Law Commission
Reforming the law

Contempt of Court

Chapter 5: Contempt in the Face of the Court

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CHAPTER 5
CONTEMPT IN THE FACE OF THE COURT

5.1 This chapter examines criminal contempts in the face of the court committed in the Crown Court or in the magistrates' courts when exercising criminal jurisdiction.

PRESENT LAW

What amounts to contempt in the face of the court

5.2 Contempt in the face of the court concerns "some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court".[1]

The proscribed conduct

5.3 The case law does not contain any comprehensive list of all forms of conduct which may amount to contempt in the face of the court,[2] but in essence it is "conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself".[3]

5.4 The conduct must be a voluntary act.[4]

5.5 Examples of conduct amounting to contempt in the face of the court include: assault on anyone in open court;[5] insulting the judge in court; throwing a missile at the judge;[6] throwing a dead rat at the court clerk;[7] directing insults at the jury; distributing leaflets in the public gallery; insults or threats to any officer or official of the court; wearing offensive clothing; not wearing any clothing at all;[8] refusing to answer a question when ordered to do so;[9] refusing to stand where directed; and disruptive behaviour. Disruptive behaviour could include calling out or applauding in the public gallery, conducting a protest in court, lying down in the

1 Arlidge, Eady and Smith on Contempt para 10-2.

2 "Its meaning is, I think, to be ascertained from the practice of the judges over the centuries": *Balogh v St Albans Crown Court* [1975] QB 73, 84 by Lord Denning. The Phillimore Committee did not propose a definition of what amounts to contempt in the face of the court.

3 *Robertson v HM Advocate* [2007] HCJAC, 2007 SLT 1153 at [29], relying on *HM Advocate v Airs* (1975) JC 64, (1975) SLT 177. See B J Cavanaugh, "Civil Liberties and the Criminal Contempt Power" (1976 - 1977) 19 *Criminal Law Quarterly* 349, 350.

4 *Re de Court, The Times* 27 Nov 1997, (1998) 17 Civil Justice Quarterly 183, 183 to 184.

5 *Parashuram Detaram Shamdasani v The King Emperor* [1945] AC 264, 269, by Lord Goddard CJ. And see para 4.23 in Miller and para 12.9 in Borrie and Lowe: The Law of Contempt.

6 *Balogh v St Albans Crown Court* [1975] QB 73, 84.

7 A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 531, 533.

8 *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153 at [74].

9 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347, unless the witness is protected by privilege. See also s 10 of the 1981 Act.

courtroom,[10] and creating a disturbance in adjacent parts of the building such that the court proceedings are disturbed.[11]

5.6 Failure to comply with an order from the judge or bench designed to control conduct in court may amount to contempt in the face of the court because, as the Court of Appeal has stated:

> It is axiomatic that any judge in any court, not least a Crown Court, has to act appropriately to control proceedings to see that they do not get out of order.[12]

The proscribed circumstance: "in the face of the court"

5.7 The notion of what counts as being "in the face of the court" has, for the Crown Court, been construed broadly,[13] so that contempts not witnessed by the judge are treated "as being constructively within the sight and hearing of the court itself".[14] This is so, it appears, even where the contempt in the face of the court consists in not appearing at court.[15]

The proscribed consequence: interference with the administration of justice

5.8 Conduct which threatens or interferes with the course of justice is contempt;[16] this includes conduct which disrupts the proceedings.[17] In a leading case, Lord Justice Salmon explained, "the sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented".[18]

[10] *R v Pateley Bridge Justices ex p Percy* [1994] Crown Office Digest 453.

[11] *R v Selby Justices ex p Frame* [1991] 2 All ER 344.

[12] *Atkinson* [2011] EWCA Crim 1766. See, eg, *R v Pateley Bridge Justices ex p Percy* [1994] Crown Office Digest 453. See also *Chandler v Horne* (1842) 174 ER 338. See Arlidge, Eady and Smith on Contempt para 10-112.

[13] See *Balogh v St Albans Crown Court* [1975] QB 73; *Purdin v Roberts* (1910) 74 *Justice of the Peace Journal* 88, cited by Arlidge, Eady and Smith on Contempt para 10-18; *A-G v Butterworth* [1963] 1 QB 696; *Curtis* [2012] EWCA Crim 945 at [11] where the two convicted of contempt had followed jurors onto a bus, sat behind them and intimidated them. The appeal was against sentence, but the Court of Appeal explicitly approved the finding of contempt.

