Bar Council response to the Law Commission's Consultation on Contempt of Court

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation on Contempt of Court.[1]

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

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[1] Consultation

Introduction

The Law Commission's consultation paper on Contempt of Court is a typically well-researched and thoughtful publication. In preparing this response, we have canvassed the views of practitioners from a variety of fields of practice. We have also benefited from sight of responses prepared by various professional associations. We should note at the outset that many of the issues raised by the consultation attract a range of opinions. That is to be expected when considering an area of the law that spreads across jurisdictions. While harmonisation of the law is to be welcomed where it is possible, it is equally important to bear in mind that different considerations may apply in different practice areas. That is in part dictated by the nature of the parties – for example, the parties in commercial litigation are likely to have very different resources than those engaged in private family proceedings. Equally, there is a fundamental distinction between disputes in which the state plays a role – for example as prosecutor in criminal proceedings – and those which concern only private parties on each side. In this response, we have sought to present the balance of the views that we have obtained on the questions asked, recognising that the Law Commission will have available to it the full range of responses from other interested parties.

Question 1.

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

Do consultees agree?

1. We are not persuaded of the need for a change. The benefit of any change would of course in any event depend on what the current framework is replaced with.

2. The suggestion is commonly made that the terms "civil contempt" and "criminal contempt" are apt to cause confusion. See for example *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, at 217F, where Lord Oliver of Aylmerton noted that the distinction had been variously described as "unhelpful" or "largely meaningless"). The most obvious drawbacks to the existing classification concern the risk of confusion arising from the existence of criminal penalties for "civil contempt", and the fact that both forms of contempt may be committed in either jurisdiction.

3. In practice, however, the current division between "civil contempt" (breach of order or undertaking) and "criminal contempt" (everything else, i.e. any other interference with the administration of justice) is, once grasped, readily understood. Similarly, the strict liability

form of contempt by publication in the course of active proceedings is generally well understood.

4. The Law Commission acknowledge that the existing distinctions serve a purpose, and do not propose that the three-way distinction between what may be termed Criminal, Civil and Strict Liability contempt should really be modified. The issue that is identified in this part of the consultation paper is, rather, more one of fair labelling. We do not underestimate the value of describing offences in terms which are readily comprehensible to the layman. However, the proposed replacement terms are themselves not without their own idiosyncrasies, and are linguistically somewhat more unwieldy.

5. More fundamentally perhaps, the proposed structure – whereby civil and strict liability contempt remain untouched, but renamed, and the remainder of criminal contempt is renamed, but split by *mens rea* depending on publication – risks creating a structure which is more confusing than that which it seeks to replace.

6. Leaving aside terminology and turning to the substance of the proposals, we would question the need to draw a distinction between "general contempt by publication" and "general contempt other than by publication". The suggested justification for this distinction turns on the contention that Article 10 rights are engaged in contempt by publication, and that this necessitates a higher level of *mens rea*. While the question of what should be the applicable *mens rea* for criminal contempt / general contempt is a question of policy, on which we express no view, we are able to express a view on the requirements of Article 10 in this regard.

7. Article 10 provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for

maintaining the authority and impartiality of the judiciary.

8. As is plain from the above, Article 10 creates a qualified right, interference with which may be permitted in accordance with the law and insofar as is necessary for particular purposes, including (perhaps of most relevance here) the protection of the rights of others. We do not consider that restricting the exercise of that right so as to criminalise conduct by someone who is aware that their conduct carried a substantial risk of interfering with the administration of justice, and whose taking of the risk is in the circumstances known to him unreasonable, would represent a breach of Article 10.

Question 2.

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

Do consultees agree?

9. Yes. This would bring clarity to the area.

Question 3.

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

Do consultees agree?

10. Yes. This would maintain the test which presently applies to the conduct which the Law Commission seeks to define as "general contempt", and which is presently understood as criminal contempt. In particular, we agree that "interference" connotes undesirability and that no further gloss is required.

Question 4.

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

Do consultees agree?

11. The proposal made here is suggested to *"reflect the fact that general contempt is concerned with serious behaviour, which we provisionally consider to be conveyed by a test that excludes from liability any trivial interferences."* It appears to be suggested that this would effectively represent a re-statement of the existing law.

12. However, it appears to us that setting the bar at the "non-trivial" level would represent a modification of the test that is presently applied by the courts. As explained in the Supreme Court decision of *Serious Fraud Office v. O'Brien* [2014] UKSC 23, at [39]:

"A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of a trial, threatening witnesses or publishing material likely to prejudice a fair trial."

13. We would also flag that the case of *Solicitor General v Cox* [2016] EWHC 1241 (QB), which is cited in the consultation paper (at 3.14, fn13) as an example of a lesser test of *"real risk"* being applied by the courts, does not in fact reflect any such lesser test. In paras. 23 and 24 of that judgment, Ouseley J repeatedly referred to the risk being of "serious interference" with the proper administration of justice. See for example the following, from para. 24:

"The real and specific risk of serious interference with the proper administration of justice are evident."

14. Whether or not the test should be changed is a matter of policy, on which we express no view. We would however observe that, given the available sanctions for contempt, the dilution of the conduct element in the way proposed would require a proper justification.

Question 5.

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

Do consultees agree?

15. We agree that a risk of the required degree of interference should suffice in order to establish the conduct element of this form of contempt. As is pointed out in the consultation paper, it will often be impossible to establish whether an actual interference with the administration of justice has eventuated. The existing caselaw (see e.g. *Solicitor General v. Cox*, above) treats the risk of interference in the same way as actual interference.

16. As observed above, however, we take the view that the existing state of the law requires the creation of a real risk of serious (rather than non-trivial, if, as it seems, that is intended to mean something else) interference with the administration of justice. In line with our response to CQ4, we take the view that while any change to this test would be a question of policy, any such change would need to have a proper justification.

Question 6.

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

Do consultees agree?

17. At present, what is required to establish this form of contempt is proof of a "real risk" of the requisite level of interference with the administration of justice. It is unclear to us whether the word "substantial" carries a different meaning than "real", given the way in which the courts have applied the "substantial risk" test in the Contempt of Court Act 1981, that is, as a risk which is not remote (so a risk of substance). If that is right, then we can see the value in harmonising the language of the test as between strict liability contempt and the form described by the Law Commission as general contempt.

Question 7.

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

Do consultees agree?

18. Yes. We are not aware of any persuasive justification for altering the present position. As illustrated in the consultation paper, there are a number of ways in which the administration of justice may be interfered with before proceedings commence.

19. While the problem of defining "imminent" is noted, we also agree that any attempt to provide clarity by selecting a time period within which proceedings must be anticipated is no real solution. How is a publisher (for example) to determine whether proceedings may commence within one, two or seven days, not least when this may depend on unpredictable factors such as when a suspect is apprehended?

20. On one view, it may be considered that the required *mens rea* provides a significant measure of protection in the face of concerns that free speech is being unduly chilled. Regardless of whether intention or recklessness is required, in order to be found in contempt, an alleged contemnor must be proved to have had some contemplation that proceedings have started, or may start, when performing the act which gives rise to the alleged contempt. If the purpose of providing a defined period is to enable informed decisions about whether to publish / perform some other act, that purpose is arguably met be requiring the alleged contemnor to have addressed their mind to this possibility before they can be found in contempt.

Question 8.

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

Do consultees agree?

21. Yes, if "future proceedings" is read in this context as including any retrial or appeal in the concluded proceedings.

Question 9.

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

Do consultees agree?

22. At present, what the law requires for this form of contempt is merely an intention to interfere with the administration of justice.[2] The proposal made by the Law Commission raises the bar for proving *mens rea*.

23. We do not consider that the existing test for *mens rea* offends against Articles 10 or 11 of the ECHR (the former of which is the more generally relevant here). It does not seem to us to be arguable that the qualified rights guaranteed by those articles require that those who intend to interfere with the administration of justice, even in a trivial way, should escape liability for contempt where their conduct either gives rise to a real risk of serious interference with the administration of justice, still less where such a consequence eventuates. Plainly, though, an unintended level of consequence may be relevant to the sanction imposed.

24. Accordingly, we do not consider that the case has been made that the present law requires a change.

Question 10.

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

Do consultees agree?

25. Yes. Taking photographs in court is a classic example of conduct that historically has been found to give rise to a real risk of serious interference with the administration of justice. See for example *Solicitor General v. Cox*, above.

Question 11.

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

Do consultees agree?

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[2] Save in specific contexts. For example, a statement made by someone who effectively does not care whether it is true or false is liable as if that person knew what was being said was false: *Berry Piling Systems Limited v. Sheer Projects Limited* [2013] EWHC 347 (TCC), at [28].

26. That is a policy question, which we leave to others to answer. But see the response to Question 9 above.

Question 12.

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

(1) only by intention, or

(2) either by intention or recklessness.

Paragraph 3.115

27. That is a policy question, which we leave to others to answer.

28. However, we would observe that the introduction of different tests for *mens rea* relating to "general contempt by publication" and "general contempt other than by publication" risks undermining the clarity which the Law Commission seeks to introduce to this area. That is so not least because what constitutes publication is not without ambiguity (for example it is generally understood to bear a different meaning at common law than it does in the context of the strict liability form of contempt). If there is not to be any different test between these two methods then that further militates against the changes covered in CQ1, above.

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.

29. If recklessness were the relevant *mens rea*, we agree that the criminal test for recklessness has been accurately stated here.

Question 14.

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

Do consultees agree?

Paragraph 3.117

30. Yes. However, see the observations above on the question of whether the distinction between "general contempt by publication" and "general contempt other than by publication" is necessary and helpful.

31. We agree that the use of illustrative examples which include online or electronic communications would assist.

Question 15.

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

Do consultees agree?

Paragraph 3.143

32. Yes, for the reasons given in the consultation paper.

Question 16.

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

Do consultees agree?

Paragraph 3.178

33. Yes. This would assist in rendering the law accessible to non-lawyers and those who do not regularly encounter this area.

Question 17.

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

(1) disrupting court proceedings;

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

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

(4) taking photographs in court;

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

(6) misconduct by jurors;

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

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

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

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

(11) accessing court documents without authorisation; or

(12) misconduct by legal representatives.

