Law Commission Consultation

'Contempt of Court'

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

November 2024

Introduction

1. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Preamble

4. It is time that the law on contempt was reformed. The many disparate pieces of legislation and procedure that apply in this area of law have led to confusion over the years and sometimes unfairness. It is to be hoped that this consultation will lead to rationalization and clarity across all jurisdictions. It is clear a great deal of work has been put into the process, for which we are grateful. This response is intended to be constructive. The CBA looks forward to working with the Law Commission on this exercise.

5. That said, any change will inevitably result in a need for more resources and an increased spend. This must not come from the already stretched Justice budget.

CHAPTER 4: GENERAL CONTEMPT

Consultation Question 1 (paragraph 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?

6. Yes.

Consultation Question 2 (paragraph 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?

7. Yes.

Consultation Question 3 (paragraph 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?

8. We agree that the test should refer to the actual or risked consequence as being "interference with the administration of justice". Adding qualifiers to the "interference", such as "undesirable", is unnecessary.

Consultation Questions 4 and 5 (paragraphs 3.17 and 3.22)

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 - or created a risk of interfering with - the administration of justice in a non-trivial way.

Do consultees agree?

9. We agree with the proposal to include "risk" of interference within the conduct element, in keeping with the common law.

10. We agree that a threshold for the level of interference to the administration of justice should be specified.

11. We are unsure how the expression, "in a non-trivial way", will be interpreted. For example, it may be argued that wolf-whistling at a juror would be too minor or inconsequential to fall within the proposed formulation. Such conduct has previously found to be a contempt (see R v Powell (1994) 98 Cr App R 224). However, having the list of examples (see Question 17 below) could provide a helpful legislative steer. Equally, there needs to be a level of seriousness specified so that truly trivial behaviour does not give rise to a finding of contempt.

Consultation Question 6 (paragraph 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

12. We agree the "substantial risk" test is appropriate.

Consultation Question 7 (paragraph 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?

13. We broadly agree, with the caveat that specific intent must be proved where the defendant's conduct occurs *before proceedings are imminen*t.

14. We note that in Attorney General v News Group Newspapers [1989] QB 110 (summarised at paragraph 3.31 of the Consultation Paper), it was held that the law of contempt may apply before proceedings are imminent. The circumstances were that the defendant newspaper clearly intended to interfere with the course of justice and was planning for proceedings to be instituted. This was applied more recently in Jet2 Holidays v Hughes and another [2020] 1 WLR 844, where an allegedly false witness statement was disclosed pre-action. Again, the defendant had the requisite intent and planned to institute proceedings.

Consultation Question 8 (paragraph 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?

15. We agree.

16. Our understanding is that the "future proceedings" may be wholly unconnected to the particular proceedings that formed the backdrop to the contemptuous conduct.

17. The Consultation Paper (at paragraph 3.56) cites Attorney General v Butterworth [1963] 1 QB 696 *per* Lord Denning, and refers to there being no other authority for the approach taken in that case. The Paper also cites a passage from Attorney General v Times Newspapers [1974] AC 273 at 320 as to the effect conduct such as victimisation of witnesses may have on future unspecified proceedings.

18. There appears to be a tension between the principle that contempt is concerned with risk of interference of proceedings (including future proceedings), and Lord Denning's *dictum* that a different rationale lies behind protecting witnesses from victimisation.

19. Attorney General v Butterworth [1963] was considered in Chapman v Honig [1963] 2 QB 502. A landlord served a notice to quit on a tenant to punish him for giving evidence. Lord Denning MR at 511-4 found this to amount to a contempt of court and to be actionable in damages. Pearson LJ at 519 found that whereas victimisation of a witness would ordinarily become known and thereby prejudice the administration of justice, in the instant case there was insufficient evidence of this. Davis LJ at 526 agreed with Lord Denning that it was a contempt of court but found no action in damages. In other words, all members of the court agreed that punishing a witness could be a contempt but disagreed as to whether proof of risk of interference with future proceedings was required.

20. Lord Denning MR was part of the constitution of the Court in Moore v Clerke of Assize of Bristol [1971] 1 WLR 1669. A girl was intimidated after giving evidence. The Court

applied Attorney General v Butterworth and the dictum of Lord Denning MR in Chapman v Honig. Lord Denning said at 1670:

> "The law has been settled by Attorney-General v. Butterworth [1963] 1 Q.B. 696. The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, pending it or after it."

21. Edmund Davis LJ at 1671 agreed with Lord Denning, and also confirmed that there was no requirement that other people got to know about the victimisation (cf Pearson LJ in Chapman v Honig). He also doubted that there was any requirement for the prosecution to prove that the defendant knew any revenge exacted on a victim would come to the knowledge of potential witnesses in future, *per* the *dictum* of Donovan LJ in Attorney General v Butterworth.

22. More recently, in Attorney General v Judd [1994] 7 WLUK 27, a person who asked a juror, who had just convicted a defendant, to write a letter the judge, and thereby intimidated her, was found to be in contempt of court. Arguably, such contempt must have related to the risk of future proceedings. (The law report is short and does not contain the full reasoning.)

23. Despite the tension identified, we think it is possible to proceed by maintaining the principle that contempt must involve a risk of interference with the course of justice, while maintaining the common law development that has protected witnesses and others such as jurors from victimisation. We suggest that maintaining this protection would be achieved by including conduct towards witnesses and other participants in the list of examples under Question 17.

Consultation Question 9 (paragraph 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?