[14] Arlidge, Eady and Smith on Contempt para 10-15 (emphasis omitted). The Criminal Procedure Rule Committee ("CPRC") refers, in the Criminal Procedure Rules ("CrimPR"), r 62.5(1)(a) to conduct "in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings".

[15] See para 5.20 below.

[16] *Morris v Crown Office* [1970] 2 QB 114, 122 by Lord Denning. See also *Jales* [2007] EWCA Crim 393, [2007] Criminal Law Review 800 at [7].

[17] The CPRC refers, in the CrimPR, r 62.5(1)(a) to "obstructive, disruptive, insulting or intimidating conduct".

[18] *Morris v Crown Office* [1970] 2 QB 114, 129.

The mental element

5.9 As Arlidge, Eady and Smith on Contempt states, "It is difficult to extract from the authorities the precise nature of the state of mind required".[19] There is no definitive statement in the case law and what judicial statements there are have been made in the context of what was undoubtedly a contempt, but not so clearly a contempt in the face of the court.[20]

5.10 While it is clear that the conduct itself must be intentional, it is not clear whether that is sufficient to prove the contempt,[21] or whether the contemnor must have intended the consequence,[22] or foreseen the consequence without necessarily intending it.[23] In many of the cases, an intention to disrupt the proceedings or to show disrespect can easily be inferred from the act itself,[24] or at least is inferred by the court.[25] This may be an explanation for the statement in *Huggins* that "an intention to disrupt proceedings was not necessary for conduct to be a contempt" which is otherwise not consistent with other authorities.[26]

Recording proceedings

5.11 Taking a photograph or making a portrait or sketch may amount to a contempt[27] as well as to an offence contrary to section 41(1) of the Criminal Justice Act 1925.[28] The statutory provision is little used.[29] There is a discrepancy between the penalty for the statutory offence (a level three fine, in other words, £1,000)

[19] Arlidge, Eady and Smith on Contempt para 10-214.

[20] For example, *Giscombe* (1984) 79 Cr App R 79 in which the conduct consisted in approaching a juror and making possibly threatening comments as the juror left the court building, and *Connolly v Dale* [1996] QB 120 in which there had allegedly been interference with witnesses by a police officer prior to the trial.

[21] As seems to be the case in *Huggins* [2007] EWCA Crim 732, [2007] Criminal Law Review 798 at [14].

[22] As in *Giscombe* (1984) 79 Cr App R 79 in which the court held, "the test for contempt was whether the appellant knowingly did an act which he intended, and which was calculated, to interfere with the course of justice and was capable of having that effect".

[23] *Schot* and *Barclay* [1997] 2 Cr App R 383 by Rose LJ. This was a case of juror contempt.

[24] Such as where the contemnor shouts abuse at the judge or throws something at him or her. See *Schot* and *Barclay* [1997] 2 Cr App R 383, 395.

[25] See, eg, *Jones* [2011] EWCA Crim 3179.

[26] *Huggins* [2007] EWCA Crim 732 at [14], [2007] Criminal Law Review 798.

[27] Borrie and Lowe: The Law of Contempt para 12.13.

[28] Section 41(2)(c) of the 1925 Act provides that the photograph, portrait or sketch shall be deemed to be taken or made in court if it is taken or made in the courtroom, the building or in the precincts of the building, or made or taken of the person while he is entering or leaving the courtroom or building or precincts.

[29] N Parpworth, "Taking Photographs in the Courtroom: A Criminal Contempt?" (2004) 168 *Justice of the Peace* 908.

and that for contempt (maximum of two years' imprisonment) but this will not prevent the court dealing with photographing by way of contempt.[30]

5.12 Section 9 of the 1981 Act[31] proscribes the use in court, or bringing into court for use, "any tape recorder or other instrument for recording sound … except with the leave of the court". Breach of this provision is a contempt of court.[32]

5.13 Section 41(1) of the 1925 Act and section 9 of the 1981 Act are supplemented by Practice Guidance[33] and the Consolidated Practice Direction I.2.2. The overall effect is that no one may take photographs or make a sound recording (except with permission) but text-based communications are permitted, in specified circumstances.[34]

Particular kinds of contemnor

5.14 WITNESSES: Courts have both statutory and common law powers for dealing with misconduct by witnesses. If a witness disobeys a Crown Court summons without "just excuse", section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965 ("the 1965 Act") provides that the witness is guilty of contempt of court "and may be punished summarily by that court as if his contempt had been committed in the face of the court". The maximum penalty is three months' imprisonment.[35]