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

34. These seem to us to broadly capture the range of ways in which criminal / general contempt may be committed. However, consideration may need to given to a more specific description of certain of the examples. In particular, it is worth comparing the proposed example of *"providing false statements or disclosures to the court"* with the definition contained in CPR r.81.3 of *"knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement"*.

Chapter 4

Consultation Question 18.

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

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

(2) an undertaking given by the defendant, provided the order or undertaking is accompanied by a penal notice or its equivalent.

Do consultees agree?

35. Yes.

Consultation Question 19.

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

Do consultees agree?

36. Yes, for the reasons set out in the consultation paper.

Consultation Question 20.

4.43 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant knows that they are bound by the relevant court order.

Do consultees agree?

37. Yes.

Consultation Question 21.

4.44 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should not require proof that the defendant knows the precise terms of that order.

Do consultees agree?

38. Yes.

Consultation Question 22.

4.55 We provisionally propose that to establish the fault element for contempt by breach of a court order or undertaking should require proof that the defendant had knowledge of the facts that made the conduct a breach.

Do consultees agree?

39. Yes.

Consultation Question 23.

4.86 We provisionally propose that interim remedies should be available to the court in order to ensure compliance with court orders or undertakings without the court having to make a finding of contempt.

Do consultees agree?

40. We agree that this would be helpful, for the purpose of achieving (or restoring) compliance with court orders, and for deterring further non-compliance.

Consultation Question 24.

4.87 We provisionally propose that such interim remedies should be available where a court is satisfied that each of the elements of contempt by breach of order or undertaking has been made out.

Do consultees agree?

41. Yes.

Consultation Question 25.

4.88 We provisionally propose that the standard of proof to obtain an interim remedy should be the civil standard (that is, on the balance of probabilities).

Do consultees agree?

42. Yes. Given that interim coercive remedies are not intended to be punitive, we agree that a lesser standard of proof would be appropriate than that required for a full finding of contempt.

Consultation Question 26.

4.89 We provisionally propose that interim remedies should only be available where any detrimental effect of non-compliance can be remedied by subsequent compliance.

Do consultees agree?

43. Yes, to minimise the risk of interim remedies being weaponised for a punitive purpose.

Consultation Question 27.

4.90 We provisionally propose that the court should have power to order the following, fixed-term interim remedies:

(1) an order that the defendant pay a fixed, perhaps periodic, deposit of money into court (which would be returned upon subsequent compliance or otherwise forfeit subject to further order of the court following a finding of contempt);

(2) sequestration of assets, the property or proceeds of which would be forfeit subject to further order of the court following a finding of contempt; and

(3) an order that the defendant surrender a passport or any other document that would allow the defendant to leave the jurisdiction.

Do consultees agree?

44. Yes. Such interim remedies may represent proportionate means of compelling compliance.

Consultation Question 28.

4.91 Should other interim remedies be available?

45. Potentially, yes, depending on the nature of the contempt and of the underlying proceedings.

Chapter 5

General

46. The Bar Council proposes that once criminal proceedings are active, there should be only one route to liability for contempt consequent on a prejudicial publication, whether the result of a breach of the revised strict liability rule (currently s.2(2) CCA 1981) or a breach of a court order (currently s.4(2) CCA 1981), and whether prosecuted (as now) by the Attorney-General with the permission of the Administrative Court or initiated by the Court of its own motion.

47. As currently proposed, it is understood that liability under s.2(2) would fall under the head of 'general contempt by publication' and liability under s.4(2) would fall under the head of 'contempt by breach of court order'.

48. The reasons for having one regime are as follows:

(a) A breach of a Section 4(2) Order will almost inevitably also constitute a *prima facie* breach of the strict liability rule or its proposed replacement (*Attorney General R v Yaxley-Lennon* [2019] EWHC 1791 QB at [95(1)]. This is because Section 2(1) defines a publication as *"any communication in whatever form"* and Section 4(2) relates to a subset namely the publication of a report of proceedings. It makes little sense for there to be two separate procedural frameworks and two separate legal tests applied to the same factual scenario. As it stands during a criminal trial two individuals could post prejudicial comments and be dealt with under a different regime depending on whether their comments could be classed as a 'report' or not. The CCA 1981 was obviously enacted before the advent of social media when both the role of a 'journalist' and the nature of a 'report' were clear.

(b) A principle aim of the proposed reform to the law of contempt is to harmonise procedure and bring greater transparency to a confusing area of the law. This is of particular importance in criminal courts where a publication which does present a substantial risk of serious prejudice could result in a discharge of the jury and a retrial (apart from any discrete liability for contempt on the part of the publisher). It is obviously the case that lay juries, as tribunals of fact, will more likely be prejudiced by offending publications then the professional judiciary in civil cases. It should be born in mind that the contempt jurisdiction has two purposes – to act as an *in terrorem* rule to dissuade offending publications and to provide for the necessary and fair trial and punishment of contemnors.

(c) In *Yaxley-Lennon* at [93]-[96] the Court, comprised of two judges with considerable experience of this area of the law, recognised the cross-over between the two species of statutory contempt and resolved the issue by, somewhat unsatisfactorily, ruling that, notwithstanding the wording of CPR r.81 to the contrary, a breach of a Section 4(2) Order is to be treated as an interference in the administration of justice rather than a general breach of a court Order; that is, the breach is effectively to be dealt with as a general contempt under the strict liability rule[3]. The proposed reforms will not solve the problem of which contempt jurisdiction is to be invoked.

(d) In the criminal courts, Section 4(2) Orders are frequently made but rarely breached (*Yaxley-Lennon* at [56] – this accords with the experience of practitioners). Therefore there is no pressing need for these orders to be encompassed within a separate framework for the breach of court orders generally.

49. The Consultation does not expressly analyse Section 4(2) in Chapter 4 as a stand-alone provision, but rather incorporates it as one of a number of court orders, the breach of which can constitute a contempt (see §4.11(4)).

50. The Consultation proposes that there is a *mens rea* of recklessness for the offence which will be the equivalent to the current breach of strict liability rule, yet there is no proposed fault element in respect of a breach of a Section 4(2) Order (beyond proof that D knows that s/he is bound by the Order, as opposed to knowledge of its terms). Given that in criminal proceedings, as above, a breach of a Section 4(2) Order almost inevitably constitutes a *prima facie* breach of the strict liability rule and that the High Court considers that the former should effectively be treated as the latter, this anomaly could be avoided by the proposed carve-out.

51. The Bar Council also notes that whilst the reporting of court proceedings will engage the media's Article 10 ECHR rights, in criminal proceedings D's right to a fair trial (Article 6 ECHR), which will include a consideration of the extent to which prejudicial reporting will adversely affect the neutrality of the jury, is not a qualified right and therefore its enforcement does not involve a balancing exercise between competing rights, for example, centred on consideration of the public interest; Article 6 has primacy.

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[3] As recognised at §8.69 of the Consultation – see also §3.67-§3.76 and §5.6

Question 29

We provisionally propose that for contempt by publication where proceedings are active, a defendant may be liable for contempt regardless of whether there was an intent to interfere with the administration of justice, but the applicant should be required to prove that:

(1) a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew or had reason to suspect proceedings were active; and

(2) a defendant distributor was reckless as to whether the distributed material "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced", in the sense that they knew there was such a risk and unreasonably took that risk by distributing the material.

Do consultees agree?

52. We agree that an offence of contempt of court should contain a fault element. There are of course a number of criminal offences which contain a fault element where the burden of proof rests on D to prove, to the civil standard, that s/he was not at fault. That route to liability has frequently been found to be compliant with Article 6(2) ECHR, notwithstanding the penalty on conviction. For example, s.92(5) of the Trades Marks Act 1994 provides that it is for D to establish that he believed on reasonable grounds that the relevant mark was not an infringement; an offence which carries 10 years imprisonment (*R v Johnstone* 2003 2 Cr App R 33). One important consideration is the extent to which the matters relevant to proof of the fault element are within D's own knowledge and, correspondingly, will be difficult for the prosecution to prove. There must though be a "compelling reason why it is fair and reasonable" to derogate from D's protection of the presumption of innocence [*ibid.* §49-50 per Lord Nichols]. In the context of contempt, different conclusions as to a reverse burden may be reached in respect of the two proposed fault elements. In respect of (1) above, D will know whether at the material time he knew or suspected that proceedings were active. On one view it would be an onerous element for the prosecution to prove why D had reason to suspect. In respect of (2) above, the question of risk to specific proceedings is inevitably fact specific and D may well not know or easily be able to find out the factual circumstances which create the risk and/or the extent of that risk.

53. A *mens rea* of 'knowledge or reason to suspect' in (1) above[4] is not a test of recklessness, as defined in *R v G* [2004 1 Cr App R 21 and as identified at §5.17 of the Consultation. As posed

[4] This description of this state of mind as recklessness is also included at page 10 of the Summary of the Consultation Paper

in (1) the test is objective and does not involve the subjective assessment of the risk of the circumstance, namely, the existence of extant criminal proceedings. *If* the test is to be one of recklessness, then it is suggested that (1) should read:

a defendant publisher was reckless as to whether proceedings were active, in the sense that they knew the proceedings were active or, or knew that there was a risk of such and unreasonably took that risk

54. While, ultimately, this amounts to a policy choice, there may though be good reason to reject a test of recklessness in respect of the existence of active proceedings. Applying the test in *G* means that a publisher who wilfully shuts his eyes to the objectively obvious would escape liability. Such a test would also benefit non-responsible publishers who do not have procedures in place to identify whether proceedings were active (as recognised in §5.31). Therefore the test as articulated in (1), although not one of recklessness, may be considered more appropriate and would address the issue of distributors such as Facebook or Instagram as discussed in §5.18.

Question 30.

In circumstances where more than one person or organisation may be the subject of proceedings for contempt by publication where proceedings are active, should the law prioritise some defendants over others? If so, which defendants should be prioritised and why?

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?

