity is that this option would leave most appeals from magistrates' courts going to the Crown Court for a rehearing (with only cases where civil jurisdiction is exercised going to the High Court for a rehearing), but all appeals by way of case stated and judicial review applications would go to the High Court.

11.51 It would also be possible to set out specifically which appeals from the magistrates' court would go to which venues. For example, it could be stated that all appeals from findings of contempt for taking photographs in court contrary to section 9 of the CCA

1981 go to the Crown Court, regardless of whether the magistrates' court was exercising civil or criminal jurisdiction at the time of the contempt. Though we do not do so here and present the options in simple form, we are open to consultees' views on these matters.

11.52 Both of our options for reform of the routes of appeal contemplate contempt appeals from the Divisional Court going to the Court of Appeal (Civil Division), rather than to the Supreme Court as they currently do.[61] It is not clear if the existing position has emerged over time and is anomalous or if there is a rational reason for it. If the reasoning is that, because a Divisional Court will include a Lord or Lady Justice of Appeal (which would be a point not limited to contempt appeals), the reality or perception is that the appeal would not be going to a sufficiently distinct body, then there may be a principled objection to contempt appeals going from the Divisional Court to the Court of Appeal. If the reasoning is that contempt is a criminal cause or matter then that has not been explicit.[62] However, whatever the rationale for the existing position, our provisional view is that the route of appeal for first appeals from contempt matters in the Divisional Court should be reformed. The justification for this is twofold:[63]

(1) because permission to appeal to the Supreme Court will only be granted if the appeal raises a point of law of general public importance, there is no effective right of appeal from a first instance decision of the Divisional Court; *and*

(2) it is not essential to remove the requirement that an appeal to the Supreme Court raises a point of law of general public importance because (unlike the position for appeals from first instance contempt decisions of the Court of Appeal) there is a practical alternative, which is for Divisional Court appeals to go to the Court of Appeal (Civil Division).

In proposing reform, we note that these are the only appeals from a decision of the Divisional Court that may result in the imprisonment of the defendant, and so it is inappropriate that the right of appeal may be constrained by a requirement that there is a point of law of general public importance.

11.53 We present the existing and proposed routes of appeal in the following three charts.

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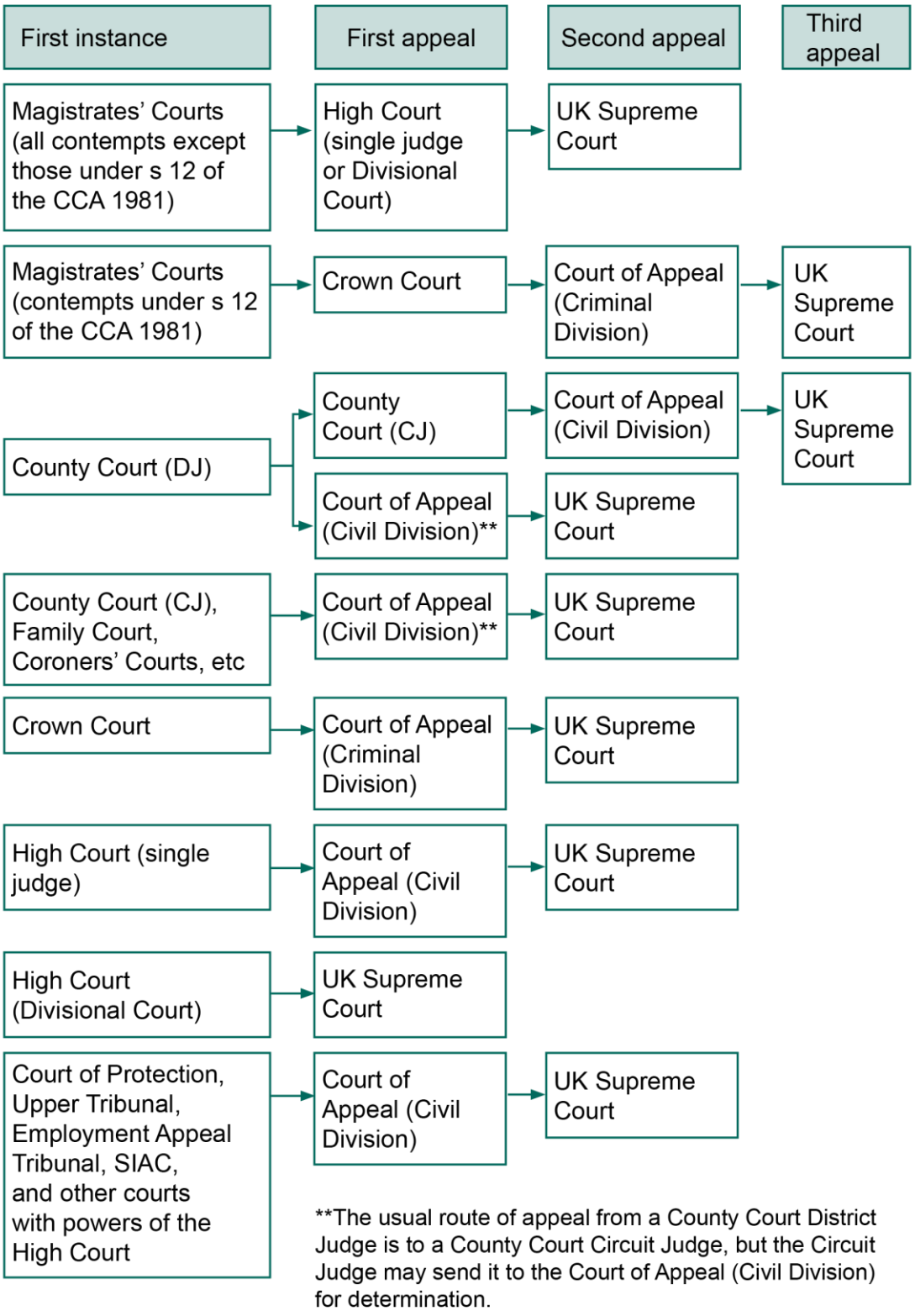
61 See para 11.20 above.

62 See para 11.20 above.

63 See also paras 11.99 to 11.104 below.

Figure 3

Existing routes of appeal from courts and tribunals other than the Court of Appeal and the Supreme Court



**The usual route of appeal from a County Court District Judge is to a County Court Circuit Judge, but the Circuit Judge may send it to the Court of Appeal (Civil Division) for determination.

Figure 4

Reform option 1 (simple, vertical structure): appeals from courts and tribunals other than the Court of Appeal and the Supreme Court

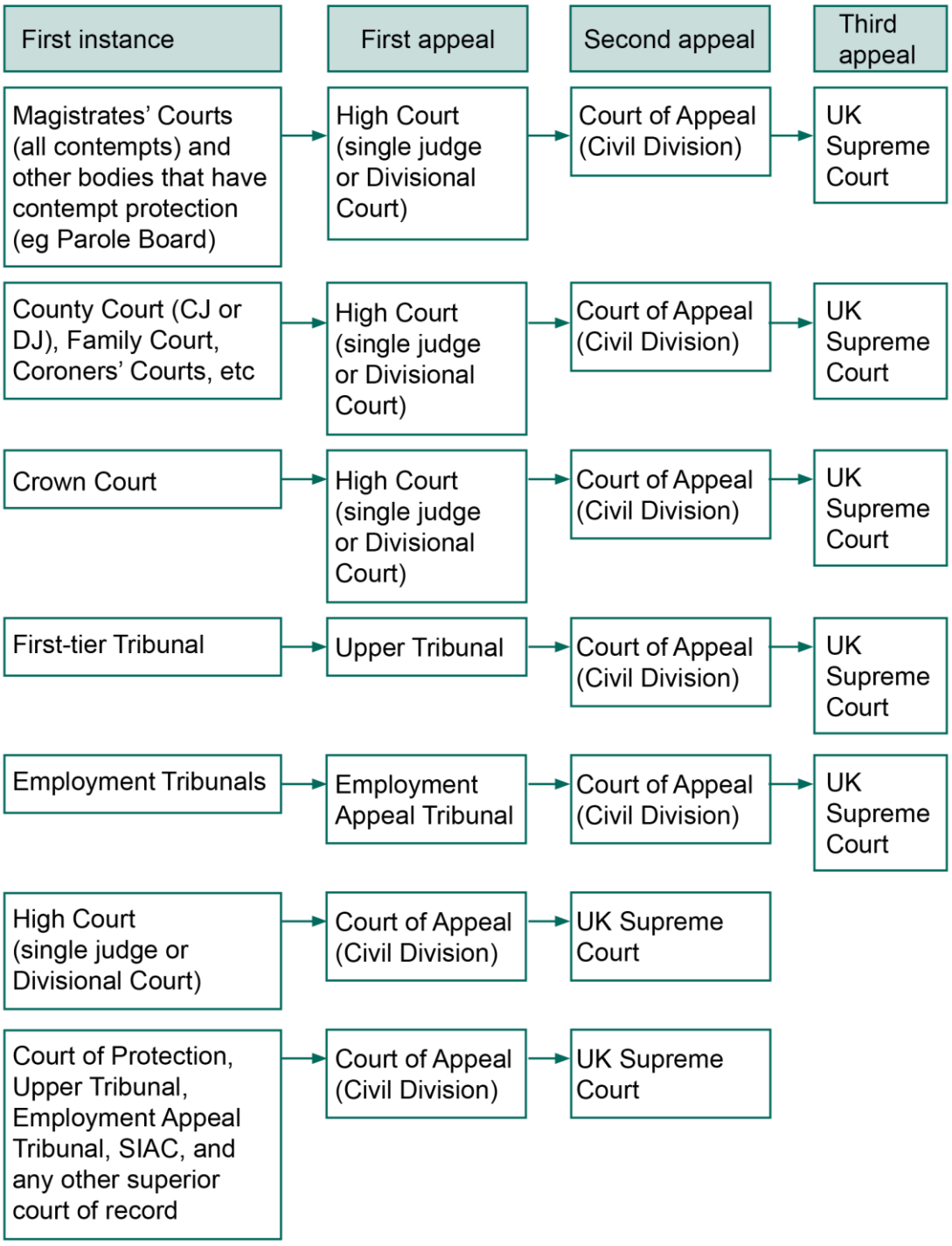
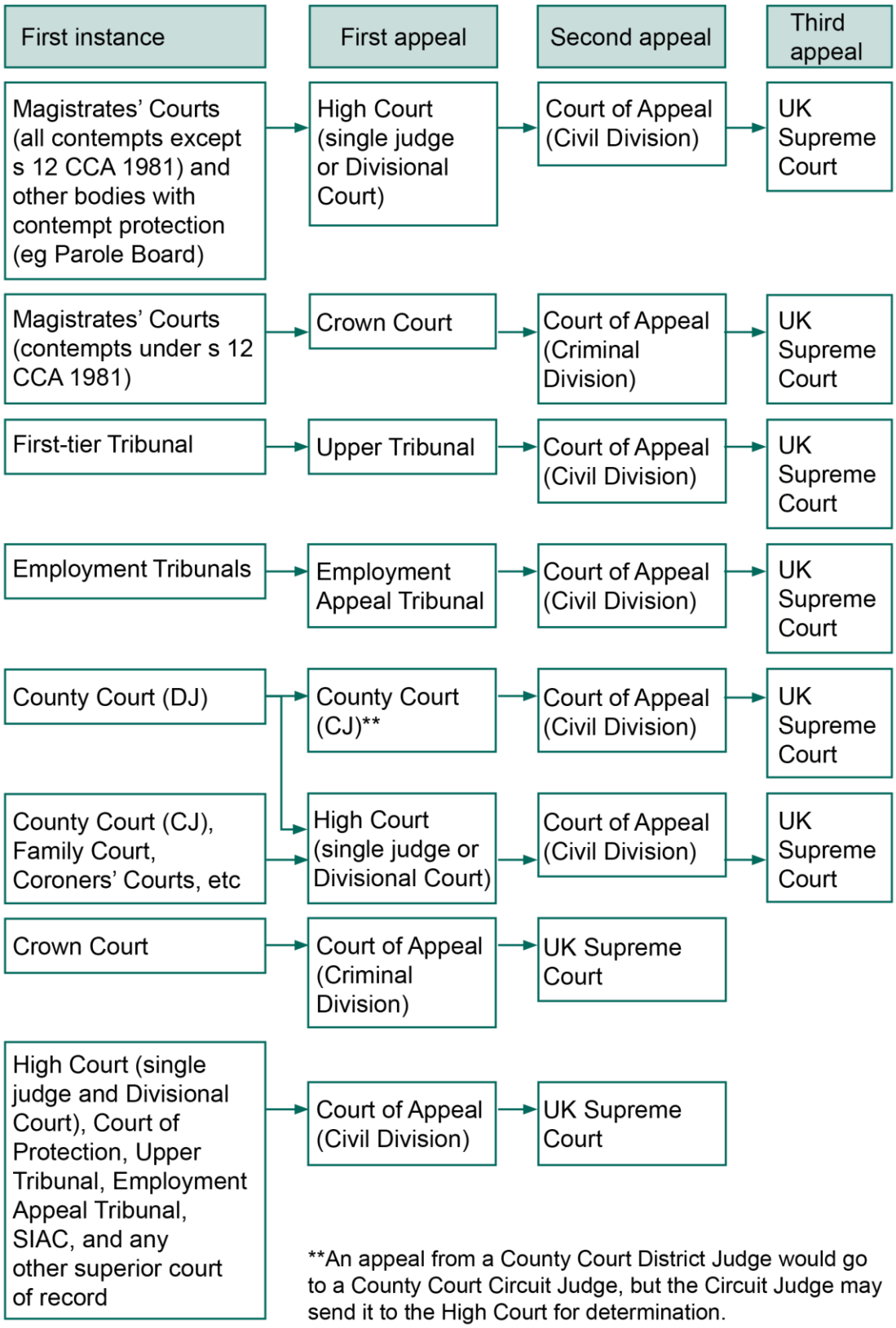


Figure 5

Reform option 2 (mirroring ordinary appeal routes): appeals from courts and tribunals other than the Court of Appeal and the Supreme Court



**An appeal from a County Court District Judge would go to a County Court Circuit Judge, but the Circuit Judge may send it to the High Court for determination.