24. In summary, we do not think that the fault element of general contempt should only be satisfied by intent to interfere with the administration of justice, for all forms of contempt and after proceedings are active (for commencement of which see Question 36). However, as noted under Question 7, we think that there is good reason for specifying such intent is required before proceedings are active.

25. To require proof of such intention in all types of general contempt would be to depart substantially from the common law.

26. The Consultation Paper at paragraph 3.78 refers to Attorney General v Newspaper Publishing [1988] Ch 333 (The Spycatcher case) as authority for the proposition that recklessness is not sufficient basis for liability, and specific intent is required. The question before the court was whether a person was in contempt for publishing book extracts where the Attorney General had been granted an injunction against others restraining such publication.

27. It appears to us that what was said about *mens rea* in The Spycatcher case does not apply to all forms of contempt.

28. The Spycatcher Case was considered, along with other authorities, by the Divisional Court in Solicitor General v Cox [2016] 2 Cr App R 15 (referred to in the Consultation Paper at paragraphs 3.90-93). This case concerned the taking of illegal photographs. The Divisional Court (Ouseley J and Lord Thomas CJ) summarised the position at [66]:

> "The circumstances in which contempt's of court arise are too varied, in our judgment, for one mens rea to be applicable to *all* forms of contempt. Nor is that the law. We are not concerned with contempt in publication cases, where there is no court order prohibiting publication, and what we say does not apply to it. Nor are we concerned with the sort of order or act involved in the *Spycatcher* or *Leveller Magazine* cases. Nor may all acts be readily pigeonholed into one broad and general category of contempt or another. But we are concerned with acts which fall into the broad category of contempt in the face of the court or contempt's closely related to such contempt."

29. The Court concluded, at paragraph 69, that in the context under consideration it was sufficient that the act was deliberate and in breach of the criminal law, or a court order of which someone knows. This would be the position for contempt's committed in the face of a court. Ouseley J explained, at [70] (also quoted in the Consultation Paper at paragraph 3.93):

> "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 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."

30. We respectfully share the concerns expressed above, based on our experience of observing proceedings being disrupted in criminal courts, and dealing with those responsible. Participants, observers and other members of the public would assume that they should not misbehave in a formal setting or undermine the court's authority, but they would not necessarily conceptualise such behavior as amounting to a risk of interference with the administration of justice. It is necessary to be able to deal with such behaviour, without having to prove the *mens rea* proposed in the Law Commission's paper.

31. Recently in R v Jordan [2024] 2 Cr App R 1 the Court of Appeal cited the above passage from Solicitor General v Cox at [70] with approval. The Court referred to examples where specific intent was not required: deliberate breach of a court order (at [46]), deliberately taking and publishing unauthorised photographs of the court (at [47], Solicitor General v Cox, above), breaching the embargo of a draft judgment (at [48], Attorney General v Crosland (2021) 4 WLR 103), filming outside court in breach of section 41 CJA 1925 or aggressively approaching defendants as they approached court (at [49], Attorney General v Yaxley-Lennon [2019] EWHC 1791), disrupting proceedings by shouting from the public gallery (at [51], R v Huggins [2007] 2 Cr App R 8). The position may be different in the case of a third party action defeating or undermining a court order (at [52]).

32. The Court in R v Jordon summarised the law at [43]:

> "In our judgment the answer is clear on principle and on authority. In a case alleging contempt in the face of the court by disruption of the proceedings the presence or absence of an intention to disrupt or otherwise interfere with proceedings may be relevant to penalty but it is not material to the issue of liability."

33. Further to the above, we respectfully suggest that where a contempt is found but intent is not established, this may be taken into account in assessing the appropriate penalty.

34. We note the Law Commission's reference at paragraph 3.71 to "indirect intent". This derives partly from R v Woollin [1999] 1 AC 82. In criminal cases, intent usually requires no elaboration, but a jury may, exceptionally, be directed the mental element is satisfied where the relevant result (being grievous bodily harm or death, in a case of murder) was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant must have appreciated that such was the case.

35. However, we fear that this does not adequately deal with the problem of defendants who willfully partake in behaviour that disrupts criminal proceedings, but where it cannot be proved that they conceptualised the virtually certain risk of interference

with the administration of justice. Moreover, the inclusion of "indirect intent" to interfere with the administration of justice in all its forms would not reflect the common law as it currently stands.

36. We note paragraph 3.69 of the Consultation Paper: "*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*".

37. However, we highlight that there are numerous examples of crimes of basic intent, which attract penalties of imprisonment. For example, unlawful act manslaughter, which attracts a maximum penalty of life imprisonment, requires proof of the *mens rea* for the unlawful act, which may be a crime of basic intent, and that the unlawful act is such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

38. We would suggest, therefore, that further consideration be given to the appropriate *mens rea* for general contempt. It may require different levels of fault for different types of contempt. Where there is a direct interference, or risk of immediate interference, with the administration of justice in relation to proceedings that have commenced, we do not think specific intent should necessarily be required.

Consultation Question 10 (paragraph 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?

39. We do not think that specific intent (or recklessness as to the risk of interference with the administration of justice) should be required to prove contempt for taking

photographs. We consider that to require intention (or recklessness) is not consistent with the current law: see Solicitor General v Cox, above.

40. In any event, we do not favour any amendment to section 41 of the Criminal Justice Act 1925. The provisions are simple, easy to understand and as far as we are aware, work in practice.

Consultation Question 11 (Paragraph 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?