55. We agree that, in terms of the mainstream media, the personal responsibility of journalist is an important component in the purpose of the law of contempt, namely to ensure compliant behaviour which does not undermine the integrity of the system of justice. There is a risk that individuals will rely on the deep pockets of their corporate employers and fail to take the necessary care both as to the existence of active proceedings and the risk of prejudice. The fact that anecdotally there are so few prosecutions for contempt in these circumstances demonstrates that the current deterrence of individual liability is effective. It is not clear why journalists or media commentators should be absolved from criminal liability; they are not an obviously vulnerable group within society. No prosecution for contempt can be brought by the Attorney-General unless it is in the public interest to do so (see the link to the 'Contempt public interest framework' at Consultation fn13). It is not understood what is meant by 'prioritising' defendants in this context. If there is to be a specific rule for a particular cohort

of society which effectively pre-emptively pardons them from what would otherwise be criminal behaviour, punishable as such and without any consideration of the merits, there would need to be compelling public interest reasons.

Question 31

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?

56. Yes, for the reasons given.

Question 32

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?

57. We agree with the principle that archived electronic material which has been published, and is still available to the public or a section of it, should be subject to the law of contempt. It is though not clear why the *mens rea* is different in respect of proceedings being active. For contemporary material, as above, the test is recklessness (or knowledge/reasonable grounds for suspicion). Whilst of course a publisher may be vested with actual knowledge, because the Attorney-General has taken appropriate steps to publicise the fact, a publisher is equally culpable if they are reckless. Retaining liability for a state of mind short of knowledge is important for the deterrent effect of the contempt jurisdiction. Also to link criminal liability

to the decision (not duty) of the AGO to put a publisher on notice in respect of one set of proceedings but not another, appears arbitrary. Additionally, it will not encourage good practice on the part of publishers to establish appropriate procedures to determine whether proceedings are active.

58. Presumably the question of notice is not limited to a formal notice issued via the AGO. A publisher could be on notice if, for example, the parties to a case communicated with a particular publisher or a Judge informs the press in open court in associated proceedings or in other circumstances. The test should be centred on the state of mind of the publisher not the means of notification.

59. The proposal to exclude previously published print material is agreed for the reasons given.

Question 33

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

Do consultees agree?

60. We agree that the position needs to be clarified. Otherwise general common law principles will apply, which turn on the 'substantial connection' test in *Smith (No.4)* in circumstances where the publication is likely to be complete before the content is read within the jurisdiction.

Question 34

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).

61. Whilst the purpose of extending the territorial reach of the offence is understandable in principle, it is not clear how in practice any breach will be enforced. There is little point in criminalising offending behaviour which cannot be prosecuted. To that end, extending liability to those individual or organisations who have a permanent link to England and Wales makes sense, although it is not clear how many potential offenders such a provision would catch.

62. A test of 'habitual residence' though has proved in the past to be notoriously difficult to define and prove in a criminal court. Prosecution of individuals who move in and out of the jurisdiction used to be dependent on whether they were 'ordinarily resident' for purposes of (as was) Section 829(1)(2) of the Income Tax Act 2007. That involved trying to determine whether they were resident for 183 days or alternatively undertaking a tortuous 'multifactorial enquiry'. The test was ultimately replaced by the 'statutory residence test' pursuant to Schedule 45 to the Finance Act 2013. Whilst a 183 day test might on paper seem straightforward to apply, the experience of HMRC has demonstrated to the contrary. If a 'habitual residence' test or similar is to be adopted, it will need to be fully defined.

Question 35

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?

63. Yes. Whilst clarity and certainty in the definition of elements of a criminal offence is essential (*R v Rimmington; R v Goldstein* [2006] 1 AC at para. 33), there is no requirement for further definition here.

Question 36

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

64. There is no easy answer. There will inevitably always be cases where the current rule (and proposed future rule) is overly restrictive. The purpose of the law of contempt in this context is to ensure that the defendant has a fair trial, not to protect the rights of the individual who may be wrongly (as it turns out at the end of the charging or trial process) identified by the media as the perpetrator of crime; the law of defamation and an individual's Article 8 rights provide the necessary protections. Also, there will remain a risk that a publisher will not know that there has been an arrest (although the fault element in reformulated strict liability rule, however expressed, will provide a protection to the publisher in those circumstances).

65. However, ultimately the issue turns on the risk of prejudice to a tribunal of fact (often a lay jury). No prosecution for contempt (as with any other criminal offence) can be brought unless there is a realistic prospect of conviction. In the context of contempt proceedings the assessment of the strength of the evidence going to the risk element of the offence will take account of the 'fade factor': the longer the time between publication and trial, the less the risk of actionable prejudice. The Consultation does not indicate that there is a body of evidence to suggest that publishers have been prosecuted for contempt in circumstances where there would have been no prosecution had proceedings become active at the point of charge, as opposed to arrest. The dearth of prosecutions and (anecdotally) the relative few occasions where trials are aborted due to prejudicial publicity suggest that the current 'cut off' point is fair and is effective as a deterrent.

Question 37

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?

66. We agree, for the reasons given in the consultation paper.

Question 38

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?

67. Yes. Whilst the risk of actual prejudice to the sentencing process is likely to be minimal (although the impact on lay magistrates should not be dismissed), the perception identified in the Consultation is important. Strides have been taken in educating the public in the purpose and structure of the sentencing process, primarily by the broadcasting of sentencing remarks in high profile case. However, unrestrained comment by pressure groups and the media in advance of the sentence hearing, in circumstances where the detail of the facts of the case are either not known or not properly addressed by the publisher, will lead to the perception that, firstly, comment can sway the outcome and, secondly, if the sentence happens to mirror that for which the 'public' was advocating, did so.

68. Additionally, albeit in a small minority of cases, unrestrained comment in advance of the sentencing in a high profile case could prejudice a future trial, if D successfully applies to vacate a guilty plea in advance of the sentence hearing (such cannot happen after sentence).

69. It is self-evident that if comment is being made as to the sentence which is to be passed, the publisher must already know of the conviction. So, arguments about the need for or definition of a fault element to the offence of contempt has little or no application in this context.

Question 39

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?

70.

Question 40

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.

71. We agree that the statutory 'defence' should be retained. In fact, the current Act does not describe Section 5 as a defence and does not provide for a burden and standard of proof. Lord Diplock in *Att-Gen v English* [1983] 1 AC 116 states that Section 5 is on an "equal footing" with the offence creating provision (Section 2(2)) and, at [142], that if the publication 'falls' within the ambit of Section 5 (ie. it was a discussion in good faith…), the burden was on the Attorney-General to 'show' that the attendant prejudice was not 'merely incidental' to the discussion. It is hoped that any draft legislation will take the opportunity to expressly provide for the status of the 'defence', and precisely articulate where the burden and standard of prove lies in respect of each element of it.

72. The Bar Council does not have a particular view as to which word is used to qualify the relationship between the risk of prejudice and the discussion. Whilst there is an argument that 'incidental' is an ordinary English word which does not require any further definition, since there appear to be two inconsistent strands of judicial interpretation, there should be a statutory definition. The mischief of the law on contempt here is the publication of material which carries a risk of prejudice to particular criminal proceedings. To that end Tugendhat J's adoption of a test which addresses the closeness of the topic of discussion to those proceedings is to be preferred (see Consultation §5.124).

Chapter 6

Question 41

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?

73. We agree that the well-established test of whether a body is exercising the judicial power of the state remains the appropriate test for determining whether a body is a "court" for the purposes of contempt. This is subject to our views in response to Question 42 below.

Question 42

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?

74. We partly agree with this proposal. First, we agree that there should be a list of the bodies that are considered "courts" which has the benefit of providing certainty and clarity,

especially to litigants in person. This would benefit parties as a consolidation of the case law and decisions to date.

75. Second, however, where this is set up as a non-exhaustive list, this would still give rise to potential ambiguity and would mean that a party seeking to research whether the body it is concerned with is a "court" for the purpose of contempt, upon finding that it was not listed would still have to go on to consider whether it is a body exercising the judicial power of the state. That is a multifactorial test, capable of giving rise to uncertainty, and differing opinions even amongst the legally trained, which may not then be clarified until there is litigation to determine the point. This is highly undesirable and represents a potential barrier to access to justice to unrepresented litigants for whom this may be a confusing task. We consider there is much to commend a slightly different approach, which is to create an exhaustive list of "courts" which list can be updated periodically by statutory instrument in the same way, for example, that the list of "prescribed persons" for protected interest disclosures is updated periodically. This should not occupy significant legislative time should that be a concern. This is an important aspect to consider if new bodies are created or existing bodies' powers change such that a reclassification or new classification is merited to ensure that the consistency and clarity of approach commended by the Law Commission is properly carried into effect. We recognise that the consequence of this is that the list would be determinative of whether a body is a "court".

Question 43

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?

76. We agree that there should be one test applied to all potential "courts" for the purposes of contempt which is whether it is exercising the judicial power of the state. Having agreed with that, we go on to agree with the proposed bodies which the Law Commission considers should be included on the list of "courts" albeit that we advocate for an exhaustive list for the reasons given in the response to question 42.

77. We do not make a strong case for the inclusion or exclusion of any specific bodies in the list though we have already agreed that a uniform test as to whether such a body is exercising the judicial power of the state is apposite, and we further agree that the volume of cases determined or level of work undertaken by such bodies should not be a determinative factor; put simply, if the test is met then it does not matter whether such a body determines 1 case or 100,000 cases a year.

78. However, in relation to the suggestions made by the Law Commission in paragraph 6.65 we comment as follows:

i. There would appear to be a good case for including all tribunals and bodies which are administered by HMCTS as it would appear that the very fact of their administration by HMCTS is linked to the exercise of judicial power of the state;
ii. As to tribunals and bodies not administered by HMCTS we consider that it would be useful to understand why they are not so administered which may be a factor pointing away from the exercise of the judicial power of the state;
iii. We consider that tribunals and bodies that regulate professions are less likely to be exercising the judicial power of the state. However, *if* they are then, again, a uniform definition is most likely required meaning that all professional regulatory and disciplinary bodies should be considered to be "courts". At present, though, we express considerable doubt as to whether this is correct. The essential constitutional purpose of the judiciary is to decide whether laws are being followed or if they have been made properly. This includes all forms of legislation, primary and secondary, but does not, in our view, encompass the "policing" of profession-specific rules determined by the profession itself (see General Medical Council v BBC, to be contrasted with any decision of the legislature that in order to be recognised or to practise a practitioner must comply with the rules and regulations set by that professional body). We are of the view, based on experience practising before regulatory and disciplinary tribunals, that there is no discernible need for such bodies to have the protection of the law of contempt, nor would they be well placed to exercise any consequent powers in this regard.