Consultation Question 129.

11.54 We invite consultees' views on the following options for streamlining routes of appeal from first instance decisions of courts and tribunals (other than the Court of Appeal and Supreme Court).

Option 1

(1) 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 the High Court appeal decisions would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.

(2) Appeals from first instance contempt 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.

Option 2

(3) In the civil courts:

(a) Appeals from first instance contempt decisions of lower civil courts (including from magistrates' courts exercising their civil jurisdiction) and tribunals (including tribunals that are superior courts of record) would lie to the High Court, and from there to the Court of Appeal (Civil Division), and then to the Supreme Court.

(b) Appeals from first instance contempt decisions of higher civil courts (including the High Court and the Divisional Court) would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.

(4) In the criminal courts:

(a) Appeals from first instance contempt 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.

(b) Appeals from first instance contempt decisions of higher criminal courts (specifically, the Crown Court) would lie to the Court of Appeal (Criminal Division), and then to the Supreme Court.

Do consultees prefer Option 1 or Option 2?

Do consultees think that the routes of appeal should change but that neither option 1 nor option 2 is appropriate? If so, what should they be?

PERMISSION TO APPEAL

11.55 In some circumstances it is necessary to obtain permission from the court to bring an appeal from an order or decision made in respect of contempt proceedings. In this part of the chapter, we consider these circumstances and the criteria that must be satisfied in order to be granted permission.

11.56 First, we make provisional proposals for reform such that the circumstances in which permission is required would be expanded. The aim of this would be to achieve a more coherent and consistent appeals framework, in which appellate court time is not being used unnecessarily and only arguable appeals are heard. Secondly, we make provisional proposals with respect to the tests for permission to appeal.

The requirement for permission: the current law

11.57 In some circumstances a party must obtain permission to appeal before a court will hear an appeal from a contempt order or decision.

Appeals from magistrates' courts to the Crown Court and the High Court

11.58 There is no permission requirement when appealing a decision of a magistrates' court.

11.59 Where there is a route of appeal from magistrates' courts to the Crown Court (which there will be where there has been a contempt in the face of the court under section 12(5) of the CCA 1981, as we explain at paragraph 11.11 above), there is no requirement to obtain permission to appeal against a finding of contempt or a sentence for contempt.[64]

11.60 Where there is a route of appeal to the High Court (which there will be in all other circumstances) then there is no permission requirement. The Civil Procedure Rules do not state that permission is required when appealing a decision of a magistrates' court, and nor do the Criminal Procedure Rules or the Magistrates' Court Rules address permission requirements. Consequently, it seems that there is no permission requirement to appeal from the magistrates' court to the High Court.

Appeals from the county court, family court and High Court to the Court of Appeal (Civil Division)

11.61 Where appeals lie to the Court of Appeal (Civil Division) then permission will be required:

> where the appeal is from a decision of a judge in the County Court or the High Court or … from a decision of a judge in the family court, except where the appeal is against … a committal order made in the County Court or by a single judge of the High Court not sitting on an appeal. [65]

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64 MCA 1980, s 108(1).

65 CPR, r 52.3(1)(a)(i).

11.62 A committal order has been defined by courts as "an order which commits a party to prison".[66] This includes a suspended committal order.[67] A committal order does not include an order made against a company (which cannot be imprisoned and can only be subject to financial sanctions)[68] or an order that *rejects* an application for committal (including where it is accompanied by an order for costs); permission to appeal will be required in those instances.[69] This is because the policy underlying the rule that permission is not required to appeal against committal orders is to provide safeguards for defendants whose liberty is at risk.

11.63 An order that does nothing more than make a finding of contempt does not constitute a committal order.[70] This is the case even where the court makes a finding of contempt and adjourns the question of sanction until a later date but forecasts the imposition of a custodial sentence at the first hearing.[71] Therefore, permission is required where a contemnor seeks to appeal against a finding of contempt before the sanction has been imposed.[72] Where a committal order is made then the contemnor can appeal without permission against the committal order on the ground that the contempt *finding* should not have been made.[73] If the court instead imposes a fine, for example, the contemnor can also appeal against the fine on the ground that the contempt finding should not have been made, but permission will be needed.[74]

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66 *Government of Sierra Leone v Davenport (No 2)* [2002] EWCA Civ 230, [2003] CLY 303 at [8]; *Nambiar v Solitair Ltd* [2022] EWCA Civ 1135 at [34]. It has also been said in more general terms that Parliament intended that no permission should be required where a person has been "deprived of their liberty for contempt of court": *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [32].

67 *Wilkinson v Lord Chancellor's Department* [2003] EWCA Civ 95, [2003] 1 WLR 1254 at [57], by Hale LJ (as she then was): "Although a suspended committal order does not immediately deprive the contemnor of his liberty …, it hangs a sword of Damocles over his head which puts his liberty at much greater risk than did the order which he has been found to have breached. To the extent that there is any doubt about the meaning of the rules, it should be resolved in favour of the citizen whose liberty is thus put in jeopardy. In our judgment, therefore, a suspended committal order is a committal order for the purpose of CPR r 52.3(1)(a) and may be appealed without permission". See also See *Solicitor General v Ellis* [2023] EWHC 604 (KB) at [70] and *Ellis v Solicitor General* [2023] EWCA Civ 585, where the order was not suspended but would not take effect until a later date.

68 *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898, [2012] 1 WLR 223.

69 *Government of Sierra Leone v Davenport* [2002] EWCA Civ 230, [2003] CLY 303; *Barnet LBC v Hurst* [2002] EWCA Civ 1009; [2003] 1 WLR 722; *M v M (Breaches of Orders: Committal)* [2005] EWCA Civ 1722, [2006] 1 FLR 1154; *Kynaston v Carroll* [2004] EWCA Civ 1434.

70 *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605; *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898, [2012] 1 WLR 223.

71 *Nambiar v Solitair Ltd* [2022] EWCA Civ 1135. See also *Solitair Ltd v Nambiar* [2021] EWHC 49 (Comm) at [132].

72 See *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [42]: "*Masri* and *Nambiar* demonstrate that unless and until an order of committal is made, any appeal needs permission".

73 *Nambiar v Solitair Ltd* [2022] EWCA Civ 1135 at [36] (Simler LJ) (as she then was); *Business Mortgage Finance 4 Plc v Hussain* [2022] EWCA Civ 1264, [2023] 1 WLR 396 at [6]; *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [39] to [40], by Males LJ.

74 *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [42].

Appeals from the Crown Court to the Court of Appeal (Criminal Division)

11.64 Permission to appeal is not required from an order or decision of the Crown Court made in the exercise of its jurisdiction to punish for contempt of court.[75]

Appeals to the Supreme Court

11.65 Permission is always required for contempt appeals to the Supreme Court.

11.66 Under the Criminal Appeal Act 1968, appeals from the Court of Appeal (Criminal Division) to the Supreme Court require permission.[76]

11.67 Under the Civil Procedure Rules, permission to appeal to the Supreme Court is required, which will be where the appeal is from a decision of:

- "a Divisional Court" (which will be an appeal from a first instance decision);[77]
- "a single judge of the High Court made on appeal"; [78] or
- "the Court of Appeal" (meaning the Civil Division) (which will be an appeal from either a first instance decision or a decision made on appeal).[79]

Appeals from a decision of a First Instance Panel of the Supreme Court to the Supreme Court

11.68 No statutes or rules state whether permission is required to appeal from a first instance Supreme Court contempt decision.

11.69 The Supreme Court itself has not made a determination about whether permission is required. In the first *Attorney General v Crosland* case,[80] a First Instance Panel of the Supreme Court made a finding of contempt and made an order for costs against Mr Crosland, for breach of an embargoed judgment. Mr Crosland sought to appeal this. The same panel which made the finding of contempt granted permission to appeal, "insofar as there *may* be a requirement of permission".[81] The second panel noted that "Mr Crosland obtained permission to appeal (*if required*)".[82]

The requirement for permission: the case for reform

11.70 In pre-consultation meetings we heard views from some stakeholders in favour of requiring permission in fewer circumstances than under the current law, and from

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75 Criminal Appeal Act 1968, s 18A; CrimPR, r 39.3 (notes).

76 Above, s 33(2).

77 CPR, r 52.3(1)(c)(i), r 52.7A. Rule 52.3A states who can grant permission and the time limits for lodging an appeal where an appeal is one to which r 52.3(1)(c)(i), (ii) or (iii) applies.

78 Above, r 52.3(1)(c)(ii), r 52.7A.

79 Above, r 52.3(1)(c)(iii), r 52.7A.

80 *Attorney General v Crosland* [2021] UKSC 15, [2021] 4 WLR 103.

81 *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367 at [15]. Emphasis added.

82 Above at [53]. Emphasis added.

others in favour of requiring permission in a wider range of circumstances. We now turn to consider these views and options for reform below.

Arguments for reducing the circumstances in which permission is required

11.71 The variations in the circumstances in which a party can appeal as of right to the Court of Appeal (Civil Division) in contempt cases can cause confusion for parties. As stated above, appeals do not require permission where the appeal is against a committal order made in the county court or by a single judge of the High Court that is not sitting on an appeal. In our pre-consultation engagement, we heard concerns from some members of the senior judiciary that this is unclear. One judge told us that "there is a lack of clarity as to whether you should wait [to appeal] until the order for committal [is made]" and attributed this problem to the "lingering difference between findings and applications for committal".

11.72 This judge illustrated their point by sharing an example of a contempt appeal in which a finding of contempt had been made against a contemnor, and the contemnor waited until after sentencing to appeal. At the sentencing hearing, the judge ultimately decided not to impose a sanction, leaving the contemnor with a finding of contempt which they could not appeal as of right. The judge considered this to be problematic and suggested that permission should not be required to appeal against both findings of contempt and committal orders. Such a reform would mean that, regardless of whether a committal order is made, contemnors would be able to appeal to the Court of Appeal (Civil Division) as of right. Consequently, the permission requirements would not vary depending on whether a person appeals before or after sentencing, or what the ultimate sanction is. This would go some way in simplifying an area of the contempt appeals system that stakeholders consider to be confusing.

11.73 While removing the permission requirement to appeal against a finding or a sanction other than committal would achieve clarity and consistency, this is not necessarily a sufficient argument for allowing appeals as of right in more cases. The objectives of clarity and consistency could also be achieved by expanding the circumstances in which permission is required. For example, requiring permission to appeal against committal orders would also overcome the current problem that whether permission is required depends on what stage the decision is appealed. Such a requirement would also prevent the granting of permission from being dependent on whether the sanction is imprisonment. We discuss in the next section why imposing permission requirements in almost all circumstances would address the problems related to vexatious claims and achieve consistency with the permission requirements in criminal appeals.