41. We note that under the Law Commission's proposals, the third form of contempt is "contempt by publication while proceedings are active". It follows that where general contempt is committed by publication, it must relate to proceedings that are not active, that is, they are yet to begin, or which have ended. Given the potentially wide ambit of risk to interference with proceedings, we see the merit in stipulating that general contempt by publication (i.e. before proceedings are active), should be satisfied only by intention. (This is related to our answer to Question 7, above.)

Consultation Question 11 (Paragraph 3.114)

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.

Do consultees agree?

42. For reasons set out under Question 9 we are not in favour of (1).

43. We do not believe (2) currently reflects the common law for some types of case where proceedings are active. We do, however, consider that this option is preferable to (1).

Consultation Question 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?

44. If recklessness is to be an alternative fault element, then the above test would be appropriate (and preferable to the "risk of a risk" formulation referred to in the Consultation Paper at paragraph 3.85(1), for reasons set out at paragraph 3.86).

Consultation Question 14 (paragraph 3.117

We provisionally propose that "publication" continues 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?

45. Yes, but we do not think illustrative examples are necessary, given that in our experience, the ambit of section 2(1) of the CCA 1981 is understood to include online or electronic communications.

Consultation Question 15 (paragraph 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?

46. Yes.

Consultation Question 16 (paragraph 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?

47. We agree.

48. We suggest that the examples, being conduct rather than importing any fault element, could be described as "conduct that is capable of interfering with the administration of justice in a non-trivial way" rather than "conduct that is capable of constituting general contempt".

Consultation Question 17 (paragraph 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?

49. Our response is in three parts: (a) Example (3); (b) Example (12); and (c) Further Examples

(a) Example (3).

50. Example (3) is: "*threatening or assaulting court officers or staff, parties to proceedings, witnesses or jurors".*

51. We would suggest amending this to the following (from adapting section 12 of the CCA 1981):

    "*threatening, assaulting, abusing or willfully insulting any judge, justice, juror, witness before or officer of the court, member of court staff, party to proceeding or any solicitor or counsel having business in the court, during their sitting or attendance in court or in going to or returning from the court"*

52. We discuss the word "insulting" conduct below. Whilst in some cases insults would be caught by other examples such as disrupting proceedings, there appears to be a general understanding that insulting a court or juror would usually constitute an

interference with the administration of justice, such as to specify it in the list of examples.

53. In Re Johnson (1887) 20 QBD 68, a solicitor who verbally abused and appeared threatening towards his opposite number was found to be in contempt. The victim solicitor was thereafter unable to attend appointments between their clients, anticipating an assault. In upholding the contempt finding, Lord Esher referred to the risk of interference of the administration of justice. Bowen LJ at 74, applied similar reasoning:

> "What is the principle which we have here to apply? It seems to me to be this. The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice.

54. We agree with the Law Commission's observation at paragraph 3.132 that "insults" are sometimes a contempt of court because they disrupt proceedings. R v Walker [2016] EWCA Crim 1851, cited in the Consultation Paper at paragraph 3.128, may provide an example of this (albeit the basis for the finding of contempt was not the issue before Court of Appeal; the passages cited in the Consultation Paper were part of its ruling as to the appropriate penalty.)

55. However, we are not sure that all insults are contempt on the basis of immediate disruption to proceedings. The type of behaviour illustrated in Re Johnson (above) would naturally fall within he descriptor "disrupting court proceedings". Rather, the conduct was a combination of insult and abuse and, given the way it made the solicitor

feel, it led him not to attend conferences, which had the effect of interfering with the administration of justice.

56. Of note is that Parashuram Detaram Shamdasani v King-Emperor [1945] AC 264, the Privy Council at 268-9 drew a distinction between insults towards counsel and such behaviour towards a juror or court:

> "For words or action used in face of the court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding judge, he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance. So, also, if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of a jury who form part of the tribunal…"

57. However, Section 12 of the CCA 1981, which gives magistrates' courts powers to deal with certain types of behaviour, includes protection for legal representatives:

> A magistrates' court has jurisdiction under this section to deal with 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.

58. In R v Powell (1994) 98 Cr App R 224 at 227, the case in which a member of the public gallery wolf-whistled at a juror, the Court of Appeal held that Section 12 of the CCA 1981:

> "must have been intended by Parliament to reflect the sort of behaviour which would, at the very least, constitute contempt in the face of the court at common law. Of course, one must be guided by the general principles we have quoted, but when it comes to the detail that section, in our view, gives a good indication of the sort of behaviour which should be considered contempt of that nature."

59. It has been recognised, therefore, that insulting behaviour is capable of amounting to a contempt. We think, on balance, that R v Powell provides a basis for including the full range of behaviour referred to in section 12 of the CCA 1981 in the list of examples of conduct "capable" of amounting to contempt. Not to do so would make magistrates' courts statutory powers (see Consultation Paper paragraph 3.312) appear wider than those of higher courts. As with any example, whether particular conduct amounts to risk of "non-trivial interference" will depend on the facts.

60. We note the point at paragraph 3.10 of the Consultation Paper that the word "insult" has been interpreted in inconsistently as to whether it includes "threats". This would not, however, be problematic because threats are included in the list in any event.

61. Finally, we highlight that punishment for willfully insulting a judge would not in principle breach Article 10 ECHR. In Stalka v Poland (2004) 38 EHRR 1, the European Court of Human Rights said at [34] that whilst the courts, as with all other public institutions, are not immune from criticism and scrutiny, a clear distinction must be made between criticism and insult, and if the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Art.10(2) of the Convention. In that case a penalty of 8 months' custody imposed on a prisoner who had written an insulting letter after being sentenced was deemed disproportionate. We suggest that this should not affect

consideration of any statutory maximum penalty available for contempt of court, but rather guidelines could address penalties for different types of behaviour.