Question 44

We provisionally propose that the test for whether a devolved Welsh tribunal is a "court" for the purposes of contempt should be whether it is exercising the judicial power of the state.

Do consultees agree?

79. Yes. We consider that the same test should apply for consistency and clarity's sake. There would be no principled reason to adopt a different test in our view.

80. However, we consider that the matter should be left to the Welsh Government and Senedd Cymru, given the current and ongoing reform of the entire system in Wales (see the Bar Council's previous response to the recent Consultation on Devolved Welsh Tribunals).

81. Furthermore, even if Schedule 7A Part 1 paragraph 8 of the Government of Wales Act 2006 expressly reserves the "*Single legal jurisdiction of England and Wales*" including (c) *civil and criminal proceedings* and paragraph 9 expressly reserves *tribunals*, there is nevertheless an exception for "*devolved tribunals*" and their procedures, so it is arguably wiser to leave this issue to the Welsh Government's own Tribunal Reform.

82. Insofar as there is any doubt over the issue of the competence of Senedd Cymru to legislate in relation to contempt in devolved Welsh Tribunal proceedings, this power could be expressly devolved to avoid any confusion.

Question 45

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?

83. In principle yes, but please see above as to our view that the matter should be left to the Welsh Government and Senedd Cymru.

Question 46

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

84. Yes. We consider this is a matter which calls for further review. We note however the Law Commission is not in a position to deal with this within the scope of this consultation.

Question 47

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

85. Having regard to the concerns articulated by those who are best placed to understand the culture, context and limitations of such superior courts, we consider there should be a judicial discretion to refer a contempt to the High Court where the judge considers that it would be in the interests of justice to do so. It would likely merit further consultation as to the factors which are relevant to the exercise of such a discretion, but we doubt that resources *alone* would warrant a referral to the High Court. This would entail an expansion of the High Court's powers in some instances as noted in paragraph 6.129.

86. We support any measures which assist any court which has power to deal with contempt proceedings in doing so with adequate resources, but the question of resources seems to us to be a separate one to the question of principle. We do not however underestimate that a change of regime may result in a substantial increase in referrals from the Employment Tribunal and First-Tier Tribunal in circumstances in which plainly contemptuous conduct often goes unchecked or has to be managed in other ways because of the cumbersome nature of or absence or effective referral mechanisms.

Question 48

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?

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

87. Subject to the question of whether "general contempt" should be subdivided by whether or not it is alleged to have been committed by publication (see response to CQ1), we agree that all protected inferior courts, tribunals and other bodies should have the limited powers suggested.

88. While it might be said that judges and tribunals in these courts, tribunal and bodies have adjusted to ways of working in recognition of their lack of powers in this regard, we consider the lack of uniformity and clarity and the lack of consistency as to which bodies have which powers to be highly unsatisfactory and to significant impede justice in many cases. We do not consider that the introduction of these powers will reduce the existing attempts made by these bodies to manage situations without having to escalate to contempt proceedings, but in cases in which a contempt requires a clear and robust intervention, the threat of instituting proceedings or referring to a higher court (the UT or EAT) is a powerful tool which will ultimately aid the administration of justice and enhance the safety of court and tribunal users and the judiciary itself.

89. We consider all such courts, tribunals and bodies should have the same powers.

Question 49

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?

90. In principle, we agree that there should be parity and consistency. However, as stated above in response to questions 44 and 45, we consider that the matter should be left to the Welsh Government and Senedd Cymru.

Chapter 7

Question 50: We provisionally propose that the Attorney General should retain the power to bring contempt proceedings in the public interest. Do consultees agree?

91. The Bar Council supports the consultation paper's conclusion that the AG should retain his current role in bringing contempt proceedings for contempt of court in the public interest.

92. The Bar Council notes the concerns discussed in Chapter 7 that the AG, as a political appointee, member of the government of the day, and either an MP or peer of the governing party, may not have the requisite independence or perception of independence.

93. One way of addressing those concerns would be to strengthen the independence of the AG by, for example, making his or her appointment or removal subject to approval by a vote of the House of Commons (the appointment and removal of the law officers of the devolved administrations being subject to an equivalent vote: see section 48(1) of the Scotland Act 1998 and section 49(3) of the Government of Wales Act 2006). However, we accept that any such proposal would be outside the scope of this consultation.

94. However, even assuming that no such change is to be made, we consider that the AG remains the appropriate holder of this power.

95. We start by recognising the wide-ranging and multi-faceted nature of the public interest discretion at issue, which in principle requires exercise by someone who is equipped to make both the legal and wider public interest judgments required. We do not regard the taking of such decisions as an appropriate judicial function, essentially for the reasons set out by Lord Wilberforce in his speech in *Gouriet v Union of Post Office Workers*[5] and quoted at §7.71 of the consultation paper. Further, subject to concerns about independence, the AG, given his wide-ranging role as defender of the public interest, is the natural person to exercise that function. We also note that the concerns relate only to the bringing of proceedings for contempt by publication: there does not appear to be any objection to the AG's role in bringing proceedings for other classes of contempt.

96. It is true that those persons against whom proceedings for contempt by publication may be brought will often be media organisations (which may well be politically partisan) and will sometimes be public figures (who, again, will sometimes be politicians or people with strong political affiliations). It is also true that there has recently been at least one occasion where a serving AG was criticised for expressing views on allegations made against a prominent political figure that were said to have compromised her independence[6].

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[5] [1978] AC 435

[6] https://www.theguardian.com/politics/2020/may/25/attorney-general-faces-calls-to-resign-defends-dominic-cummings-suella-braverman

97. Without taking any position on that particular incident, it does show that it is at least possible for any particular holder of the office of AG to fall below, or widely to be seen to have fallen below, the standard of independence and impartiality that is expected in relation to such decisions. However, we also note that there remains a strong political understanding that the AG should take such decisions independently and impartially, and that that understanding will fortify any AG who is either tempted towards partiality or is put under any pressure within government to do so. Particularly if it is made clear that the AG's decisions in this area are potentially subject to judicial review (see below) so as to provide a further check on any such temptation or pressure, we consider that the current arrangement is satisfactory.

98. Further, we agree with the consultation paper in seeing real difficulty with alternative proposals.

a. We are not attracted by the idea of an independent, stand-alone, body charged with taking such decisions: in a time of scarce resources and multiple costs pressures on a justice system that is broken or near-broken in many respects, we do not think that the inevitable additional costs of such a body could easily be justified. We also think there are dangers in having a body that is set up only to take such decisions, as the taking of such decisions can only benefit from experience of applying the public interest test in a wide variety of different contexts.

b. Nor are we attracted by the idea of transferring the power to bring such proceedings to the DPP. As the paper points out, contempt of the kind at issue is not a criminal offence, so that the obvious experience and remit of the DPP in relation to criminal prosecutions is not immediately relevant. More fundamentally, we see the risk of a real conflict of interest, and certainly a perceived risk of conflict, between the DPP's interest and function as a prosecutor in criminal proceedings and the decision as to whether it is in the public interest to (for example) bring proceedings for contempt in relation to a publication: in particular, there is a risk that such decisions could be influenced, or be perceived to be influenced, by tactical considerations in relation to the criminal proceedings. We do not think that that issue can be resolved by "Chinese walls", not least because many such decisions, such as a decision to proceed against a major public figure or major media outlet, would be bound to be taken by the DPP personally.

c. As to the proposal to confer the decision as to whether to bring contempt proceedings on a judge, we have recorded our view above that the decision is not an appropriate judicial function. In addition, we agree with the consultation paper that it would not be appropriate or practical to confer that power on the trial judge (because there may at that point be no trial judge, and if there is, the trial judge is not well-placed to weigh, or be seen to be able fairly to weigh, the wider public interest beyond the effect of a possible contempt on the trial at issue).

Question 51: We have identified three possible options for consent or permission to institute proceedings for strict liability contempt by publication under the Contempt of Court Act 1981 (which, under our provisional proposals in Chapter 5, will become contempt by publication where proceedings are active).

Option 1 (the current approach): The consent of the Attorney General is required before proceedings can be instituted.

Option 2 (the parallel approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. The potential applicant would be able to choose whether to seek Attorney General consent or court permission.

Option 3 (the sequential approach): Either the Attorney General's consent or the court's permission is required before proceedings can be instituted. If the Attorney General refuses consent, the potential applicant would subsequently be able to seek permission from the court.

We seek consultees' views on their preferred option and the reasons for their preference.

Should the position be different depending on whether the potential applicant is or is not a party to the active proceedings where the alleged contempt has occurred?

99. We prefer Option 1 (AG's consent required).

100. Both Options 2 and 3 share the common feature that, in circumstances where the AG considers it not in the public interest to bring proceedings for strict liability contempt by publication, the court is nonetheless able to give such permission, either by overruling the AG or as an alternative to applying to the AG.

101. It is not entirely clear from §§7.49-7.61 what test it is envisaged would be applied by the court. However, it appears from §7.57 that it is envisaged that the court would consider both whether there was a *prima facie* case of contempt and whether bringing the proceedings was in the public interest. For the reasons given above, we do not consider that the court is the appropriate decision-maker as to whether bringing such proceedings is in the public interest.

102. Further, we consider that there is a significant risk that weak or even frivolous applications for permission – which would be bound to take time and judicial and other public resources – would be made in order to achieve tactical objectives in criminal proceedings. Moreover, the threat that such proceedings could be brought even in circumstances where the AG would not could deter or limit entirely proper media coverage of, or entirely proper public discussion of political issues relevant to, ongoing proceedings in which there is any significant public interest. In practice, those against whom the proceedings were going to be brought would be likely to wish to – and would be likely to be advised to – take part in the hearing of

a consent application and would have a clear interest in being heard: and even where such applications were dismissed with costs, not all costs are recoverable and the time spent on dealing with them is not recoverable.

Question 52: 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.