5.15 By virtue of section 97(4) of the Magistrates' Courts Act 1980, a witness in the magistrates' court who refuses to be sworn, to give evidence or to produce any document or thing, may be committed to custody for up to one month, and/or required to pay a fine of up to £2,500. Section 97(4) does not create a criminal offence, but gives the court power to treat the witness in a way similar to if he or she had committed a contempt of court.[36]

[30] As in *D (Vincent)* [2004] EWCA Crim 1271, *The Times* 13 May 2004. This was a high security trial, including witness protection. D was the brother of the accused. D leant forward from the public gallery and took a picture of his brother in the dock with his mobile phone. Three pictures had been taken. It was treated as a contempt of court to which D pleaded guilty. He was sentenced to 12 months' imprisonment. The Court of Appeal held that taking of photographs, "has the potential gravely to prejudice the administration of criminal justice" and dismissed his appeal against sentence.

[31] See Borrie and Lowe: The Law of Contempt para 12.15 for difficulties with this provision generally. In particular, the authors note that the mental element required for the offence was left open in *Re Hooker* [1993] Crown Office Digest 190, but that there is potential for injustice.

[32] Both provisions will be subject to possible exceptions as provided by the Lord Chancellor with the concurrence of the Lord Chief Justice: Crime and Courts Bill 2012, cl 22.

[33] Civil Court Practice 2012 Practice Guidance: The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting.

[34] Clause 22 of the Crime and Courts Bill will enable the Lord Chancellor to disapply this provision: see n 32 above.

[35] Criminal Procedure (Attendance of Witnesses) Act 1965, s 3(2). See *Abbott* [2004] EWCA Crim 91, [2004] All ER (D) 154 (Feb).

[36] Subsection (5) provides that any such fine "shall be deemed … to be a sum adjudged to be paid by a conviction".

5.16 Refusal to be sworn or to answer questions may, alternatively, be treated as a contempt in the face of the court. [37] The maximum penalty is set by section 14 of the 1981 Act. Thus, as Miller and Borrie and Lowe point out,[38] in the Crown Court the penalty is considerably higher (two years' imprisonment) for the witness who attends but then refuses to answer questions than for the witness who disobeys a summons and does not attend,[39] while in the magistrates' courts the penalty is the same in both situations.

5.17 JURORS: Where juries have reached a verdict other than according to the evidence, a contempt may have been committed.[40] Thus, leaving the verdict to chance (such as drawing lots,[41] or tossing a coin[42]) will be a contempt. It is not a contempt for jurors to decline to reach a verdict, or to reach a verdict which is perverse,[43] providing that it is due to insufficiency of the facts, although, as pointed out by the Court of Appeal in *Schot* and *Barclay*,[44] a "contumacious"[45] refusal to reach a verdict may be capable of being a contempt.[46]

[37] Arlidge, Eady and Smith on Contempt para 10-167. See, eg, *Phillips* (1984) 78 Cr App R 88, *Lewis* (1993) 96 Cr App R 412. Note the special position of journalists under s 10 of the 1981 Act. It may be possible for the witness to plead duress if he or she will not give evidence out of fear: *K* (1984) 78 Cr App R 82.

[38] Borrie and Lowe: The Law of Contempt para 12.31; Miller para 4.46.

[39] See *Montgomery* [1995] 2 All ER 28 in which Potter J said at 33 that "whilst it is legitimate in the case of a witness refusing to testify, to have regard to the fact that the maximum sentence for failing to comply with a witness order is three months, that should not inhibit the court from imposing a sentence substantially longer than three months for a blatant contempt in the face of the court … ".

[40] According to Miller para 4.43, a juror will commit an offence if he or she consents to embracery, namely an attempt to persuade him or her to reach a verdict otherwise than on the basis of evidence adduced in open court. Arlidge, Eady and Smith on Contempt para 10-187 speculates that there would be a clear case of contempt if a juror tried to sway the opinion of his or her fellow jurors corruptly or improperly as in the Irish case of *MM and HM* (1933) 1 Irish Reports 299. See the recent case of Danielle Robinson: "Teenager almost wrecked two trials by texting gossip about defendant to fellow juror", *The Daily Mail*, 15 Jul 2010 (unreported), http://www.dailymail.co.uk/news/article-1294570/Juror-Danielle-Robinson-texted-paedo-lies-court-wrecking-2-trials.html (last visited 1 Nov 2012).