(b) Example (12) "misconduct by legal representatives"

62. We do not favour including example (12), "*misconduct by legal representatives*".

63. This example could cause confusion. Misconduct is an umbrella term encapsulating a very wide range of unprofessional behaviour, and most misconduct would not amount to a contempt of court.

64. It also unnecessary to include misconduct. Relevant actions of legal representatives would be caught by the other examples, which are better defined forms of contempt and are appropriately anchored to interference with court proceedings.

(c) Further examples

65. We believe that the following examples, all established by the common law, merit inclusion:

    i. willfully obstructing another person from obeying a court order;

    ii. a witness refusing to be sworn having been called to give evidence, or refusing to answer an admissible question having been sworn, subject to the court upholding a claim to privilege or holding that the exception currently within section 10 of the Contempt of Court 1981 applies;

    iii. taking revenge on or victimising a witness for giving evidence (see Chapman v Honig [1963] 2 QB 502), juror, justice or judge.

    iv. breaching the confidentiality basis on which a draft judgment is supplied to a legal representative (see Attorney General v Crosland [2021] 4 WLR 103 at [23].);

v. a defendant in criminal proceedings who is in custody refusing to be conveyed to court, refusing to enter the dock, or refusing to attend remotely when required (see R v O'Boyle (1991) 92 Cr App R 202 at 208 *obiter dicta*).

66. The final example is included partly because of public discussion in the last few years about the refusal of certain high profile defendants to attend sentencing hearings (e.g. Jordan MacSweeney in December 2022).

CHAPTER 4: CONTEMPT BY BREACH OF COURT ORDERS OR UNDERTAKINGS

Consultation Question 18 (paragraph 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?

67. We think it important to allow for a penal notice to be given orally in appropriate circumstances. Where a judge orders: a person to leave the court room; a party or representative not to adduce evidence ruled inadmissible; a person not to remove documents from the court room; or a person not to use a mobile phone in court, it may not be practicable in criminal proceedings for the Court Clerk to draw up an order with a penal notice speedily. In such circumstances, there may be no prejudice to a potential defendant in not seeing the penal notice in writing, because they will be told about it in the court room. Where proceedings are being audio recorded (for example in Crown Court proceedings), it can be proved such an order was given from the record.

Consultation Question 19 (paragraph 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?

68. We agree, but suggest that there should be a defence of reasonable excuse for failing to comply with the order.

Consultation Question 20 (paragraph 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?

69. Yes, save that we are concerned that in relation to orders made under section 4(2) of the Contempt of Court Act 1981, it may be difficult to prove that a defendant, other than a professional journalist, knew that he was bound by the relevant order.

Consultation Question 21 (paragraph 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

70. Yes.

Consultation Question 22 (paragraph 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?

71. Yes.

Consultation Question 23 (paragraph 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?

72. Given our practice area, we do not have experience of the kinds of problems referred to in paragraph 4.58. It seems to us that provisional proposals appear to be sound.

Consultation Questions 24 and 25 (paragraphs 4.87 and 4.88)

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.

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?

73. This may not relate to our practice area, but we suggest that to satisfy a court on the balance of probabilities that each of elements of contempt have been made out, the applicant would in practice need to adduce much of the same evidence, in the same form, as they would for the final determination (requiring proof to the criminal standard).

74. It may also be appropriate to include a test that an interim order is necessary to secure compliance.

Consultation Question 26 (paragraph 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?

75. We are unsure how this might be interpreted in practice, and whether the detrimental effect of interim remedies can always be remedied precisely.

Consultation Questions 27 and 28 (paragraphs 4.90 and 4.91)

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?

Should other interim remedies be available?

76. These proposals appear sensible to us.

77. Another measure, albeit of last resort, could be to order temporary detention in custody pending determination of the contempt, or other restrictions that reflect common conditions of bail in criminal proceedings (securities, sureties, electronic monitoring, restrictions on travel, and other measures).

CHAPTER 5: CONTEMPT BY PUBLICATION WHEN PROCEEDINGS ARE ACTIVE

Consultation Question 29 (paragraph 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?

78. We do not agree.

79. We favour the status quo, that is the strict liability rule, from the common law and its modification under the Contempt of Court Act 1981, and the defence in section 3, which caters for when publishers do not know proceeding are active.

80. The current law works well to protect active criminal proceedings. It is vital for the administration of justice that there are strong safeguards to prevent prejudicial publicity directly relating to factual issues to be determined in active proceedings. Such publicity can have a particularly adverse effect on jury trials.

81. We consider it appropriate for the burden to be on the publisher or distributor to show that he has exercised reasonable care and did not know or have reason to suspect

proceedings are active. The defendant will have the requisite knowledge and access to his records, whereas the Applicant will not have access to such information to be able to prove awareness of the risk. There is nothing wrong in principle with the reverse burden, which has stood the test of time.

82. The Consultation Paper at paragraph 5.17 refers to orthodox principles of criminal responsibility requiring proof of fault, especially where consequences may be imprisonment. However, we point out that the Contempt of Court Act 1981 is hardly unique in imposing liability and risk of imprisonment without requirement of specific intent or recklessness, and with a reverse burden on the defence. For example, the Health and Safety at Work Etc Act 1974 section 33 created offences of failing to discharge duties, and the burden is on the defendant to show that it was not practicable for him to have done more than was done to satisfy the duty, with punishment on conviction being up to 2 years' imprisonment.