103. The first problem with this proposal, it appears to us, is that the attempt to define a class of "politician" cases where the AG's judgment may be regarded as potentially suspect by reference to a criterion such present or past membership of a House of Parliament is doomed to failure, or, at least, to a definition likely to be regarded as either anomalous or over-extensive. The suggested criterion of membership of either House gives rise to obvious anomalies: it would catch someone who (for example) was an MP, perhaps briefly, but has gone on to a career elsewhere, for example in journalism (examples such as Brian Walden and Matthew Parris come to mind), thereby giving rise to differences in treatment between different journalists that might well not be easy to defend. Further, it would not catch people who on any view are prominent politicians such as Mark Drakeford, Andy Street, Ben Houchen, or (until the July 2024 election) Nigel Farage. Nor would it catch journalists or commentators, or media or campaigning organisations, with strong and influential opinions that may be obviously hostile, or favourable, to the government of the day, and so potentially give rise to suggestions of partiality on the part of the AG.

104. We also note the danger of a public perception – on this occasion with some justification – that special rules were being made to protect politicians but not others. Such a perception is unlikely to improve already dangerous levels of public mistrust of politicians, and is likely to exacerbate the equally dangerous but widespread feeling that there is one rule for politicians and one rule for everyone else.

105. In any event, even if a satisfactory class of persons could be identified in a way that maintained public confidence, we do not – for reasons already identified – consider that a judge is best-placed or even well-placed to decide whether proceedings for strict liability contempt by publication are in the public interest, given the wide-ranging and multi-faceted nature of that test. We do not consider that those concerns are any lower where the person concerned is a politician (however defined): indeed, the difficulties facing a court in

evaluating the public interest in such cases, and the risk of the judge being dragged into political controversy, seem to us if anything to be rather higher in those cases.

106. Our answer to sub-question (1) is therefore "no". As for sub-question (2), we would agree that were the proposal in (1) to be adopted, the AG should have a right to be joined as an intervener. As for question (3), we consider that the risk of non-parties bringing frivolous proceedings, or proceedings designed to harass or intimidate, or merely to generate publicity or attract crowdfunding, are particularly acute in the case of politicians (however defined)[7] and we would not support giving non-parties the right to institute contempt proceedings in those cases.

Question 53: 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.

Question 54: 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.

107. We agree that *R v Attorney General ex p. Taylor*[8] shows that, at Court of Appeal level and below, there is binding authority that a decision by the AG as to whether to bring proceedings for strict liability contempt by publication is not subject to judicial review – and that that is so whether the challenge is to the AG's view as to the strength of the case or as to the AG's view as to the application of the public interest test. Given that that discretion is statutory, and given that even discretion under prerogative powers is now generally subject to judicial review, we agree that that position is somewhat anomalous, particularly since decisions by the DPP (or by the AG where the prosecution decision is reserved to him or her) not to prosecute criminal offences are in principle subject to judicial review.

108. Permitting judicial review of such decisions would of course leave intact the AG's role as sole decision-maker and arbiter of the public interest: the court on judicial review would not, and would not be entitled to, substitute its own of the public interest or the evidence for

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[7] An example of the ease with which wholly misconceived proceedings against a controversial politician can sometimes generate publicity and substantial crowd-funding is the attempt to bring a private prosecution against Boris Johnson for misfeasance in public office arising out of his statements during the Brexit referendum campaign: see *R(Johnson) v Westminster Magistrates Court* [2019] EWHC 1709 (Admin).

[8] (1996) 8 Admin. L.R. 206

that of the AG. So such a change would not raise – at least in anything like such an acute form – the difficulties of principle and practice that we identified in relation to giving the court itself the power to apply those tests, whether as an alternative to or as a form of appeal from a decision by the AG. We also note the strength of the argument of principle against any non-reviewable executive power of this kind. Nonetheless, we consider that this change would at least to some extent increase the risks of tactical or abusive litigation that we identified above.

109. We also agree that permitting judicial review would in effect force the AG to provide reasons for his or her decision, at least in cases where judicial review proceedings were brought, or threatened under the pre-action protocol, and the duty of candour therefore applied.

110. We see nothing to be said for limiting the reviewability of AG decisions to cases where the person concerned is a politician: we have already noted the difficulty of defining that term in any way that does not create unacceptable and arbitrary anomalies, and the dangers of creating one rule for politicians and one rule for everyone else.

111. As to questions of standing, we start from the perspective that any departure from the general and flexible rule of standing in judicial review proceedings in England and Wales needs to be carefully justified. As far as non-parties are concerned, the courts would doubtless apply their usual multi-factorial approach to the question of standing, looking at the nature of the non-party, whether others were better placed to bring a judicial review application of the kind at issue, and so on: we see no need to depart from that flexible but widely understood approach in the name of certainty.

Question 55: 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?

112. We agree that, to the extent that the Contempt Code is not widely known, it should be better publicised.

113. We are sceptical of the idea that publishing a more detailed Code, with analysis of the weight to be attached to different factors or of information likely to be considered, would materially improve predictability. Unless a revised Code is so detailed and prescriptive as to leave little room for discretion, the nature of the discretion, the wide variety of matters to be taken into account, and the wide variety of cases, will always leave considerable room for discretion and for the approach of on AG to differ from that of another – and also for some practitioners to see inconsistency when others do not. The value of the Code, it seems to us,

is primarily to allow those who wish to make representations to the AG about the exercise of that discretion to know what should be addressed, rather than to provide a formula that will enable anyone concerned in such a case to calculate with precision whether proceedings will be brought or not. That said, we consider that including in the Code some guidance as to process and timing can only be of assistance.

Question 56: 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?

114. Yes, we agree that this would be helpful, both from the perspective of transparency but also because it may potentially act to some extent to deter potential contempts, while enabling those concerned about whether prospective conduct may amount to a contempt to model their behaviour accordingly.

Question 57: 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?

115. Yes, we agree that the 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 contempt functions.

116. The sharing of information between the police and the Attorney General is already governed by strict legal and ethical frameworks ensuring such exchanges are lawful, necessary, and proportionate. As identified in the Law Commission Consultation protections under the Data Protection Act 2018 (under Part 3 (for law enforcement purposes) and Part 2 (for General Processing) if exercised properly will be compatible with HRA and in particular Article 8 ECHR.

Question 58. 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?

117. Yes, we agree that the existing law which permits the police to continue to have power to obtain information in relation to contempt only where there is a policing purpose for doing so should remain so.

118. There does not appear to be any good reason to extend powers so as to enable the police to investigate on behalf of the Attorney General's Office in contempt cases where there are no policing purposes. Expanding police powers to investigate contempt outside policing

purposes risks overreach, potentially leading to unwarranted interference in private civil matters, and such activities might blur the lines between the police's law enforcement and the Attorney General's legal authority.

Question 59. 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?

119. Yes. As explained in the consultation paper, identifying in statute the powers of the police to obtain information in relation to contempt and to share information with Attorney General's Office would provide clarity on the scope and limits and purpose of police involvement in contempt of court matters.

Question 60: We invite consultees' views on whether the Attorney General's Office should be empowered to request and require communications data that is essential for the Attorney General to carry out their contempt function. 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.

120. This is ultimately a policy question, on which we do not express a view. However, it plainly raises significant issues around the scope of the AG's powers and the interplay between public and private actions for contempt. Any expansion of the AG's powers in this regard would only be justified if existing powers were thought to be insufficient. In this regard we note the existing availability of *Norwich Pharmacal* orders to obtain information, including as to the identities and addresses of potential defendants.

Question 61: 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?

Question 62: 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?

121. Others may be better placed to provide evidence of such a need (or otherwise).

Question 63: We provisionally propose that the Attorney General should publish data relating to the exercise of their contempt of court functions. Do consultees agree?

122. Yes. Publishing such data would promote accountability and transparency and would enhance public confidence in the system by demonstrating that these powers are exercised lawfully, proportionately and effectively.

Question 64: 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.

123. Publishing category-based data by the Attorney General (AG) would provide valuable insights into how contempt of court powers are exercised, improve transparency, and support public understanding of the justice system. However, careful consideration is needed to ensure that the data is meaningful, protects privacy, and does not inadvertently prejudice ongoing cases or judicial processes. Explanatory context may be necessary for Attorney General's decisions not to act, to prevent misinterpretation.

124. The proposed categories of data (as listed in §7.186 and the Q64)—referrals, requests for consent, decisions, and outcomes—are appropriate and align with principles of transparency and accountability. Ensuring robust anonymisation, clear contextual explanations, and careful consideration of privacy concerns will ensure that the publication enhances public understanding without compromising justice or individual rights.

Chapter 8: Procedure

General

125. We welcome the proposals to simplify and harmonise the procedure applying to contempt proceedings across different courts and tribunals. Standardising and simplifying procedure are commendable aims that go some way to justifying re-writing procedural rules, and notwithstanding that part 81 of the Civil Procedure Rules was recently reformed.

126. However, we do not consider that all of the proposed procedural reforms are necessary, proportionate and justified by the aims. In particular, we are not persuaded of the need for, or utility of, the introduction of criminal rules of evidence concerning the admissibility of hearsay evidence into civil proceedings generally.

127. There is concern that this will make committal applications more difficult to pursue to a successful conclusion, with the effect that the proposed reform may deter litigants from bringing contempt proceedings in cases of genuine contempt.

128. The existing rules in civil proceedings as to the admissibility of hearsay evidence are not understood to contravene article 6 ECHR. The fact that criminal procedural rules for hearsay have been found to be consistent with article 6 is not reason in itself to apply the same rules in civil proceedings.

129. In addition, it needs to be borne in mind that judges in civil proceedings, who are tasking with deciding matters of fact and law, are in a different position to the judges of fact in most criminal proceedings, who will either be a lay jury (in the Crown Court) or lay justices (in the Magistrates' Courts). Such lay decision-makers will typically have no (or little) legal training, and so the importance of keeping potentially inadmissible material from them is self-evident.

130. Professional judges are in a different position. They are regularly expected to determine what is and is not admissible and then to perform the functions of the judge of fact, without taking account of what they have decided to be inadmissible. Civil judges are expected, and have proven able, to perform that function. Further, such judges routinely (and in accordance with guidance) give less weight to evidence that has not been tested before them, or to evidence that is second- or third-hand hearsay, than to evidence that is given orally and shown to withstand cross-examination. Such a mode of enquiry and decision-making provides an important safeguard against any unfairness that would otherwise result from the admission of unchallenged evidence.