Arguments for expanding the circumstances in which permission is required

11.74 Both the case law and comments from stakeholders in pre-consultation meetings reveal some support for expanding the circumstances in which permission is required to appeal in contempt cases. The arguments in favour of limiting the unfettered right of appeal tend to be based on three concerns: first, it is not appropriate where contemnors have shown particular disrespect for the administration of justice; secondly, it exposes the courts to vexatious appeals; and thirdly, it does not stand up to comparison with criminal appeals, where permission is always required.

Contemnors who have shown particular disrespect for the administration of justice

11.75 The courts have expressed some support for introducing a permission requirement to appeal against a committal order, arising from concerns about contemnors who continue to flout the administration of justice during the original contempt proceedings and/or the appeal proceedings. This was considered by the Court of Appeal (Civil Division) in *Thursfield v Thursfield*, which concerned a contemnor's appeal against a 24-month committal order for breach of a disclosure order.[83] The contemnor had not yet served any of the sentence because he did not attend the committal hearing, despite being ordered to do so. He was also absent from the appeal hearing. In dismissing the appeal, Jackson LJ and Beatson LJ both suggested that the case "call[s] for the attention of law reformers":[84]

> It may be thought that persons who have been committed to prison for contempt should only be entitled to appeal with permission. Even if it is not thought appropriate to impose a general requirement for permission in committal cases, I would suggest that at the very least there should be a permission requirement in cases where the appellant has refused to submit to the jurisdiction of the court.[85]

11.76 Lord Justice Beatson said the lack of a permission requirement when appealing a committal order to the Court of Appeal (Civil Division) "risk[s] the reputation of the court and [is] an affront to the administration of justice".[86]

11.77 However, introducing a permission requirement solely where the appellant has refused to submit to the jurisdiction of the court would not simplify the law; rather, it would introduce another exception. This would risk adding further complexity and inconsistency to the contempt appeals framework. Nonetheless, it is clear there is much frustration among judges regarding the lack of permission requirements in some cases.

Unmeritorious and vexatious appeals

11.78 Our pre-consultation engagement also highlighted concerns about litigants bringing unmeritorious appeals to the Court of Appeal (Civil Division), which they may do without permission under the current law. Introducing permission requirements in more circumstances may prevent courts from spending unnecessary time and resources on contempt appeals.

11.79 One judge told us that "the lack of a permission filter has been a real issue" in a number of cases, citing as an example *Ellis v Solicitor General*.[87] In *Ellis*, the appeal was against a committal order made for breach of a general civil restraint order, which is a type of order that is imposed to prevent litigants from making unmeritorious claims and applications in a court. The litigant was described by the court as having acted "unceasingly and vexatiously over many years" as he made "the same assertions of

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83 *Thursfield v Thursfield* [2013] EWCA Civ 840, [2014] 1 FLR 389.

84 Above at [45] (Jackson LJ), [47] (Beatson LJ).

85 Above at [45] (Jackson LJ); see also the comments of Beatson LJ at [47].

86 Above at [49].

87 *Ellis v Solicitor General* [2023] EWCA Civ 585.

fraud and corruption again and again" which "inevitably fail".[88] The judge described the behaviour in *Ellis* as "a strong affront to the administration of justice [which] ought to be subject to a permission filter", highlighting the time, cost and resources it takes to deal with such appeals.

Comparison with criminal appeals

11.80 When appealing to the Court of Appeal (Civil Division) against a committal order, the absence of a permission requirement is justified on the grounds that the contemnor has lost their liberty. Similarly, no permission is required to appeal a contempt matter from the Crown Court to the Court of Appeal (Criminal Division).[89] However, in criminal cases, permission is required for an appeal from the Crown Court to the Court of Appeal (Criminal Division).[90]

11.81 This contrast has been observed in appellate courts. In *Al-Rawas v Khan*, Coulson LJ commented that "[t]here can be no justification in requiring all criminal and civil litigants to seek permission to appeal, yet allowing contemnors the right to circumvent such a filter".[91] Similarly, the court in *Deutsche Bank AG v Sebastian Holdings Inc* explained that the lack of a permission requirement in contempt cases may be considered "anomalous, as permission is needed to appeal against conviction or sentence for even the most serious criminal offences".[92] We heard similar concerns from a member of the senior judiciary: "Considering that you need permission to appeal a life prison sentence, why not contempt?"

Provisional proposals

11.82 As the preceding discussion indicates, there are arguments both for reducing and expanding the circumstances in which permission is required to appeal in contempt cases. Our provisional view is that the arguments for expanding permission requirements are significantly more persuasive.

11.83 We provisionally propose that permission to appeal should be required in all circumstances, except from magistrates' courts. This is because a magistrates' court is not currently a court of record. As such, there is no routine record of reasons that

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88 *Ellis v Solicitor General* [2023] EWCA Civ 585 at [4], citing *Spivac v Ministry of Justice, Ministry of Justice v Ellis* [2018] EWHC 798 (QB) (May J).

89 See para 11.59 above.

90 Permission may be given either by certification by the trial judge within 28 days of the finding, or leave may be given by the Court of Appeal: Criminal Appeal Act 1968, s 1(2). There is a further safeguard in the process; where permission is refused by a single judge of the Court of Appeal (Criminal Division), then the application may be renewed to be determined by a panel of three judges in that court: s 31(3), CrimPR, r 36.5. See also *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [40].

91 *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671, [2022] Costs LR 817 at [18].

92 *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWCA Civ 191, [2023] 1 WLR 1605 at [40].

would enable an appellate court to decide the matter without a rehearing, and thus requiring permission would be neither practical nor fair.[93]

11.84 Subject to the exception regarding magistrates' courts, the effect of this proposal would be that permission would be required to appeal in all circumstances, including where committal has been ordered, and whatever the route of appeal (including as modified by option 1 or option 2 above). It would mean that permission is always required to appeal against decisions or orders of the county court, the family court, the Crown Court , the High Court, including the Divisional Court, and the Court of Protection, regardless of whether the appeal is from a first instance or appeal decision. It would include a permission requirement for appeals against a contempt decision of a First Instance Panel of the Supreme Court (where the current position is unclear).

11.85 This change in the law is justifiable not only for reasons of clarity and consistency, but also for the effective use of court resources. It would bring clarity as it would no longer matter whether the contempt was appealed before or after sentencing, nor what the ultimate sanction was. This would bring internal consistency across all contempt appeals, as well as external consistency with criminal appeals, where permission is required. Further, it would conserve the resources of the court as permission filters would prevent vexatious litigants with unmeritorious claims from appealing as of right.

11.86 Allowing appeals as of right against committal orders may have been necessary in the past when there were fewer procedural safeguards in place for defendants, but contempt appeals as of right are less justifiable now. This point holds even more force in light of the contempt procedure that we provisionally propose in Chapter 8, which would harmonise and improve the procedural safeguards in all contempt cases.

11.87 The effective and appropriate use of court resources is important, and a permission requirement would assist in that regard. The courts have indicated that they are acutely aware of fairness requirements and article 6 rights such that the circumstances in which the refusal of permission or conditions placed upon the continuation of an appeal would be justified "are likely to arise very rarely".[94] However, a permission requirement would serve to ensure that the courts could filter out appeals that are, for example, totally without merit and lodged for ulterior motives. In *Al-Rawas*, it was said of the contemnors that "their objective throughout, and over a considerable number of years, has been to disrupt, frustrate and protract proceedings and to avoid compliance with court orders and ultimately to evade [paying the judgment sum]".[95] On appeal, Coulson LJ found that the contemnors:

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93 In the criminal context we are currently reviewing criminal appeals, including from the magistrates' courts. For a detailed explanation of process in the magistrates' courts, see Criminal Appeals (2023) Law Commission Issues Paper. That project is also exploring whether routine recording of magistrates' courts' cases might be introduced and the right to a rehearing replaced by an appeal by way of review. In the event that were to happen then our provisional position regarding permission in contempt appeals would be reconsidered.

94 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 639 at [28]; see also *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671, [2022] Costs LR 817 at [20].

95 *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671, [2022] Costs LR 817 at [9]; *Hassan Khan & Co v Al-Rawas* [2021] EWHC 3229 (QB) at [33].

> endeavoured to take advantage of the automatic right to appeal … in order to prolong proceedings and delay payment of the sums due. … [They] never had any genuine intent to advance this appeal in a legitimate fashion. It was a sham from start to finish.[96]

11.88 Such conduct, as the court observed in *Al-Rawas*, is "a long way outside the norm".[97] Nevertheless, without a permission requirement, appeals can currently proceed in such circumstances.

Consultation Question 130.

11.89 We provisionally propose that permission should be required to appeal against a finding of contempt or against a sanction imposed for contempt, other than where the appeal is from a magistrates' court.

Do consultees agree?

The tests for permission to appeal

11.90 Under the current law, the tests that must be satisfied for permission vary depending on the court from which the decision is appealed. We begin by looking at appeals in civil and criminal courts, provisionally proposing that the current tests for permission should continue to apply, other than for first appeals to the Supreme Court. We then turn to first appeals to the Supreme Court.

Appeals in civil courts

11.91 To obtain permission to appeal against a decision made at first instance, rule 52.6 of the Civil Procedure Rules states that the court must consider that "the appeal would have a real prospect of success" or that "there is some other compelling reason for the appeal to be heard".[98]

11.92 The threshold is higher in respect of second appeals, where it is not enough that the appeal would have a real prospect of success. Permission to appeal to the Court of Appeal (Civil Division) against a decision that was itself made on appeal will only be granted where the court considers that the appeal "would have a real prospect of success" and either "raise[s] an important point of principle or practice" or that "there is some other compelling reason for the Court of Appeal to hear it".[99]

11.93 There is a specific test for permission to appeal in contempt proceedings where the appeal lies to the Supreme Court. The court from which the appeal lies may grant permission only if that court certifies that a point of general public importance is

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96 *Al-Rawas v Hassan Khan & Co* [2022] EWCA Civ 671, [2022] Costs LR 817 at [26] and [31].

97 Above at [31].

98 CPR, r 52.6.

99 Above, r 52.7.

involved in the decision and it appears to that court that the point is one which ought to be considered by the Supreme Court.[100] We return to this test below.

Appeals in criminal courts

11.94 As stated above, no permission is required in contempt cases to appeal from decisions of the magistrates' courts and the Crown Court. In criminal cases, the test for permission to appeal to the Court of Appeal (Criminal Division) is whether the grounds of appeal are "arguable", meaning that the appellant has "(at least) a reasonable or real prospect of succeeding".[101]

11.95 The test for permission to appeal from the Court of Appeal (Criminal Division) to the Supreme Court is the same as the test for permission to appeal to the Supreme Court in civil proceedings.

> Leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.[102]

Provisional proposals

11.96 We have heard no stakeholder views about what the tests should be for permission and our provisional view is that there is no reason to depart from the established tests. As such, we provisionally propose that the tests in contempt appeals, other than for first appeals to the Supreme Court, should be:

(1) In the civil courts, other than for a first appeal to the Court of Appeal (Civil Division), the tests that are currently used for contempt appeals (in circumstances where permission is required);

(2) in the criminal courts, the tests that are currently used for criminal appeals; and

(3) in the Supreme Court, for the hearing of cases that have been heard at least once on appeal, the tests that are currently used for Supreme Court appeals.

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100 CPR, r 52.7A. Where permission is sought from the Supreme Court, see Supreme Court Practice Direction 3, para 3.3.3: "Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal".

101 *R v Gohil* [2018] EWCA Crim 140, [2018] 1 Cr App R 30 at [125].

102 Criminal Appeal Act 1968, s 33(2); see also Supreme Court Practice Direction 3, para 3.3.3.

Consultation Question 131.

11.97 We provisionally propose that, other than for first appeals to the Supreme Court, where appeals against contempt decisions or orders require permission then the tests for permission should be the same as those that currently apply in civil and criminal courts.

The effect of this would be the following:

(1) permission would be granted for first instance appeals:

(a) in the civil courts, where the appellant has a real prospect of success or there is some other compelling reason for the appeal to be heard; and

(b) in the criminal courts, where the appellant has a reasonable or real prospect of succeeding;

(2) permission would be granted for second appeals where the appellant has a reasonable prospect of success and the matter either raises an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it; and

(3) permission would be granted for second or subsequent appeals to the Supreme Court where a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.

Do consultees agree?

First appeals to the Supreme Court

11.98 As discussed from paragraph 11.29 above, there is uncertainty about whether permission is required to appeal from a Supreme Court decision where the Supreme Court dealt with the contempt at first instance. Without deciding that question, the Court heard the appeal in *Crosland,*[103] but it is unclear what test was or would have been employed by the Court in agreeing that the appeal could be heard.