83. Moreover, with information now being available on the internet (with local police forces issuing press releases), it has become easier for publishers and distributors to discover whether proceedings relating to a particular crime are active, and so the burden on them to check has become less onerous over time. No examples are given in the Consultation Paper of any problems with the application of the CCA 1981 in practice.

Consultation Question 30 (paragraph 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?

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?

84. We are not in favour of the law prioritising some defendants over others.

85. Legislation does not specify priority of defendants in criminal prosecutions in this way. There appears to be no need to do so for contempt proceedings. Prioritisation is a fact-specific determination for the entity responsible for bringing contempt proceedings.

86. Were legislation to specify such matters, this would add additional complication. Proceedings may be delayed while arguments are mounted as to the application and interpretation of any provisions that relate to priority of defendants.

87. We also do not consider that any defendants should be excluded from liability.

Consultation Question 31 (paragraph 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?

88. Yes.

Consultation Question 32 (paragraph 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?

89. By "notice" we assume that this refers to proposals whereby the AG gives notice of specific material that may be prejudicial to active proceedings, as referred to in the Consultation Paper at paragraph 5.45.

90. We envisage that it would not be necessary to use this procedure particularly often. Whilst contemporaneous reporting of matters relating to the subject matter of proceedings needs to be tightly controlled (see under Question 29), old publicity is less likely to come to the notice of jurors unless it is actively searched for (in breach of a judge's directions). News and other internet sources tend to promote current and recently published material. We have experience of undertaking trials linked to earlier proceedings that had attracted considerable publicity, as well as cases where information about a defendant's antecedent history has been published online, without such publicity interfering with the new proceedings. The courts have emphasised the ability of jurors to abide by their oaths (see *Re B* [2006] EWCA Crim 2692 *per* Sir Igor Judge at [31]), and to avoid being prejudiced by material remaining on the internet in relation to a previous trial (see *R v. Ali* [2011] 2 Cr. App. R. 22 at [92], *per* Lord Thomas).

91. We also appreciate that it may be difficult or impossible to remove some material published online, for example because of its quantity, difficulties with identifying the "publisher", and the number of publishers involved.

92. Nevertheless, we think that there will circumstances in which previous publication creates a substantial risk, which would justify the proposed measures being deployed.

Consultation Question 33 (Paragraph 5.69)

We provisionally propose that it is appropriate to clarify the legal position when online publication occurs outside the jurisdiction.

Do consultees agree?

93. We agree that clarification would be welcome.

Consultation Question 34 (Paragraph 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).

94. We note that the Consultation paper (paragraph 5.66) refers to there being several offences that may be committed abroad but only where the person is a UK national or habitually resident the jurisdiction and the offence would be an offence in the country where it occurred. However, we do not think this point justifies a requirement for habitual residence in cases of contempt. First, contempt is not a criminal offence but rather a means to preserve the administration of justice. Second, and in any event, the criminal law provides that some crimes may be committed abroad where the effects are felt in England and Wales, without a requirement of habitual residence: see sections 44 and 52 Serious Crime Act 2007.

95. Moreover, it appears that currently, there is no requirement for a defendant in contempt proceedings to be habitually resident in England and Wales. Recently, in Solicitor General v Angela Power-Disney [2024] EWHC 1538, an extension of time was granted to serve proceedings in Ireland, against a person who had published material in England and Wales alleged to have created a risk to interference with the course of justice, and in breach of a court order, the defendant not being habitually resident in the United Kingdom.

96. We therefore consider that liability for contempt should arise either where the publication is in England and Wales, or regardless of publication venue, where the publication interferes with, or creates a substantial risk of interference with, the course of justice in England and Wales (in a non-trivial way).

Consultation Question 35 (paragraph 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?

97. Yes.

98. We consider there is no need for further elaboration of the expression "a section of the public". This expression is used in other legislation, and is understood and applied without too much difficulty. For example, terrorism legislation refers to publishing to the public or section of the public (see section 1 and 20 Terrorism Act 2006), as does the Public Order Act 1986 (see section 19).

Consultation Question 36 (paragraph 5.102)

We invite consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest.

Do consultees agree?

99. We highlight that some defendants in criminal proceedings are never arrested. Under sections 24 and 24A of PACE 1984, a police constable may only arrest a person without a warrant if it is necessary for reasons set out in those sections. It follows that some defendants are never arrested because the necessity conditions are not met.

Furthermore, some proceedings are initiated other than from a police investigation, and without arrests having been made.

100. Therefore, we suggest that criminal proceedings should be deemed active from the earliest of the following (drawing upon paragraph 4 of Schedule 1 to the CCA 1981):

(i) arrest;

(ii) issuing of a warrant of arrest;

(iii) issuing of a summons;

(iv) issuing of a written charge by the prosecutor;

(v) charge;

(vi) service of an indictment.

101. Paragraph (vi) above caters for all circumstances listed in section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 where service of the indictment has not been preceded with one of the other events .

102. We recognise that the police do not generally name suspects when they are arrested. However, the police often publicise that an arrest has been made in respect of an offence.

Consultation Question 37 (paragraph 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?