131. We therefore take the view that the introduction of criminal hearsay rules into civil proceedings is not necessary, proportionate or justified by the aims of standardisation and simplification. It risks deterring private litigants from bringing committal applications or making such proceedings more difficult in cases where there may have been genuine contempt, and it tends to not lessen and not enhance the degree of trust put in professional judges in civil proceedings to perform their functions as judges of fact and law.

132. Consequently we disagree with the proposal to introduce the hearsay provisions of the Criminal Justice Act 2003 into non-criminal proceedings.

Question 65. 8.94 We provisionally propose that there should be a uniform, general procedure in contempt proceedings in all courts, tribunals and other bodies, with that procedure allowing for variations that are needed to address potential contempts in different settings. Do consultees agree?

133. Subject to the above comments as regards hearsay evidence, we agree.

Question 66. 8.97 We provisionally propose that the various procedure rule committees should consider collaborating to develop a uniform, general procedure (for example, by establishing a joint working group of rule committees or a new contempt procedure rule committee). Do consultees agree?

134. Subject to the above comments as regards hearsay evidence, we agree.

Question 67. 8.143 We provisionally propose that, where practicable, a court, tribunal or other body should be required first to conduct an initial enquiry into the allegation in all cases where: (1) the court, tribunal or other body observes, or someone reports to it, a potential contempt; and (2) the court, tribunal or other body is contemplating instituting contempt proceedings. Do consultees agree?

135. We agree.

Question 68. 8.144 We provisionally propose that the procedure on initial enquiry should require the following: (1) Unless the defendant's behaviour makes it impracticable to do so, the court, tribunal or other body must— (a) explain, in terms the defendant can understand (with help, if necessary)— (i) the conduct that is in question; (ii) (where relevant) that the court, tribunal or other body may refer the matter to the High Court (or to the Upper Tribunal or Employment Appeal Tribunal) (asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself); (iii) (where relevant) that the court, tribunal or other body may refer the matter to the Attorney General (asking the Attorney General to consider whether to institute contempt proceedings) or to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence); (iv) the sanctions that the court, tribunal or

other body can impose for such conduct; (v) (where relevant) that the court, tribunal or other body has power to order the defendant's immediate temporary detention, if that is required in the opinion of the court, tribunal or other body; (vi) that the defendant may explain the conduct; (vii) that the defendant may apologise, if they so wish, and that this may persuade the court, tribunal or other body to take no further action; and (viii) that the defendant may take legal advice; and (b) allow the defendant a reasonable opportunity to reflect, take advice, explain and, if they so wish, apologise. Do consultees agree?

136. Subject to the above comments as regards hearsay evidence, we agree.

Question 70. 8.154 We invite consultees' views on whether all protected inferior courts, tribunals and other bodies should have a power to order the immediate temporary detention of a defendant in contempt proceedings.

137. Subject to the above comments as regards hearsay evidence, we agree.

Question 71. 8.155 We provisionally propose that all courts, tribunals and other bodies that are empowered to order the immediate temporary detention of a defendant in contempt proceedings should have available to them a specific procedure for doing so. Do consultees agree?

138. We agree.

Question 72. 8.156 We provisionally propose that a defendant who is detained temporarily by a court, tribunal or other body should be entitled to have someone told of their detention. Do consultees agree?

139. We agree.

Question 73. 8.157 We provisionally propose that where a court, tribunal or other body orders the immediate temporary detention of a defendant in contempt proceedings it should be required to review the case no later than the end of the same day. Do consultees agree?

140. We agree.

Question 74. 8.163 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should require the court, tribunal or other body to consider whether to institute proceedings itself or to refer the matter to: (1) the Attorney General, asking the Attorney General to consider whether to institute contempt proceedings in the High Court; (2) the police, asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute the matter as a criminal offence; or (3) the High Court (or to the Upper Tribunal or Employment Appeal Tribunal), asking the High Court (or the Upper Tribunal or Employment Appeal Tribunal) to consider instituting contempt proceedings itself (where the court, tribunal or other body has the power to make such a referral). Do consultees agree? 8.164 We provisionally propose that the relevant procedure rule committee should consider whether the procedure rules should set out the relevant factors for the court, tribunal or other body to take into account when considering whether to institute proceedings itself or to refer the matter to the Attorney General, police, High Court, Upper Tribunal or Employment Appeal Tribunal. Relevant factors may include the complexity of the matter, the seriousness of the conduct, the availability and type of evidence, the expertise of the court, tribunal or other body, and the appropriateness of its sentencing powers for contempt. Do consultees agree? We invite consultees' views on other factors that may be relevant.

141. We agree.

Question 75. 8.173 We provisionally propose that, where a court, tribunal or other body institutes contempt proceedings, in all cases the hearing should be set for a time and date that allows the defendant a reasonable opportunity to obtain legal advice and prepare their defence. Do consultees agree?

142. We agree.

Question 76. 8.174 We provisionally propose that, where a court, tribunal or other body institutes contempt proceedings, it should not be required to hear the proceedings on the same day. Do consultees agree?

143. We agree.

Question 77. 8.185 We provisionally propose that the following information should be provided to a defendant in a contempt application (where proceedings are initiated by application) or in a written statement issued by a court, tribunal or other body (where proceedings are initiated by a court, tribunal or other body): (a) the nature of the alleged

contempt (for example, breach of an order or undertaking or contempt in the face of the court); (b) where the alleged contempt relates to breach of an order, (i) the date and terms of any order allegedly breached or disobeyed, (ii) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service, (iii) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service, (iv) confirmation that any order allegedly breached or disobeyed included a penal notice; (c) where the alleged contempt relates to breach of an undertaking, (i) the date and terms of any undertaking allegedly breached, (ii) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it; (d) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order; I 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 defend'nt'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 co'rt'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.

144. We agree.

Question 78. 8.192 We invite consultees to tell us their experience where a court or tribunal directs that a contempt application does not need to be supported by written evidence

given by affidavit or affirmation: in what form does the court or tribunal tend to direct that the evidence must be provided (for example, a witness statement or oral evidence)?

Question 79. 8.193 We seek consultees' views on whether, when written statements of witnesses are used as evidence, witness statements should be admissible (and the requirement for such evidence to be given on affidavit abandoned where it exists).

145. Opinion is divided on this question. On the one hand, a witness statement accompanied by a declaration of truth acts as a powerful deterrent to perjury. On the other, sworn statements / affidavits are widely used worldwide, and in cross-jurisdictional disputes are often considered necessary notwithstanding domestic procedural requirements.

Question 80. 8.203 We provisionally propose that contempt proceedings should be subject to the same rules of evidence that apply in criminal proceedings such that: (1) hearsay evidence would be admissible only in the circumstances permitted by the Criminal Justice Act 2003; and (2) the court may refuse to admit evidence if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Do consultees agree?

146. As to (1), we disagree, for the reasons set out above of this chapter.

147. As to (2), most if not all courts or tribunals already have a wide discretion to refuse to admit otherwise admissible evidence. See for example CPR r.32.1(2). It may therefore not be necessary to introduce a provision akin to s.78 of the Police and Criminal Evidence Act 1984 in order to preserve the fairness of contempt proceedings. However, the explicit introduction of such a provision across the range of jurisdictions in which contempt proceedings may be brought would be consistent with the aim of harmonisation, and we can see the sense in making this power explicit.

Question 81. 8.212 We provisionally propose that (in addition to the existing permission requirements under the Civil Procedure Rules, Family Procedure Rules, and Court of Protection Rules 2017) permission to make a contempt application should be required in all courts, tribunals and other bodies where the application relates to breach of an order.

Do consultees agree? We invite consultees' views on whether permission should be required for applications relating to all other types of contempt.

148. We do not agree that permission should be required in all contexts. For example, where there has been a complete failure to comply with a court order or undertaking, a permission stage would add time, expense and difficulty to what might otherwise be straightforward and expeditious proceedings. However, we do agree that there will be circumstances in which it will be appropriate to require permission, in order to filter out vexatious or otherwise inappropriate applications. For example, if a contempt such as lying in a witness statement is alleged, a permission filter would likely be appropriate.

Question 82. 8.225 We invite consultees' views on whether the burden of bringing a contempt application for breach of an order should lie always with the party seeking to enforce the order.

149. The input of a family practitioner would be welcomed here.

Question 83. 8.226 We invite consultees' views on whether there should be a new enforcement body that is empowered to make a contempt application for breach of an order.

150. Not generally – that would be too onerous and would for example prima facie require a body to monitor compliance with all court orders. However, we can see some utility in the establishment of a body capable of bringing contempt proceedings for breaches of an order in the family context. In particular, resources in many family cases can be a serious impediment to seeking to enforce an order, given the very high levels of self-representation. In a significant number of cases, deliberate breaches of family court orders in relation to financial or children issues, necessitating an applicant bringing enforcement proceedings (and thereby impacting their resources) can amount to domestic abuse.

Question 84. 8.231 With the exception of the inherent power of immediate temporary detention and any specific powers provided for in statute, we do not propose the creation of a general power to remand a defendant in custody prior to a finding of contempt. Do consultees agree?

Question 85. 8.236 We provisionally propose that in all contempt proceedings the procedure for hearing a contempt allegation should have the following features: (1) The court, tribunal or other body must: (a) ensure that the defendant understands (with help, if necessary) what is alleged; (b) explain what the procedure at the hearing will be; and (c) ask whether the defendant admits the conduct in question. (2) If the defendant admits the conduct, the court, tribunal or other body need not receive evidence. (3) If the defendant does not admit the conduct, the court, tribunal or other body must then consider: (a) any statement served on the defendant where proceedings were initiated by the court, tribunal or other body itself, or any application served on the defendant where proceedings were initiated on application; (b) any other evidence of the conduct; (c) any evidence introduced by the defendant; and (d) any representations by the defendant about the conduct. Do consultees agree?

151. We agree.

Question 86. 8.241 We provisionally propose that, where the allegation is contested by the defendant, the court, tribunal or other body that conducts the hearing should not comprise the same members who observed the conduct in question. In these circumstances, the matter should be heard by another member of the court, tribunal or other body in accordance with a prescribed procedure. Do consultees agree?

152. We recognise the potential for bias, or the appearance of bias, where a decision-maker is also a witness. However, we are concerned that a widespread bar on judges dealing with instances of alleged contempt which they have witnessed or to which they can speak may be unworkable, or at least give rise to additional costs and other burdens on those seeking to prosecute alleged contempt.