11.99 The Supreme Court is the most senior court in the UK. It ordinarily only hears matters that:

raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will

[103] *Attorney General v Crosland* [2021] UKSC 58, [2022] 1 WLR 367.

already have been the subject of judicial decision and may have already been reviewed on appeal.[104]

11.100 The requirement that an appeal must raise a point of law of general public importance is ordinarily appropriate because appeals to the Supreme Court have normally already been considered on appeal at least once. However, this will not always be the case as some appeals to the Supreme Court are first appeals. Where the appeal is from a first instance decision of either division of the Court of Appeal then the matter will not have been subject to the same judicial scrutiny as other appeals that reach the Supreme Court, and the appeal may not raise a point of general public importance.

11.101 In keeping with the usual tests for first instance appeals, our provisional view is that it would be appropriate that where there is an appeal against a contempt decision or order of a First Instance Panel of the Supreme Court then the threshold should align with first instance appeals in other courts. That is, the test should be whether the appellant has a real prospect of success. This is consistent with the Supreme Court's recognition in *Crosland* that the right of appeal is of fundamental importance.[105] We note also that, having decided a right of appeal existed in that case, the Court heard the appeal without any reference to whether it had been necessary for the appellant to show that the appeal raised a point of law of general public importance. The fact that such matters are likely to be extremely rare means that a lower permission threshold should not add any meaningful burden to the Court's workload.

11.102 With respect to first appeals from either division of the Court of Appeal to the Supreme Court, our provisional view is that, for the same reasons, the same test should apply. That is, there should be no requirement that the appeal raises a point of law of general public importance and the test should be whether the appellant has a real prospect of success. It is exceptional to remove the general public importance requirement but where it is a first appeal to the Supreme Court then there is no other option if there is to be an effective right of appeal. Similarly, in the event that there were to be first appeals to the Supreme Court from any other court, tribunal or other body, the real prospect of success test should apply.

Consultation Question 132.

11.103 We provisionally propose that the test for permission for a first appeal to the Supreme Court should be whether the appellant has a real prospect of success.

Do consultees agree?

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104 This is the test to the Supreme Court for permission to appeal: UK Supreme Court Practice Direction 3, para 3.3.3. The tests for certification by the Court of Appeal are to similar effect: CPR, r 52.7A(2), Criminal Appeal Act 1968, s 33(2).

105 See paras 11.30 to 11.32 above.

ATTORNEY GENERAL'S APPEALS AND REFERENCES ON A POINT OF LAW

11.104 In this part of the chapter we discuss two issues related to the role of the AG in contempt proceedings: the right of appeal as an applicant and references on a point of law.

Appeals where the AG is an applicant

11.105 Under the current law, where contempt proceedings are commenced on application then an appeal will lie "in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant".[106] Where the AG is the applicant then they have the same right of appeal as any other applicant.

11.106 As a government minister commencing proceedings in the public interest, it might be argued that the AG's ability to appeal a finding that there was no contempt or appeal against a decision on a sanction is unusual. Notably, the AG in contempt cases is in a very different position to the prosecution in criminal cases: the prosecution cannot appeal an acquittal at a Crown Court trial.[107] In both cases the forces of the state are marshalled against an individual. As such, the provisions allowing AG appeals against findings that contempt has not been committed could be seen as oppressive, especially when compared with acquittals in criminal cases. Similarly, the prosecution cannot appeal a sentence, though the AG may, in the public interest, refer a sentence to the Court of Appeal (Criminal Division) on the grounds that it is unduly lenient.[108]

11.107 We have not received views from stakeholders on this issue, nor have we reached a provisional position. We welcome consultees' views.

Consultation Question 133.

11.108 We invite consultees' views as to whether the Attorney General should be able to appeal in contempt cases where they are the applicant. If so, should there be any restrictions on what aspects of a decision or order may be appealed?

Attorney General's reference to the Court of Appeal on a point of law

11.109 Although the AG may appeal if they are an applicant, the position is different where contempt proceedings are commenced on the court's own motion. In those cases, only the defendant may appeal.[109] This means that if the law requires clarification,

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106 AJA 1960, s 13(2).

107 The prosecution can appeal by way of case stated from an acquittal in the magistrates' court (MCA 1980, s 11). If "a defendant has successfully appealed to the Crown Court in summary proceedings, the prosecution may appeal against acquittal in the Crown Court by way of case stated to the Divisional Court, but only on grounds that the decision was wrong on a point of law or in excess of jurisdiction". Criminal Appeals (2023) Law Commission Issues Paper, para 7.11.

108 Criminal Justice Act 1988, s 36.

109 P Londono (ed), *Arlidge, Eady & Smith on Contempt* (5th ed and 1st supplement 2019) ("*Arlidge, Eady & Smith*"), para 15-118. See also *Attorney General v Hislop* [1991] 1 QB 514.

then there will be no path by which a matter may reach an appellate court, unless the defendant appeals.

11.110 The position in criminal cases provides an interesting contrast. Where there is an acquittal on indictment then the prosecution cannot appeal, but the AG may refer points of law to the Court of Appeal (Criminal Division).[110] A reference on a point of law means that the AG cannot challenge the substantive findings of the case but can challenge a point of legal principle which arose. This can have the effect of correcting a ruling of law made by the judge during the trial and preventing the ruling from becoming authority in subsequent cases.[111] The purpose of this procedure is to clarify the law.[112] A reference on a point of law does not affect the trial in relation to which the reference is made or any acquittal in that trial.[113]

11.111 We welcome consultees' views on whether, in contempt cases where the court commences proceedings of its own motion, the AG should be able to refer a point of law to the Court of Appeal after proceedings have concluded. Allowing the AG to make a reference on a point of law to either division of the Court of Appeal could provide a route for clarification, without affecting the outcome of the case. We anticipate that a matter would be referred to the division to which an appeal would lie were the appeal lodged by the defendant.

11.112 Further to the consultation question above, were the AG unable to appeal as an applicant, that would further limit the pathways by which a matter might reach the Court of Appeal. We also welcome consultees' views on whether the AG should be able to refer a point of law in the event that the right of appeal was removed.

Consultation Question 134.

11.113 We invite consultees' views as to whether, where contempt proceedings were instituted on the court's own motion and proceedings have concluded, the Attorney General should be able to make a reference to the Court of Appeal on a point of law.

Consultation Question 135.

11.114 We invite consultees' views as to whether, where contempt proceedings were instituted on application by the Attorney General, and if the Attorney General's right to appeal were to be abolished, the Attorney General should instead be able to make a reference to the Court of Appeal on a point of law.

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110 Criminal Justice Act 1972, s 36(1). An acquittal "on indictment" means that, in respect of an indictable offence which was heard in the Crown Court, the person has been found not guilty in respect of that offence.

111 Criminal Appeals (2023) Law Commission Issues Paper, para 7.6.

112 CPS, *Attorney General's Reference on a Point of Law*, (14 July 2022).

113 Criminal Justice Act 1972, s 36(7).

Chapter 12: Impacts

12.1 Recommendations for law reform must be informed by the economic and equality impact of such changes to the law. Throughout this consultation paper we have presented provisional proposals designed to produce a clearer, more coherent and consistent contempt of court regime. We have sought views on these proposals to better understand their effectiveness and impact. This final chapter provides an opportunity to consider specifically the economic and equality impacts of law reform in this area.

12.2 We anticipate that some of our proposals will have significant economic benefits, for example, a more streamlined and coherent contempt regime may reduce judicial costs. We also anticipate there will be costs if our proposals are implemented. We consider that some of our provisional proposals for reform will have positive equality impacts. We do not anticipate that our proposals would have negative equality impacts.

12.3 In this chapter we summarise some of the potential impacts we have identified so far. We then invite views and evidence on economic and equality impacts, whether in relation to individual proposals, any combination of proposals, or the overall effect of our proposals. We would particularly welcome evidence directed towards quantification of the impacts described and evidence of any impact our reforms may have that we have not already considered.

12.4 Responses to these questions will be considered alongside responses to the substantive consultation questions which may already include evidence as to impact. Therefore, in responding to these questions, consultees do not need to repeat material that has been included in responses to previous consultation questions in this consultation paper.

ECONOMIC IMPACTS

12.5 Reforming the law will typically have economic benefits or costs, or a combination of both. The costs can be divided into two types:

(1) transitional costs, the costs incurred in moving to a new scheme; and

(2) ongoing costs, the costs of a new scheme once it is implemented.

12.6 Although we anticipate our provisionally proposed reforms would have a positive economic impact, some of our proposals will involve one or both of these types of costs.

12.7 To illustrate, below we discuss possible economic impacts related to some of our provisional proposals. We invite consultees to provide views, evidence and data on the economic impact of those provisional proposals. However, we also ask a more general question inviting consultees to provide views, evidence and data on the economic impact of any other proposals made in this paper which we have not

covered in this chapter, including the impact of the combination of our provisional proposals. Consultees will have the opportunity to address cost effectiveness and resource implications of the issues as they arise in specific areas in the individual chapters of our consultation paper. However, the purpose of this chapter is to provide a further opportunity for consultees to consider the economic impact of our provisional proposals, in particular where consultees may not have already raised these issues in previous responses.

Consideration of economic impacts of specific provisional proposals

A new framework for contempt liability and contempt procedure

12.8 We provisionally propose a new, simplified contempt liability framework. This includes proposals on coercive remedies for breaches of court orders and revisions to the procedural rules to ensure consistency in the way contempt is handled across courts. These proposals are aimed at achieving a clear, coherent and streamlined contempt regime.

12.9 A streamlined regime will lead to efficiencies. For example, our provisional proposals on coercive remedies may reduce the number of contempt cases and associated costs, and thus may more effectively secure compliance with court orders.

12.10 We also anticipate there may be both transitional and ongoing costs. For example: revised procedures may enable courts to handle contempt cases more efficiently resulting in cost savings, however there will be costs associated with embedding the new procedure. Further, a clearer contempt regime may result in courts more readily exercising contempt powers, which may result in greater resourcing needs. We are interested in evidence as to the possible resource implications of these proposals, for example:

(1) whether the number or complexity of cases might increase or decrease;

(2) how much more or less hearing time would be needed to deal with contempts, and whether such impacts may vary across particular courts or tribunals;

(3) the resources needed for courts to adapt to revised procedure;

(4) what the likely effects of clearer contempt procedures might be on appeals and whether the number of appeals might increase or decrease as a result of the proposed regime; and

(5) the resource implications of the introduction of permission filters for a range of contempt applications.

Expansion of contempt in tribunals

12.11 In Chapter 6, we set out provisional proposals that would result in clarification and expansion of the contempt protections and powers of first instance tribunals. If implemented, our proposals will mean that conduct in many tribunals would constitute contempt where it does not currently, and that those tribunals would be able to handle contempt themselves as well as to refer matters to higher courts. The provisional proposals would have the effect of overtaking more limited existing referral powers in

some tribunals. We seek evidence as to the possible economic impacts of expanding the protections and powers of these courts and tribunals, for example:

(1) whether it will result in an increase or decrease in the number of contempt cases;

(2) what economic impacts may result from improved compliance with procedures and orders;

(3) whether there will be an increase or decrease in the demand for judicial time and resources where inferior courts, tribunals and other bodies can deal with contempt themselves rather than refer matters to higher courts; and

(4) whether expanding the powers and protections of these courts and tribunals will require the presence of (additional) security staff or police for enforcement purposes.

Wider range of sanctions, pre-sentence reports and guidelines for sentencing for contempt

12.12 In Chapter 10, we provisionally proposed that a wider range of sanctions should be available to courts, for example, we proposed that courts should be able to impose community sentences for contempt. We provisionally proposed that courts should be empowered to order a pre-sentence report ("PSR") where they are considering a community or custodial sentence. We also provisionally proposed that courts may remand a person in custody pending the PSR. Finally, we proposed that guidelines for sentencing for contempt should be prepared.

12.13 Relative to prison costs, community sentences are less costly.[1] The National Audit Office cite data on the unit costs of prisons that indicates that "in 2021-2022, [the Ministry of Justice] spent £3.75 billion on overall prison running costs, which equates to an average cost of £47,434 to hold one prisoner for the full year or around £4,000 per month".[2] In 2020, a parliamentary briefing compared the cost of a prison sentence with a community sentence for the years 2016-2018:

> In 2017/18, the average cost of custody was £37,543 per prisoner (not including costs after release, such as probation). The cost for a community order in 2016/17 (the latest available data) was between £2,500–£4,000 per person.[3]

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1 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) para 25. See also, Parliamentary Office of Science and Technology (POST), *Non-custodial sentences* (No 613) (January 2020) p 4; and Probation Institute, *Written evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0015)* (July 2023) p 5: "The cost of a prison place averages £48,162 per year; The cost of a high-intensity Community Order including 80 hours of unpaid work and programmes costs between £4,000 and £12,000 (depending on the range of requirements)".