103. A difficulty in extradition proceedings is that the issuing of warrants is confidential, and unlikely to be verifiable on enquiry. According to CPS legal guidance on Extradition to the UK (https://www.cps.gov.uk/legal-guidance/extradition-to-uk):

> "It is the policy of His Majesty's Government and all operational partners to 'neither confirm nor deny' (NCND) the existence of a European Arrest Warrant (EAW), TaCA warrant, extradition request, provisional arrest request or Interpol Red Notice/Wanted Diffusion made by or received by the UK where the requested person sought has not been arrested."

104. Where a person's extradition is sought, the options for when proceedings are deemed to be active include: (1) when an arrest is made (outside the jurisdiction); or (2) from when the person first appears at a domestic court after extradition to the UK.

Consultation Question 38 (paragraph 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?

105. This reflects paragraph 5 Schedule 1 to the Contempt of Court Act 1981. We think, consistent with those provisions, that simply referring to "sentence" rather than "sentencing has been handed down" would suffice.

106. Paragraph 5 of Schedule 1 refers to the ambit of "sentence" for these purposes. We note there is no express provision for disposal after acquittal on grounds of insanity, or after a finding of the act under Criminal Procedure (Insanity) Act 1964. However, such events would likely fall within paragraph 5(2).

107. Some proceedings take place after sentence. Two common examples are referred to below. However, on balance we do not think the prospect of further

hearings should delay the stage at which active proceedings are deemed to cease for these purposes.

108. Variations in sentence may take place under the 'slip rule' in Section 385 of the Sentencing Act 2020, within 56 days of sentence. "Sentence" includes any variation for the purposes of appeal provisions (section 385(6)). The slip rule is usually invoked when errors are spotted only after the end of the hearing, by which time journalists have left, having assumed proceedings have concluded.

109. Any confiscation proceedings under POCA 2022 usually take place after sentencing. They must conclude within 2 years of conviction, unless exceptional circumstances under section 14 of POCA are found. In practice, confiscation proceedings are often not resolved for months (at least). Sometimes witnesses are called in confiscation proceedings. As a safeguard, legislation could provide for the power to restrict reporting of particular matters until conclusion of confiscation proceedings, albeit we expect this would only rarely be necessary.

Consultation Question 39 (Paragraph 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?

Where there is uncertainty about whether proceedings are active, how might that most effectively be addressed?

110. Whilst recognising that the question refers to family and Court of Protection proceedings, of which we do not profess experience, there are circumstances in which criminal proceedings might be considered dormant, and where there are reviews post-sentencing.

111. There is a procedure whereby counts on an indictment are "left on the court's file", not to proceeded with without leave of the court or of the Court of Appeal. This is commonly used where a defendant has entered acceptable pleas to other charges.

We consider that in such circumstances, proceedings can be deemed inactive. The default position is that they are not resurrected.

112. A judge may review compliance with a drug treatment and testing requirement as part of a community order. Such reviews will be announced at sentence. A defendant will typically appear before the judge, without the need for representation, and often the hearing will take a more informal turn than court proceedings up to and including sentence. We do not think this prevents proceedings from being deemed inactive at sentence.

Consultation Question 40 (paragraph 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.

113. We favour the status quo, in section 5 of the CCA 1981, rather than any new public interest defence.

CHAPTER 6: CONTEMPT PROTECTION AND POWERS

Consultation Question 41 (Paragraph 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?

114. Yes.

Consultation Question 42 (Paragraph 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?

115. Yes

Consultation Question 43 (Paragraph 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?

116. We agree with the list proposed.

117. We suggest adding The Supreme Court to (1).

118. Consideration should be given to the status of statutory inquiries established under the Inquiries Act 2005. It may well be that currently, statutory inquiries are not protected from contempt. The 2005 Act does not refer to powers to deal with contempt as such. Section 35 creates offences of failing to comply with a notice issued under section 21, and distorting, preventing, concealing and destroying evidence. Under section 36, the chairman of an inquiry or Minister may certify to the High Court to take enforcement action, but not punishment for contempt. The 2005 Act does not contain any equivalent to section 12 of the CCA 1981 to deal with threatening or disruptive behaviour. It follows that, were statutory inquires to be deemed to be protected from contempt, this may constitute a development of the existing law and require amendment of the 2005 Act.

Consultation Questions 44 and 45 (Paragraphs 6.83 and 6.84)

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.

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.

119. Consideration of this proposal is outside our area of experience, but we see no reason to disagree with it.

Consultation Question 46 (Paragraph 6.109)

Is there a need for the Government to consider reviewing the powers of the Employment Appeal Tribunal to make civil restraint orders?

120. We do not have experience of this area.

Consultation Question 47 (Paragraph 6.132)

Should superior courts have the power to refer conduct that apparently constitutes contempt to the High Court?

121. If there is a need to, this is unobjectionable.

Consultation Question 48 (Paragraph 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?

13.51 Do consultees consider that any specific protected inferior courts, tribunals or other bodies should be treated differently? If so, why?

122. We are of the view that the Magistrates' Court should have the power to refer to the Crown Court.

Consultation Question 49 (Paragraph 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?

123. We do.

Consultation Question 50 (Paragraph 7.48)

We provisionally propose that the Attorney General should retain the power to bring contempt proceedings in the public interest.

124. We agree.

Consultation Question 51 (Paragraph 7.62)

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 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.

125. We favour option 3, for its flexibility. The position should remain the same regardless of the standing of the applicant in the proceedings.

Consultation Question 52 (Paragraph 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.

126. Our view is that the procedure should remain the same irrespective of the standing of the alleged contemnor.

Consultation Question 53 (Paragraph 7.80)

3.57 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.

127. In all circumstances.

Consultation Question 54 (Paragraph 7.81)

3.58 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.