153. As the Law Commission notes, there are already in existence mechanisms intended to protect against bias, or the perception of bias (see paras. 8.108 – 8.110 of the consultation paper). Whilst judges can recuse themselves and indeed must do so in cases of apparent bias, their prior involvement does not necessarily disqualify them from fairly disposing of matters which they have witnessed. There will be cases where they have observed matters that are later disputed in the context of a contempt application which do not pass the test of bias (or even apparent bias).

154. Furthermore, while in many cases a contempt will be an isolated incident with no connection with other proceedings, there will be other cases in which the committal proceedings are so closely connected with other proceedings between the same parties that it would be appropriate for all matters to be determined by the same judge. In some courts there

may only be a few judges (or, sometimes, only one) with the ability to deal with certain types of cases, for example housing.

155. A contempt may also need to be addressed before substantive proceedings can progress. For example, where a search order, or pre-action disclosure order or pre-action injunction order has been infringed there will often be a need to ensure compliance (by punishing non-compliance) before continuing with the underlying proceedings. In such cases judicial familiarity and prior involvement may be valuable. There are often instances where a decision-maker can perform their judicial functions entirely fairly and effectively whilst having regard to the matters they have observed, which may only be peripheral or subsidiary element of the committal application. A judge may have seen, for example, an order being served on a party in court, or they may remember that they themselves warned the party about the importance of an order and the consequences of not complying with it.

156. In such cases as the above, disqualifying a judge would be likely to give rise to additional unnecessary additional costs, both within the proceedings and more widely: the need for judges to free themselves up from their work as judges to act as witnesses would potentially adversely effect the expeditious conduct of litigation more widely.

157. Overall, we consider that there will be cases where committal applications can be fairly and efficiently resolved by the involvement of a decision-maker who may have witnessed some aspect and where their familiarity with the case will be valuable, especially where committal proceedings are closely connected to the progress of other proceedings. Accordingly, we do not agree with the proposal made here.

Question 87. 8.250 We provisionally propose that judgments should be published where a court, tribunal or other body makes an order of committal for contempt of court, whether immediate or suspended. Do consultees agree?

158. We agree and consider that this proposal, by adding transparency, may help to deter contempt.

Question 88. 8.251 We provisionally propose that judgments in which a court, tribunal or other body makes an order of committal for contempt of court should be sent to the National Archives for publication on the Find Case Law service. Where that service does not accept judgments from the sentencing court, tribunal or other body then judgments should be published on the website of the judiciary of England and Wales. Do consultees agree?

159. We agree, and consider that this proposal, by adding transparency, may help to deter contempt.

Question 89. 8.256 We provisionally propose that the committee responsible for devising procedure rules that apply in the devolved tribunals in Wales should consider developing a uniform, general procedure for contempt proceedings. Do consultees agree?

160. See our responses to questions 44 & 45 above as to the Welsh Government and Senedd Cymru, given the current and ongoing reform of the entire system in Wales.

Question 90. 8.257 We provisionally propose that, after conducting an initial enquiry into the contempt allegation, the First-tier Tribunal for Wales or Appeal Tribunal for Wales should have the option to: (1) take no further action in respect of the allegation; (2) institute proceedings for contempt in respect of the allegation, where the devolved tribunal has the power to do so (and the devolved tribunal should be able to discontinue those proceedings at any time); (3) refer the matter to the Appeal Tribunal for Wales (from the First-tier Tribunal for Wales) or to the High Court (from the Appeal Tribunal for Wales), asking that tribunal or court to consider instituting contempt proceedings itself (where the First-tier Tribunal for Wales or Appeal Tribunal for Wales has the power to make such a referral); or (4) refer the matter to the police (asking the police to investigate and consider referring it to the Crown Prosecution Service for a decision on whether to prosecute it as a criminal offence). Do consultees agree?

161. See above.

Question 91. 8.258 We invite consultees' views on what should be the role of the Attorney General and Counsel General in relation to contempt in the devolved tribunals in Wales.

162. See above.

Chapter 9

Question 92.

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?

163. Yes. We agree with the Law Commission's analysis that contempt proceedings are 'criminal proceedings' for the purposes of Art. 6 of the European Convention on Human Rights, and for the purposes of the legal aid scheme generally. We agree that permission proceedings should be considered in the same way as committal proceedings, and that it would be preferable for any uncertainty in this regard to be resolved.

What is the implication for the rules of evidence – see above re: Chapter 8 – can this sit together with <u>not</u> introducing the criminal hearsay rules into contempt proceedings?

Question 92.

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?

164. Yes. We agree with the Commission that contemnors should have certainty about their eligibility for legal aid in such proceedings. This is because, as stated below, of the potentially serious consequences for the liberty of the subject in such applications.

Question 94.

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

Do consultees agree?

165. Yes. We agree with the Commission that applications to discharge committal orders should be considered 'criminal proceedings' for the purposes of legal aid. As above, we believe that legal aid should be available to those involved in such proceedings (where needed), given the potentially serious consequences for the liberty of the subject etc.

[See above query re: Q92]

Question 95.

We provisionally propose that means testing for legal aid should apply in all contempt proceedings.

Do consultees agree?

166. No. Legal aid means testing does not currently apply to applications for legal aid in respect of contempt proceedings heard in civil venues. 'Means testing' in respect of criminal proceedings in the Crown Court in fact means that anyone who earns over the threshold (unless the cost of private funding were to reduce their earnings below the threshold). That means testing procedure is a complicated and cumbersome process. We would encourage the abolition of means testing across all contempt proceedings for a number of reasons.

167. First, there are relatively limited numbers of contempt proceedings arising from criminal venues, so the sums involved would not increase dramatically. Second, in criminal matters, there is frequently the need for the contempt proceedings to take place quickly (to prevent an impact on current proceedings). Limited numbers of contemnors in criminal matters have significant means, and suitable costs orders can be made for those very few individuals who may be of very substantial means yet refuse to pay for their own private representation. Legal aid should be unavailable for corporate bodies, e.g. media organisations who breach reporting restrictions (such bodies would not require any assistance from the state for their representation in any event).

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?

168. We are of the view that means testing should not apply for contempt proceedings tried summarily arising out of criminal matters, for the reasons set out above.

Question 96.

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?

169. We have no information to assist with this question.

What changes to the current law or the current processes would remedy problems with access to legal aid for defendants in civil contempt proceedings?

170. We have no information to assist with this question.

Question 97.

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?

171. Yes. It should not be the case that a lawyer should stand to benefit financially from the imprisonment of a client's opponent in civil litigation.

Question 98.

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?

172. Yes. If there is to be a consistency of approach between contempt proceedings arising from criminal and civil matters, then that should extend to this issue as well. A contemnor's means and ability to pay should be one (but only one) of the relevant factors for a court to consider when making a costs order (see below). A unified test across the whole scope of contempt is to be desired.

Question 99.

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?

173. Yes, for the same reasons as set out above.

<u>Chapter 10: Sanctions</u>

Consultation Question 100.

We provisionally propose that the two-year maximum sentence for contempt of court should remain. Do consultees agree?

174. We agree.

<u>Consultation Question 101.</u>

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).

175. We do not offer a strong view on the appropriate maximum sentence but we do support the Law Commission's observations as to the importance of consistency, and in that regard we agree that the stark difference is anomalous and could usefully be addressed. We observe that the distinction in maximum penalties in relation to the Judgment Summons procedure is historical and arises from an Act that is now over 150 years old. There can be no present justification for having differing maximum penalties for what amounts to the same thing.

<u>Consultation Question 102.</u>

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

176. We agree that that committal should remain an option where contempt is committed by publication when proceedings are active. As the Commission rightly observes (at paragraph 10.34) sentencing guidelines can be used to ensure it is not used inappropriately or unpredictably. The current maximum also has the benefit of consistency with other forms of contempt, and a reduction would send the wrong message in terms of the importance of adherence to court orders and the seriousness of violation.

<u>Consultation Question 103.</u>

We provisionally propose that a regime for suspended sentences for contempt should be set out in statute. Do consultees agree?

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?

177. We agree that a regime for suspended sentences/committals for contempt should be set out in statute. Section 286 Sentencing Act 2020 provides an obvious template in this respect, however there are important differences in relation to contempt that would need to be reflected, and the powers would need to be more flexible.

178. Whereas the operational period of a suspended sentence for a criminal offence must be at least 6 months and not more than 2 years (s288), it may be that a suspended sentence/committals for contempt could in certain circumstances legitimately have a shorter operational period, e.g. when it is being used as a coercive method to ensure compliance with a particular order. It may therefore be that a maximum period of 2 years should be specified, but without a minimum period. Alternatively, a minimum period of six months could apply unless there are particular circumstances that would justify a shorter period.

179. Greater flexibility would also be necessary in relation to conditions that may be imposed. If community orders are to be introduced as a sanction for contempt, then it would be sensible for the same community requirements to be available as conditions of a suspended sentence (whether or not this is the same as the list in s287 will depend upon whether the same community requirements are available for contempt as for criminal offences). Unlike for criminal offences, however, the conditions of a suspended sentence/committal for contempt would need to be more flexible to allow it to be used coercively to achieve compliance with a particular order (etc.), and so should not be restricted to punitive or rehabilitative community requirements.

180. Finally, whilst a sentence of imprisonment must be of at least 14 days (but not more than 2 years) to be suspended, if financial penalties for contempt will also be capable of being suspended then there is little justification for creating a break in the spectrum of sanction at the shortest end of committal. Again, the use of the power to achieve compliance with a court order would also justify allowing a very short period of committal to be suspended.

Consultation Question 104.

13.113 We provisionally propose that when a committal order (or a community sentence should that option be available) is being contemplated as a contempt sanction, the court should be required to order a pre-sentence report unless the court considers it to be unnecessary in the circumstances. Do consultees agree?

181. We agree. There can be no detriment to this provision given that the court is not required to order a pre-sentence report that it does not think is necessary, and to that extent it is a sensible provision that will simply ensure that the possible utility of a pre-sentence report is always considered rather than being overlooked.

<u>Consultation Question 105.</u>

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. We agree, for the same reasons given in response to question 104.