2 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) para 20, citing Ministry of Justice and HM Prison and Probation Service, *Prison performance data 2021 to 2022: Costs per prison place and costs per prisoner by individual prison 2021-2022 summary* (March 2023).

3 Parliamentary Office of Science and Technology (POST), *Non-custodial sentences* (No 613) (January 2020) p 4, citing Ministry of Justice and HM Prison and Probation Service, *Prison performance data 2017 to 2018:*

12.14 The demand on prison places has been noted as a concern by both the executive and the judiciary.[4] As at the end of May 2023, the prison estate was operating at 99% of its total capacity.[5] When considering a short custodial sentence, the Court of Appeal (Criminal Division) has recently held that courts should consider the impact of current prison population levels, and may, as a result, opt to order a community sentence instead of a custodial sentence.[6] If implemented, our provisional proposal on community sentences would alleviate the cost burden and reduce pressure on the prison service.

12.15 In Chapters 1 and 10, we noted the data on committal orders.[7] Ministry of Justice data on prison receptions records that between 2020-2022, 107 people were imprisoned for contempt of court.[8] We noted (although with caution) that it appears likely that most people imprisoned for contempt are committed as a consequence of breaching an Anti-Social Behaviour Injunction ("ASBI") or other injunction.[9] We also observed that the data on ASBI and injunction committal orders show that in addition to cases where immediate committal is ordered, committal may also be suspended. For example, in 2021 there were 46 immediate committal orders and a further 28 that were suspended. If implemented, our provisional proposal may have economic benefits by reducing the need for costly prison places which would also alleviate pressure on the prison service.

12.16 However, there would be costs associated with a shift from custodial to non-custodial options as there are still infrastructure and staffing requirements for community options. The probation service is responsible for supervising offenders in the community and they must monitor requirements attached to community sentences, including requirements to do unpaid work, adhere to a curfew or live at a particular address, undergo mental health or drug or alcohol treatment, or restrictions and monitoring of whereabouts. There would likely be both transitional and ongoing costs were our provisional proposals implemented.

12.17 In addition, our provisional proposals in relation to PSRs would result in an increase in costs to probation services.

12.18 There would also be costs associated with the development of guidelines for sentencing for contempt. Though the existence of guidelines in the long term might

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Cost per Place and Costs per Prisoner by Individual Prisoner 2017 to 2018 (October 2018); and House of Commons Library, *Estimates Day: Ministry of Justice Spending* (June 2018).

4 See, for example: *R v Ali (Arie)* [2023] EWCA Crim 232 at [18]-[20]; The Rt Hon Alex Chalk KC MP, Lord Chancellor and Secretary of State for Justice, *Hansard* (HC), 16 October 2023, vol 738, col 58-62 (on prison capacity, early release and short sentences).

5 National Audit Office, *Written Evidence to Justice and Home Affairs Committee inquiry into Community Sentences (JCS0039)* (September 2023) para 11.

6 *R v Ali (Arie)* [2023] EWCA Crim 232 at [18]-[22]. See also Statement by the Chairman of the Sentencing Council, *The application of sentencing principles during a period when the prison population is very high – statement from the Chairman of the Sentencing Council* (20 March 2023).

7 See paras 1.5 to 1.6 and 10.12 above.

8 Ministry of Justice and HM Prison and Probation Service, *Offender Management Statistics quarterly: October to December 2022* (27 April 2023), Prison Receptions: 2022, Non-criminal admissions (A2-12).

9 See para 10.12 above.

reduce court time devoted to sentencing, there will be initial and ongoing costs of developing these guidelines and monitoring their implementation.

12.19 We seek evidence as to:

(1) how many more or fewer prison places would be needed for contemnors;

(2) the resourcing and staffing required to supervise community sentences for contempt compared to the current regime;

(3) how many additional PSRs might be expected per year; and

(4) the likely effects of PSR and sentencing guidelines reforms (for example, the effect on time involved in preparing submissions and court time in sentencing).

Transparency and publication of judgments

12.20 Throughout this consultation paper we made various provisional proposals to enhance transparency and predictability of contempt cases. One provisional proposal in Chapter 8 is that judgments should be published where a court makes an order of committal for contempt of court, whether immediate or suspended, and that the judgment should be published in the Find Case Law database hosted by The National Archives. While the Civil Procedure Rules, Family Procedure Rules and Court of Protection Procedure Rules already require publication of judgments in contempt proceedings (with the latter two not limited to circumstances where a committal order has been made), this provisional proposal would extend the requirement to criminal courts. We also made provisional proposals in Chapter 10, in relation to data gathering and the publication of data relating to sanctions for contempt. We invite evidence-based comments about the economic impacts of these proposals, for example:

(1) whether more time and resources would be required for writing and publishing a judgment than is currently required where committal orders are made, including whether this burden would be greater in some courts than in others; and

(2) the time and resources associated with gathering data and publishing transparency data, and whether there would be economic benefits.

Consultation Question 136.

12.21 We invite consultees to provide data and evidence-based views on the likely economic costs and benefits of our provisional proposals for:

(1) a new framework for contempt liability and contempt procedure;

(2) expansion of contempt in tribunals;

(3) a wider range of sanctions, pre-sentence reports and guidelines for sentencing for contempt;

(4) transparency and publication of judgments; or

(5) any other provisional proposals which do not fall within the above four categories and which consultees have not already discussed in responses to other consultation questions.

EQUALITY IMPACTS

12.22 It is important to consider whether any proposed policy change might adversely affect groups or individuals with particular protected characteristics, which are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[10] Although these characteristics have legal protection, there are other ways that laws may have impacts on groups or members of groups that may not fall within those groups of those with protected characteristics and the consideration of impacts on them is also important. For example, contempt laws may potentially have particular effects on: homeless people; those living in regional or remote areas; or those who hold particular political beliefs.[11] It may also be that some people may be affected as a result of belonging to two or more of the groups mentioned.

12.23 As part of our policy formation process, we consider the possible impact our provisional proposals might have on these different communities and groups of people. At different points in the consultation paper, we asked consultation questions tailored to specific issues where we are already aware that some of our proposals may involve equality considerations. For example, in Chapter 10:

(1) we recognised that some sanctions for contempt of court may adversely affect those who live with mental health conditions. Therefore, we invite consultees' views on the appropriateness of certain sanctions for contempt, and matters such as PSRs, specifically where the contemnor suffers from mental health conditions or other vulnerabilities; and

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10 Equality Act 2010, s 4.

11 For example, homeless people may be vulnerable to the imposition of ASBIs and find it difficult to avoid breaching them, people in regional and remote areas are less likely to have access to legally aided legal advice, and protesters may be subject to contempt demands for breaching injunctions; see generally Chapter 10.

(2) we recognised that protection of the rights of children and young people may require that they are not treated in the same way as adults, and we asked a consultation question about contempt law as it relates to children and young people.

12.24 We also ask a general consultation question below about potential equality impacts. Consultees may address equality impact issues as they arise in specific areas in the chapters of our consultation paper. However, the purpose of this question is to allow consultees to alert us to whether any of our proposals may have equality impacts that we have not considered. Responses to this question will help us to identify any issues and evidence gaps that have not been addressed in responses to other questions. Consultees do not need to repeat here material that has been included in response to other questions.

12.25 We include both specific questions (throughout the consultation paper) and the general question (below) to enable us to make well-informed recommendations for law reform that do not have adverse impacts and, ideally, have positive impacts on equality.

Consultation Question 137.

12.26 We invite consultees to tell us if they believe or have evidence or data to suggest that any of our provisional proposals could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010, and which those consultees have not already raised in relation to other consultation questions.

Chapter 13: Consultation Questions

Consultation Question 1.

13.1 We provisionally propose that a reformed framework for liability for contempt of court should discard the traditional distinction between civil and criminal contempt.

Do consultees agree?

Paragraph 2.50

Consultation Question 2.

13.2 We provisionally propose that the term “kindred offences” should no longer be used. Instead, conduct currently captured by the term “kindred offences” should be described as contempt.

Do consultees agree?

Paragraph 2.57

Consultation Question 3.

13.3 We provisionally propose that to establish the conduct element of general contempt, there should be a requirement to prove that the actual or risked consequence of the defendant’s conduct was an interference with the administration of justice.

Do consultees agree?

Paragraph 3.12

Consultation Question 4.

13.4 We provisionally propose that to establish the conduct element of general contempt it should be sufficient to prove that the defendant's conduct actually interfered with the administration of justice in a non-trivial way.

Do consultees agree?

Paragraph 3.17

Consultation Question 5.

13.5 We provisionally propose that to establish the conduct element of general contempt it should be sufficient to prove that the conduct created a risk of interfering with the administration of justice in a non-trivial way.

Do consultees agree?

Paragraph 3.22

Consultation Question 6.

13.6 We provisionally propose that to establish the conduct element of general contempt on the basis that the defendant's conduct created a risk of interfering with the administration of justice in a non-trivial way, it should be a requirement to prove that the conduct created a substantial risk of such an interference. By "substantial risk" we mean a risk that is not remote (which is the meaning the courts have given to the term in section 2(2) of the Contempt of Court Act 1981).

Do consultees agree?

Paragraph 3.28

Consultation Question 7.

13.7 We provisionally propose that the law of contempt should continue to apply before proceedings have commenced, including when proceedings are imminent and also before proceedings are imminent.

Do consultees agree?

Paragraph 3.54

Consultation Question 8.

13.8 Our provisional view is that where potentially contemptuous conduct occurs following the conclusion of particular proceedings, then any application of the law of contempt will inevitably be concerned with the risk of interference with future proceedings.

Do consultees agree?

Paragraph 3.64

Consultation Question 9.

13.9 We provisionally propose that the fault element of general contempt should be satisfied by intention, which will be established where it is proved that the defendant intended to interfere with the administration of justice in a non-trivial way.

Do consultees agree?

Paragraph 3.76

Consultation Question 10.

13.10 We provisionally propose that, in the event that taking photographs in court were not to constitute contempt unless intention (or recklessness, if recklessness is to be sufficient for establishing fault) could be proved, the government should consider reviewing section 41 of the Criminal Justice Act 1925.

Do consultees agree?

Paragraph 3.97

Consultation Question 11.

13.11 We provisionally propose that where general contempt is committed by publication, the fault element for general contempt should be satisfied only by intention.

Do consultees agree?

Paragraph 3.114

Consultation Question 12.

13.12 We invite consultees' views on whether, where general contempt is committed by conduct other than publication, the fault element for general contempt should be satisfied:

(1) only by intention, or

(2) either by intention or recklessness.

Paragraph 3.115

Consultation Question 13.

13.13 If recklessness is to be an alternative fault element where contempt is committed by conduct other than publication, we provisionally propose that recklessness should be established by proving that:

(1) the defendant was aware that their conduct carried a substantial risk of interfering in a non-trivial way with the administration of justice; and

(2) in the circumstances as the defendant knew them, it was unreasonable to take the risk.

Do consultees agree?

Paragraph 3.116

Consultation Question 14.

13.14 We provisionally propose that "publication" continue to be defined as it is in section 2(1) of the Contempt of Court Act 1981, but with illustrative examples to include online or electronic communications.

Do consultees agree?

Paragraph 3.117

Consultation Question 15.

13.15 We provisionally propose that, where inferior courts have specific powers to deal with contempt that involves the assault of a court officer then those same powers should apply to non-physical assaults and threats.

Do consultees agree?

Paragraph 3.143

Consultation Question 16.

13.16 We provisionally propose that any statutory provision setting out what constitutes general contempt should be accompanied by a non-exhaustive list of examples of conduct that is capable of constituting general contempt.

Do consultees agree?

Paragraph 3.178

Consultation Question 17.

13.17 We provisionally propose that the following should be included in a non-exhaustive list of examples of conduct that is capable of constituting general contempt to accompany a statutory statement of what constitutes general contempt:

(1) disrupting court proceedings;

(2) obstructing court officers or staff in the execution of their duties;

(3) threatening or assaulting court officers or staff, parties to proceedings, witnesses or jurors;

(4) taking photographs in court;

(5) making non-permitted audio or video recordings of proceedings;

(6) misconduct by jurors;

(7) disobeying a court order made for the purpose of protecting the administration of justice;

(8) subverting an order of the court by destroying the subject matter of an action;

(9) encouraging or assisting another to disobey a court order;

(10) providing false statements or disclosures to a court;

(11) accessing court documents without authorisation; or

(12) misconduct by legal representatives.