128. We prefer the settled test for standing to bring judicial review proceedings rather than creating a new test.

Consultation Question 55 (Paragraph 7.100)

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?

129. Yes.

Consultation Question 56 (Paragraph 7.131)

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?

130. Yes.

Consultation Question 57 (Paragraph 7.152)

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?

131. Yes.

Consultation Question 58 (Paragraph 7.153)

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?

132. Yes.

Consultation Question 59 (Paragraph 7.154)

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?

133. Yes.

Consultation Question 60 (Paragraph 7.173)

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 her 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.

134. Yes to both.

Consultation Question 61 (Paragraph 7.178)

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?

135. Yes - it would make sense to cater for such provision.

Consultation Question 62 (Paragraph 7.179)

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?

136. Yes - it would make sense to cater for such provision.

Consultation Question 63 (Paragraph 7.189)

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?

137. Yes.

Consultation Question 64 (Paragraph 7.190)

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.

138. We would suggest and hope for the fullest possible disclosure in these circumstances.

Consultation Question 65 (Paragraph 8.94)

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?

139. Yes.

Consultation Question 66 (Paragraph 8.97)

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?

140. Yes.

Consultation Question 67 (Paragraph 8.143)

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?

141. Yes.

Consultation Question 68 (Paragraph 8.144)

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?

142. Yes.

Consultation Question 69 (Paragraph 8.145)

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?

143. Yes.

Consultation Question 70 (Paragraph 8.154)

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.

144. We do not have experience of this area, save for in the Magistrates' Court, which is dealt with elsewhere in this response.

Consultation Question 71 (Paragraph 8.155)

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?

145. Yes.

Consultation Question 72 (Paragraph 8.156)

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?

146. Yes.

Consultation Question 73 (Paragraph 8.157)

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?

147. This depends upon when the detention arises. If at the end of the working day it may not then be practical or possible to carry out a review to the requisite standard. We suggest that, similarly to breach of bail, a review should take place no later than 24 hours after the detention.

Consultation Question 74 (Paragraph 8.163)

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.

148. We agree. The factors set out are the relevant ones.

Consultation Question 75 (Paragraph 8.173)

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?

149. We agree.

Consultation Question 76 (Paragraph 8.174)

3.82 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?

150. Yes, so long as that possibility remains open if the circumstances are right. In cases where an individual has been taken into detention proceedings should be reviewed within 24 hours, even if the full contempt proceedings are not heard.

Consultation Question 77 (Paragraph 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.

151. Yes. The proposal contains the relevant information.

Consultation Question 78 (Paragraph 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)?

152. Oral evidence or s.9 1967 Act witness statement.

Consultation Question 79 (Paragraph 8.193)

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).

153. The evidence should be on oath, whether in oral evidence or in affidavit form given that these are proceedings for which the penalty may be incarceration. For hearsay see Q80.

Consultation Question 80 (Paragraph 8.203)

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?

154. Yes, although there needs to sufficient time between the alleged contempt and the proceedings for relevant notices to be drafted and filed. Rules should also be provided for the Court to dispense with service of such notices where necessary.

Consultation Question 81 (Paragraph 8.212)

3.87 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.

155. The background behind this and the concerns raised in pre-consultation engagement are outside our area of expertise.

Consultation Question 82 (Paragraph 8.225)

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.

156. This is outside our area of expertise.

Consultation Question 83 (Paragraph 8.226)

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.

157. There is no need to create a new organisation.

Consultation Question 84 (Paragraph 8.231)

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?

158. No. The availability of such a power, lawfully exercised in conjunction with the availability of bail, would be in the interests of justice.

Consultation Question 85 (Paragraph 8.236)

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?

159. Yes.

Consultation Question 86 (Paragraph 8.241)

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?

160. We suggest that contempt in the face of the court be excluded from this procedure.

Consultation Question 87 (Paragraph 8.250)

3.93 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?

161. Yes.

Consultation Question 88 (Paragraph 8.251)

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?

162. Yes.

Consultation Question 89 (Paragraph 8.256)

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?

163. Yes.

Consultation Question 90 (Paragraph 8.257)

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?

164. Yes.

Consultation Question 91 (Paragraph 8.258)

3.97 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.

165. This is outside our area of expertise.

Consultation Question 92 (Paragraph 9.13)

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?

166. We agree that permission proceedings form an integral part of the committal for contempt process and should be eligible for funding by legal aid.

167. The question as to that funding, however, is one that must be examined in detail. Legal Aid remuneration for contempt proceedings is woefully inadequate and as an essential adjunct to this consultation the rates for conducting contempt proceedings must be reviewed.

Consultation Question 93 (Paragraph 9.19)

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?

168. Yes.

Consultation Question 94 (Paragraph 9.20)

13.100 We provisionally conclude that applications to discharge committal orders are criminal proceedings for the purposes of legal aid.

Do consultees agree?

169. Yes.

Consultation Question 95 (Paragraph 9.33)

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?

170. Yes, subject to the Legal Aid application process being streamlined so that contempt proceedings are not delayed by lengthy wrangling with the LAA.

Consultation Question 96 (Paragraph 9.40)

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?

171. On the evidence presented it appears abundantly clear that certain defendants are at a particular disadvantage. The conclusions of CJC, *Anti-Social Behaviour and the Civil Courts* (2020) report make for sombre reading.

172. The thing that would provide the greatest prospect of remedying these problems would be proper funding. Until there is proper remuneration for this kind of work legal providers will continue to refuse to take it on and the risks of serious injustice will increase.