<u>Consultation Question 106.</u>

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. The difficulty with this suggestion is that on one hand it invites the court to significantly pre-judge the outcome following the adjournment, whilst on the other excluding other legitimate considerations that may apply. An example may be where the court has strong reasons to believe that the contemnor will not return to court to receive sanction, but there is less than a high likelihood of immediate committal. In circumstances where the court has the power to order immediate committal following a finding of contempt, it would not appear necessary to fetter its discretion in terms of a remand in custody where appropriate.

<u>Consultation Question 107.</u>

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. We broadly agree. Time spent in custody should be considered in determining what sanction is appropriate. There may be circumstances in which it is of little or no relevance, but it would be wrong to simply ignore it.

185. As to calculation of the time served, the language of s240ZA(3) Criminal Justice Act 2003 is somewhat simpler: 'The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence'. An appropriate adaptation of s240ZA would appear to be sufficient.

Consultation Question 108.

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?

186. The proposal does achieve fairness in relation to equivalent punishment for the commission of a criminal offence. There may be a concern, however, that where committal is being used as a coercive measure to achieve compliance with court orders, the fact that a contemnor might be released on HDC as little as 14 days after the committal is imposed could somewhat undermine the effectiveness of the sanction. One can imagine a court being somewhat surprised on the next hearing of a case to find that a contemnor is already at liberty again having been committed to prison for a significant period of time. This is particularly so if HDC eligibility can occur up 180 days before an automatic release date, as that would be immediately effective after the minimum 14 / 28 days for any committal of up to 14 months (out of a maximum of 24).

187. It may therefore be that if HDC is to be available to contemnors, the minimum period to be served should be somewhat longer to ensure that committal serves its intended purpose, and/or eligibility should be closer to the automatic release date.

188. Alternatively, a court could have the power to order that HDC eligibility is not available without further leave of the court. In appropriate cases this would mean that a contemnor who is capable of purging their contempt could not avail of HDC without doing so, thereby avoiding the undermining of the sanction through early release. That aspect of the decision would still be susceptible to appeal if the power were exercised without good reason.

Consultation Question 109.

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?

189. We agree.

<u>Consultation Question 110.</u>

Do consultees have evidence about whether there is a gap in the protection of contempt for 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?

190. The Bar Council does not have evidence on this point. As to the possible remedy, the above proposals in terms of pre-sentence reports and medical reports would make a significant difference in this respect.

<u>Consultation Question 111.</u>

We provisionally propose that there should remain no maximum limit on the fines open to superior courts in contempt cases. Do consultees agree?

191. We agree.

<u>**Consultation Question 112.**</u>

We provisionally propose that the superior courts should have the power to suspend a fine in contempt cases. Do consultees agree?

192. We agree.

<u>**Consultation Question 113.**</u>

Do consultees agree with our understanding of how sequestration functions?

Do consultees have evidence of how sequestration is used in contempt cases and whether it is effective as a coercive and/or punitive sanction?

Do consultees have views about whether there should be any clarification of or reform to sequestration as it applies in contempt proceedings?

193. The Bar Council does not offer any evidence or views on sequestration.

<u>**Consultation Question 114.**</u>

We provisionally propose that community sentences should be available as a sanction for contempt of court. Do consultees agree?

194. We agree.

<u>**Consultation Question 115.**</u>

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.

195. As per paragraph 10.142, the Bar Council defers to the experience of specialist stakeholders. If, however, a working group is nominated to create sentencing guidelines (Q121 below), that working group should pay careful attention to the Sentencing Council's overarching guideline on sentencing children and young people (https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-children-and-young-people/) and ensure that similar considerations are incorporated in the guidance provided to courts dealing with young contemnors.

<u>Consultation Question 116.</u>

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

196. The notable absence of power that superior courts have with respect to mental health orders is that s14 CCA 1981 does not include the power to add restrictions pursuant to s41 MHA 1983 to a s37 hospital order, nor can a period of committal to prison be combined with a hospital order as per s45 MHA 1983 (i.e. a hybrid order). Given the important distinction between a contempt and a criminal offence, there is nothing inappropriate in the absence of these powers.

197. If community requirements are introduced as part of the available sanctions for contempt, this will presumably include a mental health treatment requirement, which would further enhance the range of powers available.

<u>Consultation Question 117.</u>

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?

[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?]

198. We agree.

<u>Consultation Question 118.</u>

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?

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

199. A distinction could reasonably be drawn between the magistrates' court and other inferior courts, tribunals and bodies. The magistrates' court routinely exercises the power to imprison defendants for up to six months for a single offence and twelve months for multiple offences, and magistrates are trained to exercise that power. This is in stark contrast to, e.g., the First-tier Tribunal, which exercises wholly different powers and whose members are unused to making punitive decisions. It would therefore be reasonable to accord the

magistrates’ court its normal maximum sentencing powers in relation to length of committal and financial penalties.

<u>Consultation Question 119.</u>

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?

Do consultees consider that any specific chambers of the First-tier Tribunal for Wales should be treated differently? If so, why?

200. The Bar Council is not aware of any reason why the First-tier Tribunal for Wales should be treated differently to the First-tier Tribunal, but repeat the suggestion made in response to e.g. Question 44 above that the matter should be left to the Welsh Government and Senedd Cymru, given the current and ongoing reform of the entire system in Wales

<u>Consultation Question 120.</u>

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?

201. As above.

<u>Consultation Question 121.</u>

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?

202. We agree. This is among the most important proposals made in the consultation and would be of enormous benefit to a greatly expanded range of courts, tribunals and bodies exercising these powers.

<u>Consultation Question 122.</u>

We provisionally propose that a finding of contempt and any associated sanction should never be entered into the Police National Computer. Do consultees agree?

203. We agree.

Consultation Question 123.

We provisionally propose that a finding of contempt and any associated sanction should never appear on a criminal record certificate. Do consultees agree?

204. We agree.

Consultation Question 124.

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?

205. We agree. However this should apply to all contempt cases in all three classes

Consultation Question 125.

Should data be recorded when contempt proceedings are instituted? If so, what data?

Should such recorded data be published in anonymised and disaggregated form?

Data should be recorded when contempt proceedings are instituted, and should be published in anonymised and disaggregated form.

Consultation Question 126.

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.**

206. -

Chapter 11: Appeals

Consultation Question 127.

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?

207. We agree.

Consultation Question 128.

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?

208. We agree.

Consultation Question 129.

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?

209. As the consultation observes (at para 11.50), the advantage of option 2 is that it reflects the current routes of appeal in other areas of law. This is a significant benefit, as the more the routes of appeal differ in relation to contempt, the more confusion there is likely to be, particularly in jurisdictions where there is not substantial provision of public funding for representation. Furthermore, where a contempt arises in relation to a failure to comply with court orders the best-placed appellate court will be that which would deal with substantive appeals on the related matter.

210. The Law Commission is right to be concerned about the demands on the High Court in option 1, and as an example there are clear advantages to Crown Courts dealing with all appeals from the magistrates' court in criminal matters.

211. The disadvantage identified at para 11.50 in relation to the confusion that arises from the multiple avenues of appeal available from the magistrates' court in criminal matters (i.e. appeal by way of re-hearing in the Crown Court, appeal by way of case stated to the High Court, and judicial review in the High Court) simply reflects an issue on appeals that the Law Commission is rightly considering in a different exercise. In the hope that there will be reform in this area in the foreseeable future, this is not a reason to divert from option 2. Alternatively, appeals by way of case stated could be explicitly excluded from the appellate remedies in contempt of court thereby simplifying the position ahead of any broader reform to make it clear that any legal grounds of appeal should be dealt with on a re-hearing in the Crown Court unless they were of a specific nature (e.g. procedural unfairness) that make judicial review appropriate.

212. We agree in relation to the observation at para 11.52 that appeals from the Divisional Court should go to the Court of Appeal (Civil Division). The fact that they can be heard judges of the same level is not an impediment, and is no different from a constitution of the Court of Appeal (Criminal Division) including High Court judges dealing with an appeal from a first instance decision of a High Court judge sitting in the Crown Court.

Consultation Question 130.

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?

213. We agree in principle, but the exception for the magistrates' court should apply to all inferior courts and tribunals. By way of example, the First-tier Tribunal is not a court of record and therefore an appeal to the Upper Tribunal should be by way of re-hearing and as of right. Similarly from the Employment Tribunal to the EAT.

214. Where appeals are brought from a superior court of record, it is appropriate for them to be subject to a permission stage to act as a filter.

__Consultation Question 131.__

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?

215. We agree. As with the benefit of mirroring the avenues of appeal between courts, there is a clear benefit in making the tests on appeal the same as would otherwise apply.

__Consultation Question 132.__

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?

216. We agree – to apply the usual test of public importance in relation to a first appeal is to deny individuals an effective right of appeal.

__Consultation Question 133.__

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?

217. There is no reason why the Attorney-General should not be able to appeal in contempt cases where they are the applicant. At paragraph 11.106 a contrast is drawn with the absence of the right of appeal of the prosecution following acquittals by a jury in the Crown Court. This overlooks, however a) that a defendant convicted by a jury can only appeal if their conviction can be shown to be unsafe (as opposed to simply disagreeing with the jury's verdict) and b) that the prosecution do have a right of appeal in relation to terminatory rulings made by judges in trials on indictment. The Attorney General can also (as paragraph 11.106 notes) appeal to the Court of Appeal (Criminal Division) in relation to an unduly lenient sentence. Furthermore, the prosecution are able to appeal to the High Court by way of case stated in relation to acquittals and unlawful sentences in the magistrates court. While defendants in criminal proceedings do therefore have broader rights of appeal than the prosecution (e.g. the right to a re-hearing in the Crown Court following summary conviction, and the right to challenge a wider range of rulings in the course of trial on indictment), there is still a significant right of appeal available to the prosecution.

218. If restriction is to be imposed upon the Attorney-General, it may be that appeals can only be brought in relation to an error of law or an unduly lenient sanction, as opposed to factual findings and the exercise of legitimate discretion.

Consultation Question 134.

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.

219. There is no obvious reason why there should not be the same right for the Attorney-General to refer points of law in relation to contempt of court as with points of law in criminal proceedings.

Consultation Question 135.

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.

220. If the Attorney-General's right to appeal were to be abolished, then a right to refer a point of law would go some way to ensuring that any legal mis-steps were corrected.

Bar Council

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