Do consultees agree? Are there other examples that should be included?

Paragraph 3.179

Consultation Question 18.

13.18 We provisionally propose that establishing the circumstance element for contempt by breach of a court order or undertaking should require proof that there is:

(1) an order of the court, whether expressed as a summons or otherwise, that applies to the defendant, or

(2) an undertaking given by the defendant,

provided the order or undertaking is accompanied by a penal notice or its equivalent.

Do consultees agree?

Paragraph 4.17

Consultation Question 19.

13.19 We provisionally propose that to establish the conduct element for contempt by breach of a court order or undertaking should require proof that the defendant failed to comply with the order or undertaking, regardless of whether significant consequences followed from the failure to comply.

Do consultees agree?

Paragraph 4.23

Consultation Question 20.

13.20 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant knows that they are bound by the relevant court order.

Do consultees agree?

Paragraph 4.43

Consultation Question 21.

13.21 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should not require proof that the defendant knows the precise terms of that order.

Do consultees agree?

Paragraph 4.44

Consultation Question 22.

13.22 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant had knowledge of the facts that made the conduct a breach.

Do consultees agree?

Paragraph 4.55

Consultation Question 23.

13.23 We provisionally propose that interim remedies should be available to the court in order to ensure compliance with court orders or undertakings without the court having to make a finding of contempt.

Do consultees agree?

Paragraph 4.86

Consultation Question 24.

13.24 We provisionally propose that such interim remedies should be available where a court is satisfied that each of the elements of contempt by breach of order or undertaking has been made out.

Do consultees agree?

Paragraph 4.87

Consultation Question 25.

13.25 We provisionally propose that the standard of proof to obtain an interim remedy should be the civil standard (that is, on the balance of probabilities).

Do consultees agree?

Paragraph 4.88

Consultation Question 26.

13.26 We provisionally propose that interim remedies should only be available where any detrimental effect of non-compliance can be remedied by subsequent compliance.

Do consultees agree?

Paragraph 4.89

Consultation Question 27.

13.27 We provisionally propose that the court should have power to order the following, fixed-term interim remedies:

(1) an order that the defendant pay a fixed, perhaps periodic, deposit of money into court (which would be returned upon subsequent compliance or otherwise forfeit subject to further order of the court following a finding of contempt);

(2) sequestration of assets, the property or proceeds of which would be forfeit subject to further order of the court following a finding of contempt; and

(3) an order that the defendant surrender a passport or any other document that would allow the defendant to leave the jurisdiction.

Do consultees agree?

Paragraph 4.90

Consultation Question 28.

13.28 Should other interim remedies be available?

Paragraph 4.91

Consultation Question 29.

13.29 We provisionally propose that for contempt by publication where proceedings are active, a defendant may be liable for contempt regardless of whether there was an intent to interfere with the administration of justice, but the applicant should be required to prove that:

(1) a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect proceedings were active; and

(2) a defendant distributor was reckless as to whether the distributed material "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced", in the sense that they knew there was such a risk and unreasonably took that risk by distributing the material.

Do consultees agree?

Paragraph 5.19

Consultation Question 30.

13.30 In circumstances where more than one person or organisation may be the subject of proceedings for contempt by publication where proceedings are active, should the law prioritise some defendants over others? If so, which defendants should be prioritised and why?

13.31 Should any potential defendants be excluded from liability for contempt by publication where proceedings are active? If so, which potential defendants should be excluded from liability and why?

Paragraph 5.23

Consultation Question 31.

13.32 We provisionally propose that for contempt by publication where proceedings are active, the conduct threshold should be the same as that which currently applies under the Contempt of Court Act 1981. That is, the applicant should be required to prove that the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

Do consultees agree?

Paragraph 5.33

Consultation Question 32.

13.33 We provisionally propose that a publisher may be liable for contempt of court:

(1) where previously published online material subsequently creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced;

(2) the publisher has notice that relevant proceedings are active; and

(3) the publisher has notice of the specific material that is potentially prejudicial to those active proceedings.

Do consultees agree?

Paragraph 5.48

Consultation Question 33.

13.34 We provisionally propose that it is appropriate to clarify the legal position when online publication occurs outside the jurisdiction.

Do consultees agree?

Paragraph 5.69

Consultation Question 34.

13.35 Where online publication occurs outside the jurisdiction, how should place of publication be relevant? For example:

(1) the place of publication should be irrelevant: liability should attach to a publication regardless of where it was produced or uploaded; or

(2) the place of publication should be relevant: liability should attach to a publication that:

(a) has been produced or uploaded in England and Wales; or

(b) has been produced or uploaded outside England and Wales by a person habitually resident in England and Wales or by an organisation with a place of business within England and Wales; or

(3) the place of publication should be defined in some other way (please specify).

Paragraph 5.70

Consultation Question 35.

13.36 We provisionally propose that the definition of publication as "publication to the public at large or to a section of the public" remain unchanged and that there should be no further elaboration on the meaning of the definition.

Do consultees agree?

Paragraph 5.82

Consultation Question 36.

13.37 We invite consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest.

Paragraph 5.102

Consultation Question 37.

13.38 We provisionally propose that in extradition cases the current position should be maintained and proceedings should be active from the time a warrant for arrest is issued in England and Wales.

Do consultees agree?

Paragraph 5.107

Consultation Question 38.

13.39 We provisionally propose that in criminal cases where there has been a conviction, proceedings should be considered active until sentencing has been handed down, which maintains the current law.

Do consultees agree?

Paragraph 5.114

Consultation Question 39.

13.40 In family, Court of Protection or other proceedings where orders may be made and review hearings set down for the future, or in similar circumstances where the nature of proceedings is that they may be dormant for some time, what should be the status of proceedings between the hearings?

13.41 Where there is uncertainty about whether proceedings are active, how might that most effectively be addressed?

Paragraph 5.118

Consultation Question 40.

13.42 We provisionally propose that there should be a defence that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active.

Do consultees agree?

We invite consultees' views on the form that defence should take.

Paragraph 5.133

Consultation Question 41.

13.43 We provisionally propose that the test for whether a body is a "court" for the purposes of contempt should be whether it is exercising the judicial power of the state.

Do consultees agree?

Paragraph 6.34

Consultation Question 42.

13.44 We provisionally propose that the test for whether a body is a "court" for the purposes of contempt should be accompanied by a non-exhaustive list of the bodies that are considered "courts".

Do consultees agree?

Paragraph 6.35

Consultation Question 43.

13.45 We provisionally propose that, if the test for whether a body is protected by the law of contempt is whether it is exercising the judicial power of the state, the following should be included in a non-exhaustive list of the bodies that have contempt protection:

(1) all superior courts of record, including the High Court, Court of Appeal, Crown Court, Court of Protection, the Upper Tribunal, the Employment Appeal Tribunal, the Special Immigration Appeals Commission, and the Court Martial Appeal Court.

(2) the following inferior courts: the county court, the family court, coroners' courts, magistrates' courts, consistory courts, election court, the Service Civilian Court, the Summary Appeal Court and the Court Martial.

(3) all chambers of the First-tier Tribunal;

(4) the Employment Tribunals (England and Wales); and

(5) the Parole Board for England and Wales.

Do consultees agree?

Should any other inferior courts, tribunals or other bodies be included in a list? If so, which ones?

Paragraph 6.68

Consultation Question 44.

13.46 We provisionally propose that the test for whether a devolved Welsh tribunal is a "court" for the purposes of contempt should be whether it is exercising the judicial power of the state.

Do consultees agree?

Paragraph 6.83

Consultation Question 45.

13.47 We provisionally propose that, if the test for whether a devolved Welsh tribunal is protected by the law of contempt is whether it is exercising the judicial power of the state, then all chambers of a First-tier Tribunal for Wales (if created) should be included in a non-exhaustive list of the bodies that have contempt protection.

Do consultees agree?

Paragraph 6.84

Consultation Question 46.

13.48 Is there a need for the Government to consider reviewing the powers of the Employment Appeal Tribunal to make civil restraint orders?

Paragraph 6.109

Consultation Question 47.

13.49 Should superior courts have the power to refer conduct that apparently constitutes contempt to the High Court?

Paragraph 6.132

Consultation Question 48.

13.50 We provisionally propose that all protected inferior courts, tribunals and other bodies should have the following powers:

(1) 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

(2) the power to refer any type of contempt to the High Court, or, in the case of the First-tier Tribunal and the Employment Tribunals (England and Wales), to the Upper Tribunal and the Employment Appeal Tribunal respectively.

Do consultees agree?

13.51 Do consultees consider that any specific protected inferior courts, tribunals or other bodies should be treated differently? If so, why?

Paragraph 6.139

Consultation Question 49.

13.52 We provisionally propose that all protected devolved tribunals in Wales should have the same powers as protected tribunals in England and protected reserved tribunals.

Do consultees agree?

Paragraph 6.146

Consultation Question 50.

13.53 We provisionally propose that the Attorney General should retain the power to bring contempt proceedings in the public interest.

Do consultees agree?

Paragraph 7.48

Consultation Question 51.

13.54 We have identified three possible options for consent or permission to institute proceedings for strict liability contempt by publication under the Contempt of Court Act 1981 (which, under our provisional proposals in Chapter 5, will become contempt by publication where proceedings are active).

Option 1 (the current approach): The consent of the Attorney General is required before proceedings can be instituted.

Option 2 (the parallel approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. The potential applicant would be able to choose whether to seek Attorney General consent or court permission.

Option 3 (the sequential approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. If the Attorney General refuses consent, the potential applicant would subsequently be able to seek permission from the court.

We seek consultees' views on their preferred option and the reasons for their preference.

13.55 Should the position be different depending on whether the potential applicant is or is not a party to the active proceedings where the alleged contempt has occurred?

Paragraph 7.62

Consultation Question 52.

13.56 Where the potential defendant is a current or former member of either House of Parliament, and the allegation is of contempt by publication when proceedings are active, we seek consultees' views on whether:

(1) the requirement to obtain the Attorney General's consent to bring contempt proceedings should be removed and replaced with a requirement to obtain permission of the court;

(2) if so, the AG should have a right to be joined as an intervener; and

(3) non-parties should be able to institute contempt proceedings.

Paragraph 7.68

Consultation Question 53.

13.57 We seek consultees' views on whether a refusal by the Attorney General to bring contempt proceedings or consent to contempt proceedings should be judicially reviewable:

(1) in all circumstances; or

(2) where the potential defendant is a member or former member of either House of Parliament.

Paragraph 7.80

Consultation Question 54.

13.58 If decisions by the Attorney General were to be judicially reviewable, we seek consultees' views on which of the following should be able to bring an application for judicial review:

(a) a party to the active proceedings;

(b) a person or body who was refused consent to bring proceedings;

(c) a person or body who has requested that the AG bring proceedings; or

(d) any person or body acting in the public interest.

Paragraph 7.81

Consultation Question 55.

13.59 We provisionally propose that the Attorney General's Office should publish a statement of practice setting out the process used for decision-making under the "The Contempt Code", including the information that is typically gathered and relied upon, and indicative timescales.

Do consultees agree?

Paragraph 7.100

Consultation Question 56.

13.60 We provisionally propose that the Attorney General's Office should publish a statement of its powers and practice in relation to searching and using publicly accessible information.

Do consultees agree?

Paragraph 7.131

Consultation Question 57.

13.61 We provisionally propose that police should continue to have the power to share with the Attorney General information it holds that is essential for the Attorney General to have to discharge their contempt function.

Do consultees agree?

Paragraph 7.152

Consultation Question 58.

13.62 We provisionally propose that police should continue to have the power to obtain information in relation to contempt only where there is a policing purpose for obtaining that information.

Do consultees agree?

Paragraph 7.153

Consultation Question 59.

13.63 We provisionally propose that the powers of police to obtain information in relation to contempt and to share information with the Attorney General should be expressly stated in statute.

Do consultees agree?

Paragraph 7.154

Consultation Question 60.

13.64 We invite consultees' views on whether the Attorney General's Office should be empowered to request and require communications data that is essential for the Attorney General to carry out their contempt function.

13.65 If consultees are of the view that the Attorney General's Office should be empowered to request and/or require data, we invite consultees' views on whether that power should be explicitly limited to seeking the identity and address data of potential defendants.

Paragraph 7.173

Consultation Question 61.

13.66 If the Attorney General's Office is empowered to request and/or require data, do consultees have evidence of a need to provide for urgent authorisations by a Designated Senior Officer within the Attorney General's Office?

Paragraph 7.178

Consultation Question 62.