Consultation Question 97 (Paragraph 9.48)

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?

173. This is not our area of expertise.

Consultation Question 98 (Paragraph 9.62)

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?

174. This is not our area of expertise, however in would seem iniquitous not to have a requirement to consider means in all proceedings.

Consultation Question 99 (Paragraph 9.73)

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?

175. Yes.

Consultation Question 100 (Paragraph 10.20)

13.108 We provisionally propose that the two-year maximum sentence for contempt of court should remain.

Do consultees agree?

176. Yes.

Consultation Question 101 (Paragraph 10.27)

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).

177. This is outside our area of expertise

Consultation Question 102 (Paragraph 10.35)

13.110 We seek consultees' views on whether committal should remain an option where contempt is committed by publication when proceedings are active?

178. Yes it should.

Consultation Question 103 (Paragraph 10.46)

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?

179. Yes, we agree.

180. The regime should replicate the perfectly serviceable regime that exists in criminal proceedings and for which provisions have been set out by the Sentencing Guidelines Council.

Consultation Question 104 (Paragraph 10.65)

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?

181. Yes – the provisions of the section 30 of the Sentencing Act 2020 should apply.

Consultation Question 105 (Paragraph 10.66)

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?

182. Yes. See s232 SA 2020. In addition the SGC provides extensive helpful guidance on sentencing in these circumstances.

Consultation Question 106 (Paragraph 10.75)

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?

183. Yes.

Consultation Question 107 (Paragraph 10.88)

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?

184. Yes.

Consultation Question 108 (Paragraph 10.95)

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?

185. Yes.

Consultation Question 109 (Paragraph 10.102)

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?

186. Yes.

Consultation Question 110 (Paragraph 10.109)

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?

187. We have no evidence of such a gap, although we appreciate it may be of concern. We support the requirement for PSRs and would encourage the provision of continuous ongoing support for all prisoners.

Consultation Question 111 (Paragraph 10.116)

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?

188. Yes.

Consultation Question 112 (Paragraph 10.119)

13.121 We provisionally propose that the superior courts should have the power to suspend a fine in contempt cases.

Do consultees agree?

189. Yes. This could be a useful addition to the range of sentencing options.

Consultation Question 113 (Paragraph 10.129)

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?

190. This is outside our area of expertise.

Consultation Question 114 (Paragraph 10.139)

13.125 We provisionally propose that community sentences should be available as a sanction for contempt of court.

Do consultees agree?

191. Yes.

Consultation Question 115 (Paragraph 10.143)

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.

192. This is outside our area of expertise.

Consultation Question 116 (Paragraph 10.147)

13.127 Do the superior courts have appropriate powers with respect to mental health orders in the context of contempt?

193. Yes.

Consultation Question 117 (Paragraph 10.167)

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?

194. This is outside our area of expertise.

Consultation Question 118 (Paragraph 10.169)

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?

195. We agree with the proposal, save that Magistrates' Courts should have sentencing powers of imprisonment up to six months and unlimited fines (commensurate with their criminal sentencing powers).

Consultation Question 119 (Paragraph 10.176)

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?

196. Outside our specific area of expertise and experience, although we suggest that there should be parity with English Courts and Tribunals.

Consultation Question 120 (Paragraph 10.178)

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?

197. Outside our area of expertise, however the same parity comments apply.

Consultation Question 121 (Paragraph 10.214)

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?

198. Yes (and logic dictates that any such working group should liaise with the Sentencing Guidelines Council - although we note their reluctance to become involved).

Consultation Question 122 (Paragraph 10.236)

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?

199. No. We prefer proposal 2a – that it may be entered on the PNC (as important information about an individual) but that it should not appear on a criminal record certificate.

Consultation Question 123 (Paragraph 10.237)

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?

200. Yes (but see answer above re: PNC).

Consultation Question 124 (Paragraph 10.246)

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?

201. Yes.

Consultation Question 125 (Paragraph 10.247)

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?

202. Yes. The data set out at 10.243(1) to assist with analysis and the future review of the regime. And yes - anonymised and disaggregated data should be published in the interests of transparency.

Consultation Question 126 (Paragraph 10.250)

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.*

203. We have nothing to add.

Consultation Question 127 (Paragraph 11.41)

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?

204. Yes

Consultation Question 128 (Paragraph 11.42)

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?

205. Yes

Consultation Question 129 (Paragraph 11.54)

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?

206. Option 2.

Consultation Question 130 (Paragraph 11.89)

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?

207. Yes.

Consultation Question 131 (Paragraph 11.97)

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?

208. Yes.

Consultation Question 132. Paragraph 11.103

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?

209. Yes.

Consultation Question 133 (Paragraph 11.108)

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?

210. The AG should not be able to appeal in contempt cases where they are the applicant save where the matter relates to an unduly lenient "sentence".

Consultation Question 134 (Paragraph 11.113)

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.

211. Yes.

Consultation Question 135 (Paragraph 11.114)

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.

212. Yes.

Consultation Question 136 (Paragraph 12.21)

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.

213. Practicalities of the proposed reforms have been referred to throughout this lengthy consultation document. The truth of the matter is that for these long-needed proposals to be brought into effect further funding must be obtained from the Treasury for more sitting days, increased funding for probation and support services, the proper funding of legal aid and of the prison service. Reform must not come at the expense of a system that is already creaking and on its knees.

Consultation Question 137 (Paragraph 12.26)

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.

214. We do not have any such evidence or data at this stage.