13.67 If the Attorney General's Office is empowered to request and/or require data, do consultees have evidence of a need to provide for data retention orders?

Paragraph 7.179

Consultation Question 63.

13.68 We provisionally propose that the Attorney General should publish data relating to the exercise of their contempt of court functions.

Do consultees agree?

Paragraph 7.189

Consultation Question 64.

13.69 If the Attorney General is to publish category-based data, we seek consultees' views on what data should be included. Possible examples include:

(1) Referrals to the Attorney General, including: date received; who from (for example, court, public, CPS, MP, or AG own motion); type of contempt (for example, breach of order, contempt by publication), jurisdiction (for example, civil, criminal, family);

(2) Requests made for consent of the Attorney General to bring proceedings under section 7 of the CCA 1981, including the same data as that for referrals;

(3) Decisions made by the Attorney General, including: for example, refer to police as offence; pre-action letter; advisory notice; contempt application; no action;

(4) Outcome of proceedings (if applicable): for example, court, finding, sanction (if applicable), case citation or link to decision.

Paragraph 7.190

Consultation Question 65.

13.70 We provisionally propose that there should be a uniform, general procedure in contempt proceedings in all courts, tribunals and other bodies, with that procedure allowing for variations that are needed to address potential contempts in different settings.

Do consultees agree?

Paragraph 8.94

Consultation Question 66.

13.71 We provisionally propose that the various procedure rule committees should consider collaborating to develop a uniform, general procedure (for example, by establishing a joint working group of rule committees or a new contempt procedure rule committee).

Do consultees agree?

Paragraph 8.97

Consultation Question 67.

13.72 We provisionally propose that, where practicable, a court, tribunal or other body should be required first to conduct an initial enquiry into the allegation in all cases where:

(1) the court, tribunal or other body observes, or someone reports to it, a potential contempt; and

(2) the court, tribunal or other body is contemplating instituting contempt proceedings.

Do consultees agree?

Paragraph 8.143

Consultation Question 68.

13.73 We provisionally propose that the procedure on initial enquiry should require the following:

(1) Unless the defendant's behaviour makes it impracticable to do so, the court, tribunal or other body must—

(a) explain, in terms the defendant can understand (with help, if necessary)—

(i) the conduct that is in question;

(ii) (where relevant) that the court, tribunal or other body may refer the matter to the High Court (or to the Upper Tribunal or Employment Appeal Tribunal) (asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself);

(iii) (where relevant) that the court, tribunal or other body may refer the matter to the Attorney General (asking the Attorney General to consider whether to institute contempt proceedings) or to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence);

(iv) the sanctions that the court, tribunal or other body can impose for such conduct;

(v) (where relevant) that the court, tribunal or other body has power to order the defendant's immediate temporary detention, if that is required in the opinion of the court, tribunal or other body;

(vi) that the defendant may explain the conduct;

(vii) that the defendant may apologise, if they so wish, and that this may persuade the court, tribunal or other body to take no further action; and

(viii) that the defendant may take legal advice; and

(b) allow the defendant a reasonable opportunity to reflect, take advice, explain and, if they so wish, apologise.

Do consultees agree?

Paragraph 8.144

Consultation Question 69.

13.74 We provisionally propose that, after conducting an initial enquiry into the contempt allegation, the court, tribunal or other body should have the option to:

(1) take no further action in respect of the allegation;

(2) institute proceedings for contempt in respect of the allegation, where the court, tribunal or other body has the power to do so (and the court, tribunal or other body should be able to discontinue those proceedings at any time);

(3) refer the matter to the High Court (or to the Upper Tribunal or Employment Appeal Tribunal), asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral); or

(4) refer the matter to the Attorney General (asking the Attorney General to consider whether to institute contempt proceedings) or the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute it as a criminal offence).

Do consultees agree?

Paragraph 8.145

Consultation Question 70.

13.75 We invite consultees' views on whether all protected inferior courts, tribunals and other bodies should have a power to order the immediate temporary detention of a defendant in contempt proceedings.

Paragraph 8.154

Consultation Question 71.

13.76 We provisionally propose that all courts, tribunals and other bodies that are empowered to order the immediate temporary detention of a defendant in contempt proceedings should have available to them a specific procedure for doing so.

Do consultees agree?

Paragraph 8.155

Consultation Question 72.

13.77 We provisionally propose that a defendant who is detained temporarily by a court, tribunal or other body should be entitled to have someone told of their detention.

Do consultees agree?

Paragraph 8.156

Consultation Question 73.

13.78 We provisionally propose that where a court, tribunal or other body orders the immediate temporary detention of a defendant in contempt proceedings it should be required to review the case no later than the end of the same day.

Do consultees agree?

Paragraph 8.157

Consultation Question 74.

13.79 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should require the court, tribunal or other body to consider whether to institute proceedings itself or to refer the matter to:

(1) the Attorney General, asking the Attorney General to consider whether to institute contempt proceedings in the High Court;

(2) the police, asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence; or

(3) the High Court (or to the Upper Tribunal or Employment Appeal Tribunal), asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral).

Do consultees agree?

13.80 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should set out the relevant factors for the court, tribunal or other body to take into account when considering whether to institute proceedings itself or to refer the matter to the Attorney General, police, High Court, Upper Tribunal or Employment Appeal Tribunal. Relevant factors may include the complexity of the matter, the seriousness of the conduct, the availability and type of evidence, the expertise of the court, tribunal or other body, and the appropriateness of its sentencing powers for contempt.

Do consultees agree?

We invite consultees' views on other factors that may be relevant.

Paragraph 8.163

Consultation Question 75.

13.81 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.

Do consultees agree?

Paragraph 8.173

Consultation Question 76.

13.82 We provisionally propose that, where a court, tribunal or other body institutes contempt proceedings, it should not be required to hear the proceedings on the same day.

Do consultees agree?

Paragraph 8.174

Consultation Question 77.

13.83 We provisionally propose that the following information should be provided to a defendant in a contempt application (where proceedings are initiated by application) or in a written statement issued by a court, tribunal or other body (where proceedings are initiated by a court, tribunal or other body):

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) where the alleged contempt relates to breach of an order,

(i) the date and terms of any order allegedly breached or disobeyed,

(ii) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service,

(iii) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service,

(iv) confirmation that any order allegedly breached or disobeyed included a penal notice;

(c) where the alleged contempt relates to breach of an undertaking,

(i) the date and terms of any undertaking allegedly breached,

(ii) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(d) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(e) that the defendant has the right to be legally represented in the contempt proceedings;

(f) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(g) that the defendant may be entitled to the services of an interpreter;

(h) that the defendant is entitled to a reasonable time to prepare for the hearing;

(i) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(j) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(k) that the court may issue a bench warrant to secure the defendant's attendance at a hearing of the allegation, if they do not attend;

(l) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(m) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets (where applicable) or other punishment under the law;

(n) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(o) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(p) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

This information should be served on the defendant with a notice of where and when the contempt proceedings will take place.

Do consultees agree?

We invite consultees' views on whether it should be necessary to include any other information in the contempt application or written statement.

Paragraph 8.185

Consultation Question 78.

13.84 We invite consultees to tell us their experience where a court or tribunal directs that a contempt application does not need to be supported by written evidence given by affidavit or affirmation: in what form does the court or tribunal tend to direct that the evidence must be provided (for example, a witness statement or oral evidence)?

Paragraph 8.192

Consultation Question 79.

13.85 We seek consultees' views on whether, when written statements of witnesses are used as evidence, witness statements should be admissible (and the requirement for such evidence to be given on affidavit abandoned where it exists).

Paragraph 8.193

Consultation Question 80.

13.86 We provisionally propose that contempt proceedings should be subject to the same rules of evidence that apply in criminal proceedings such that:

(1) hearsay evidence would be admissible only in the circumstances permitted by the Criminal Justice Act 2003; and

(2) the court may refuse to admit evidence if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Do consultees agree?

Paragraph 8.203

Consultation Question 81.

13.87 We provisionally propose that (in addition to the existing permission requirements under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017) permission to make a contempt application should be required in all courts, tribunals and other bodies where the application relates to breach of an order.

Do consultees agree?

We invite consultees' views on whether permission should be required for applications relating to all other types of contempt.

Paragraph 8.212

Consultation Question 82.

13.88 We invite consultees' views on whether the burden of bringing a contempt application for breach of an order should lie always with the party seeking to enforce the order.

Paragraph 8.225

Consultation Question 83.

13.89 We invite consultees' views on whether there should be a new enforcement body that is empowered to make a contempt application for breach of an order.

Paragraph 8.226

Consultation Question 84.

13.90 With the exception of the inherent power of immediate temporary detention and any specific powers provided for in statute, we do not propose the creation of a general power to remand a defendant in custody prior to a finding of contempt.

Do consultees agree?

Paragraph 8.231

Consultation Question 85.

13.91 We provisionally propose that in all contempt proceedings the procedure for hearing a contempt allegation should have the following features:

(1) The court, tribunal or other body must:

(a) ensure that the defendant understands (with help, if necessary) what is alleged;

(b) explain what the procedure at the hearing will be; and

(c) ask whether the defendant admits the conduct in question.

(2) If the defendant admits the conduct, the court, tribunal or other body need not receive evidence.

(3) If the defendant does not admit the conduct, the court, tribunal or other body must then consider:

(a) any statement served on the defendant where proceedings were initiated by the court, tribunal or other body itself, or any application served on the defendant where proceedings were initiated on application;

(b) any other evidence of the conduct;

(c) any evidence introduced by the defendant; and

(d) any representations by the defendant about the conduct.

Do consultees agree?

Paragraph 8.236

Consultation Question 86.

13.92 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.

Do consultees agree?

Paragraph 8.241

Consultation Question 87.

13.93 We provisionally propose that judgments should be published where a court, tribunal or other body makes an order of committal for contempt of court, whether immediate or suspended.

Do consultees agree?

Paragraph 8.250

Consultation Question 88.

13.94 We provisionally propose that judgments in which a court, tribunal or other body makes an order of committal for contempt of court should be sent to the National Archives for publication on the Find Case Law service. Where that service does not accept judgments from the sentencing court, tribunal or other body then judgments should be published on the website of the judiciary of England and Wales.

Do consultees agree?

Paragraph 8.251

Consultation Question 89.

13.95 We provisionally propose that the committee responsible for devising procedure rules that apply in the devolved tribunals in Wales should consider developing a uniform, general procedure for contempt proceedings.

Do consultees agree?

Paragraph 8.256

Consultation Question 90.

13.96 We provisionally propose that, after conducting an initial enquiry into the contempt allegation, the First-tier Tribunal for Wales or Appeal Tribunal for Wales should have the option to:

(1) take no further action in respect of the allegation;

(2) institute proceedings for contempt in respect of the allegation, where the devolved tribunal has the power to do so (and the devolved tribunal should be able to discontinue those proceedings at any time);

(3) refer the matter to the Appeal Tribunal for Wales (from the First-tier Tribunal for Wales) or to the High Court (from the Appeal Tribunal for Wales), asking that tribunal or court to consider instituting contempt proceedings itself (where the First-tier Tribunal for Wales or Appeal Tribunal for Wales has the power to make such a referral); or

(4) refer the matter to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute it as a criminal offence).

Do consultees agree?

Paragraph 8.257

Consultation Question 91.

13.97 We invite consultees' views on what should be the role of the Attorney General and Counsel General in relation to contempt in the devolved tribunals in Wales.

Paragraph 8.258

Consultation Question 92.

13.98 We provisionally conclude that for the purposes of legal aid for the defendant, both permission proceedings and committal proceedings are considered to be criminal proceedings.

Do consultees agree?

Paragraph 9.13

Consultation Question 93.

13.99 We provisionally propose that eligibility for legal aid for an application to discharge a committal order should be expressly stated, whether in statute or in policy.

Do consultees agree?

Paragraph 9.19

Consultation Question 94.

13.100 We provisionally conclude that applications to discharge committal orders are criminal proceedings for the purposes of legal aid.

Do consultees agree?

Paragraph 9.20

Consultation Question 95.

13.101 We provisionally propose that means testing for legal aid should apply in all contempt proceedings.

Do consultees agree?

13.102 If means testing for legal aid were to apply in all contempt proceedings, are there any categories of cases that should be carved out as exceptions where means testing should not apply?

Paragraph 9.33

Consultation Question 96.

13.103 To what extent are defendants in civil contempt proceedings hampered in their access to legal aid? Are defendants in anti-social behaviour injunction proceedings at a particular or specific disadvantage?

13.104 What changes to the current law or the current processes would remedy problems with access to legal aid for defendants in civil contempt proceedings?

Paragraph 9.40

Consultation Question 97.

13.105 We provisionally propose that contempt proceedings (including permission proceedings) should be criminal proceedings for the purposes of the Courts and Legal Services Act 1990 and thus any conditional fee agreement should not be enforceable in relation to those proceedings.

Do consultees agree?

Paragraph 9.48

Consultation Question 98.

13.106 Where a court is determining costs in contempt proceedings that were commenced on application in a civil court, should there be a requirement that the court consider the defendant's financial resources? If so, how?

Paragraph 9.62

Consultation Question 99.

13.107 We provisionally propose that where a defendant is legally aided in contempt proceedings in a civil court then the costs should not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including:

(1) the financial resources of all of the parties to the proceedings; and

(2) their conduct in connection with the dispute to which the proceedings relate.

Do consultees agree?

Paragraph 9.73

Consultation Question 100.

13.108 We provisionally propose that the two-year maximum sentence for contempt of court should remain.

Do consultees agree?

Paragraph 10.20

Consultation Question 101.

13.109 The Debtors Act 1869 limits to six weeks the period of committal that can be imposed for contempt of court where there is a failure to comply with a family court or High Court maintenance order. We seek consultees' views on whether this limit should remain or whether the maximum period of committal should be the same as that for other forms of contempt (and thus two years).

Paragraph 10.27

Consultation Question 102.

13.110 We seek consultees' views on whether committal should remain an option where contempt is committed by publication when proceedings are active?

Paragraph 10.35

Consultation Question 103.

13.111 We provisionally propose that a regime for suspended sentences for contempt should be set out in statute.

Do consultees agree?

13.112 If a regime for suspended sentences for contempt were to be set out in a statute:

(1) What should be the minimum and maximum period of suspension (that is, the period for which a person must comply with conditions)?

(2) What should be the conditions that may be imposed?

(3) What other features should a statutory regime contain?

Paragraph 10.46

Consultation Question 104.

13.113 We provisionally propose that when a committal order (or a community sentence should that option be available) is being contemplated as a contempt sanction, the court should be required to order a pre-sentence report unless the court considers it to be unnecessary in the circumstances.

Do consultees agree?

Paragraph 10.65

Consultation Question 105.

13.114 We provisionally propose that where a committal order is being contemplated as a contempt sanction and the contemnor is or appears to be suffering from a mental disorder, before that order is made:

(1) the court should be required to obtain and consider a medical report unless, in the circumstances of the case, it considers that it is unnecessary to obtain a medical report; and

(2) the court should be required to consider any information before it which relates to the contemnor's mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of committal on that condition and on any treatment which may be available for it.

Do consultees agree?

Paragraph 10.66

Consultation Question 106.

13.115 We provisionally propose that courts should have the power to remand a contemnor in custody after a finding of contempt but before sentencing only where an order of immediate committal is highly likely.

Do consultees agree?

Paragraph 10.75

Consultation Question 107.

13.116 We provisionally propose that where time has been spent on remand in custody then:

(1) the time spent in custody should be considered in determining what sanction is appropriate in all the circumstances; and

(2) if a term of committal is imposed, then double the time spent in custody should be automatically deducted from the period of committal that is ordered.

Do consultees agree?

Paragraph 10.88

Consultation Question 108.

13.117 We provisionally propose that contemnors who have been committed to prison for 12 weeks or more should be eligible for early release on electronically monitored Home Detention Curfew up to 180 days before their automatic early release date. Consistently with the criminal regime, contemnors would need to have served at least 28 days of their sentence (14 of which must be served after the sentence is handed down).

Do consultees agree?

Paragraph 10.95

Consultation Question 109.

13.118 We provisionally propose that, in deciding whether to discharge on application by the contemnor, courts should consider the following factors:

(1) whether the contemnor has suffered punishment proportionate to the contempt;

(2) whether the interest of the state to uphold the rule of law would be significantly prejudiced by early discharge;

(3) the extent to which the contemnor's expression of contrition is genuine;

(4) whether the contemnor has done all they reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early;

(5) whether the contemnor has done all they reasonably can (bearing in mind the difficulties of doing so while in prison) in order to construct proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of committing a further breach;

(6) whether the contemnor has made any specific proposal to augment the protection against any further breach of those whom the order which they breached was designed to protect;

(7) the length of time already served in prison, including its relation to (a) the full term imposed and (b) the term which the contemnor would otherwise be required to serve prior to release; and

(8) any other factors the court thinks relevant.

Do consultees agree?

Paragraph 10.102

Consultation Question 110.

13.119 Do consultees have evidence about whether there is a gap in the protection of contempt prisoners who lack capacity or who have capacity but are otherwise vulnerable? If so, keeping in mind our provisional proposals to introduce pre-sentence reports, how might such a gap be addressed?

Paragraph 10.109

Consultation Question 111.

13.120 We provisionally propose that there should remain no maximum limit on the fines open to superior courts in contempt cases.

Do consultees agree?

Paragraph 10.116

Consultation Question 112.

13.121 We provisionally propose that the superior courts should have the power to suspend a fine in contempt cases.

Do consultees agree?

Paragraph 10.119

Consultation Question 113.

13.122 Do consultees agree with our understanding of how sequestration functions?

13.123 Do consultees have evidence of how sequestration is used in contempt cases and whether it is effective as a coercive and/or punitive sanction?

13.124 Do consultees have views about whether there should be any clarification of or reform to sequestration as it applies in contempt proceedings?

Paragraph 10.129

Consultation Question 114.

13.125 We provisionally propose that community sentences should be available as a sanction for contempt of court.

Do consultees agree?

Paragraph 10.139

Consultation Question 115.

13.126 With respect to children and young people, are there aspects of the law regarding sanctions for contempt that are satisfactory or unsatisfactory? Where the law is unsatisfactory, what changes should be made?

We would welcome evidence of the way that the law has operated with respect to children and young people.

Paragraph 10.143

Consultation Question 116.

13.127 Do the superior courts have appropriate powers with respect to mental health orders in the context of contempt?

Paragraph 10.147

Consultation Question 117.

13.128 We provisionally propose that the county court should be treated as a superior court for the purpose of imposing sanctions for contempt.

Do consultees agree?

13.129 Are there any circumstances in which consultees think the county court should not be treated as a superior court for the purpose of imposing sanctions for contempt?

Paragraph 10.167

Consultation Question 118.

13.130 We provisionally propose that with the exception of the county court, all protected inferior courts, tribunals and other bodies should have the following powers in relation to contempt:

(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.

Do consultees agree?

13.131 Do consultees consider that any protected inferior courts, tribunals and other bodies should be treated differently? If so, why?

Paragraph 10.169

Consultation Question 119.

13.132 We provisionally propose that the First-tier Tribunal for Wales should have the following powers:

(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.

Do consultees agree?

13.133 Do consultees consider that any specific chambers of the First-tier Tribunal for Wales should be treated differently? If so, why?

Paragraph 10.176

Consultation Question 120.

13.134 We provisionally propose that the Appeal Tribunal for Wales should have the contempt powers of a superior court of record.

Do consultees agree?

Paragraph 10.178

Consultation Question 121.

13.135 We provisionally propose that a working group nominated by the senior judiciary should be established to prepare guidelines for sentencing for contempt

Do consultees agree?

Paragraph 10.214

Consultation Question 122.

13.136 We provisionally propose that a finding of contempt and any associated sanction should never be entered into the Police National Computer.

Do consultees agree?

Paragraph 10.236

Consultation Question 123.

13.137 We provisionally propose that a finding of contempt and any associated sanction should never appear on a criminal record certificate.

Do consultees agree?

Paragraph 10.237

Consultation Question 124.

13.138 We provisionally propose that there should be annual publication of data in relation to contemnors received into prison, including for each contemnor the court that sentenced them, the number of days expected to be served before their automatic release date, and number of days actually served in prison.

Do consultees agree?

Paragraph 10.246

Consultation Question 125.

13.139 Should data be recorded when contempt proceedings are instituted? If so, what data?

13.140 Should such recorded data be published in anonymised and disaggregated form?

Paragraph 10.247

Consultation Question 126.

13.141 Are there any issues in relation to sanctions for contempt of court that have not already been addressed? We would particularly welcome views and evidence in relation to:

- contemnors who are or have been imprisoned;
- positive and negative equality impacts on vulnerable groups that we have not already considered; and
- economic costs and benefits associated with the sanctions regime and our provisional proposals.

Paragraph 10.250

Consultation Question 127.

13.142 We provisionally propose that appeals from first instance contempt decisions of either division of the Court of Appeal should lie to the Supreme Court.

Do consultees agree?

Paragraph 11.41

Consultation Question 128.

13.143 We provisionally propose that appeals from first instance contempt decisions of the Supreme Court should lie to a non-conflicted (though not necessarily larger) panel of the Supreme Court.

Do consultees agree?

Paragraph 11.42

Consultation Question 129.

13.144 We invite consultees' views on the following options for streamlining routes of appeal from first instance decisions of courts and tribunals (other than the Court of Appeal and Supreme Court).

Option 1

(1) 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 the High Court appeal decisions would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.

(2) Appeals from first instance contempt 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.

Option 2

(3) In the civil courts:

(a) Appeals from first instance contempt decisions of lower civil courts (including from magistrates' courts exercising their civil jurisdiction) and tribunals (including tribunals that are superior courts of record) would lie to the High Court, and from there to the Court of Appeal (Civil Division), and then to the Supreme Court.

(b) Appeals from first instance contempt decisions of higher civil courts (including the High Court and the Divisional Court) would lie to the Court of Appeal (Civil Division), and then to the Supreme Court.

(4) In the criminal courts:

(a) Appeals from first instance contempt 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.

(b) Appeals from first instance contempt decisions of higher criminal courts (specifically, the Crown Court) would lie to the Court of Appeal (Criminal Division), and then to the Supreme Court.

Do consultees prefer Option 1 or Option 2?

Do consultees think that the routes of appeal should change but that neither option 1 nor option 2 is appropriate? If so, what should they be?

Paragraph 11.54

Consultation Question 130.

13.145 We provisionally propose that permission should be required to appeal against a finding of contempt or against a sanction imposed for contempt, other than where the appeal is from a magistrates' court.

Do consultees agree?

Paragraph 11.89

Consultation Question 131.

13.146 We provisionally propose that, other than for first appeals to the Supreme Court, where appeals against contempt decisions or orders require permission then the tests for permission should be the same as those that currently apply in civil and criminal courts.

The effect of this would be the following:

(1) permission would be granted for first instance appeals:

(a) in the civil courts, where the appellant has a real prospect of success or there is some other compelling reason for the appeal to be heard; and

(b) in the criminal courts, where the appellant has a reasonable or real prospect of succeeding;

(2) permission would be granted for second appeals where the appellant has a reasonable prospect of success and the matter either raises an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it; and

(3) permission would be granted for second or subsequent appeals to the Supreme Court where a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.

Do consultees agree?

Paragraph 11.97

Consultation Question 132.

13.147 We provisionally propose that the test for permission for a first appeal to the Supreme Court should be whether the appellant has a real prospect of success.

Do consultees agree?

Paragraph 11.103

Consultation Question 133.

13.148 We invite consultees' views as to whether the Attorney General should be able to appeal in contempt cases where they are the applicant. If so, should there be any restrictions on what aspects of a decision or order may be appealed?

Paragraph 11.108

Consultation Question 134.

13.149 We invite consultees' views as to whether, where contempt proceedings were instituted on the court's own motion and proceedings have concluded, the Attorney General should be able to make a reference to the Court of Appeal on a point of law.

Paragraph 11.113

Consultation Question 135.

13.150 We invite consultees' views as to whether, where contempt proceedings were instituted on application by the Attorney General, and if the Attorney General's right to appeal were to be abolished, the Attorney General should instead be able to make a reference to the Court of Appeal on a point of law.

Paragraph 11.114

Consultation Question 136.

13.151 We invite consultees to provide data and evidence-based views on the likely economic costs and benefits of our provisional proposals for:

(1) a new framework for contempt liability and contempt procedure;

(2) expansion of contempt in tribunals;

(3) a wider range of sanctions, pre-sentence reports and guidelines for sentencing for contempt;

(4) transparency and publication of judgments; or

(5) any other provisional proposals which do not fall within the above four categories and which consultees have not already discussed in responses to other consultation questions.

Paragraph 12.21

Consultation Question 137.

13.152 We invite consultees to tell us if they believe or have evidence or data to suggest that any of our provisional proposals could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010, and which those consultees have not already raised in relation to other consultation questions.

Paragraph 12.26