[41] *Langdell v Sutton* (1736) Barnes 32, 94 English Reports 791, 791, where jurors were publicly admonished for "determining their verdict by hustling half-pence in a hat"; *Foster v Hawden* (1676) 2 Levinz's King's Bench and Common Pleas Reports 205, 83 English Reports 520.

[42] *Vaise v Delaval* (1785) 1 Turner and Russell's Chancery Reports 11, 99 English Reports 944.

[43] *Bushell's Case* (1670) 6 State Trials 999, 1014, 89 English Reports 2.

[44] *Schot* and *Barclay* [1997] 2 Cr App R 383.

[45] Stubbornly or wilfully disobedient to authority: Oxford dictionaries online, http://oxforddictionaries.com/definition/contumacious (last visited 1 Nov 2012).

[46] The need to keep jurors' deliberations confidential in accordance with s 8 of the 1981 Act requires a court to proceed with care if it needs to inquire into any irregularity in the way decisions have been made. The approach to be adopted is set out in *Smith* by Lord Carswell: *Smith* [2005] UKHL 12, [2005] 2 All ER 29 at [16]. See Ch 4 at para 4.46.

5.18 It is an offence of both contempt and interference with the course of justice to impersonate a juror, and act in his or her stead.[47]

5.19 Juror misconduct may also amount to a statutory offence.[48] If a juror fails to attend following a summons, that may be dealt with as a contempt, or as a breach of the statutory provision.[49]

5.20 LEGAL REPRESENTATIVES: The way a representative conducts the case can amount to contempt if it amounts to more than rudeness, incompetence or discourtesy.[50] Doing something which hinders or aborts a trial, with the intention of having that effect, such as deliberately failing to attend court or mentioning prejudicial evidence before the jury, would amount to contempt.[51] It seems odd to treat a failure to be at court as contempt *in the face of* the court, although Miller does so.

5.21 Punishment of an advocate for what he or she says in court, whether a criticism of the judge or a prosecutor,[52] amounts to an interference with his or her rights under article 10 of the ECHR, and so that interference must be prescribed by law, pursue a legitimate aim and be proportionate in pursuit of that aim, and be necessary in a democratic society. The ECtHR has held that, "It is … only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society".[53]

5.22 The legitimate aim in question may be that of maintaining the authority of the judiciary.[54] The issue is not the protection of individual judges or prosecutors from criticism, but the protection of the justice system.[55]

[47] *Levy* (1916) 32 TLR 238; see also *Clark* (1918) 82 *Justice of the Peace* 295, where a farmer paid one of his farm labourers to impersonate him.

[48] On statutory offences which may be committed by jurors, see Ch 4 at para 4.1.

[49] Borrie and Lowe: The Law of Contempt para 12.38. They write that "as with advocates' absence it is a nice point whether a juror's absence is properly classifiable as a contempt in the face of the court".

[50] *Weston v Central Criminal Courts Administrator* [1977] QB 32. The representative may well also then become the subject of disciplinary proceedings before his or her professional body.

[51] "If a solicitor deliberately fails to attend – with intent to hinder or delay the hearing, and doing so – he would be guilty of a contempt of court. He would be interfering with the course of justice": *Weston v Central Criminal Courts Administrator* [1977] QB 32, 43 by Lord Denning. See Miller para 4.38.

[52] *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [38].

[53] *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [55].

[54] See the terms of art 10(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, ... for maintaining the authority and impartiality of the judiciary". See also *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [168].

[55] *Sunday Times v UK (No 1)* (1979) 2 EHRR 245 (App No 6538/74) at [55].

5.23 It follows from the principle of protecting the system of justice that a distinction will be made between criticism and insult.[56] The court will take into account the nature of the criticism (whether personal or directed to the professional function of the person who has been criticised or insulted), the forum in which it is made,[57] the fairness of the proceedings, the procedural guarantees, and the nature and severity of the penalties.[58]

5.24 Interference with an advocate's freedom of expression during trial could also potentially entail breach of the accused's right to a fair trial under article 6.[59] The ECtHR has highlighted the potential "chilling effect" of punishing an advocate for criticism made in the course of a trial, even if the penalties imposed are relatively minor.[60]

How contempt in the face of the court may be dealt with

Action by the court itself or application to the Divisional Court

5.25 Some courts and tribunals may take action themselves in respect of contempts in their face. This may be as a matter of their inherent jurisdiction,[61] or by virtue of specific statutory provisions.[62] Other courts and tribunals may not take action directly, but an application for an order of committal for contempt may be made by the Attorney General to the Divisional Court.[63]

5.26 Uncertainty as to which courts or tribunals would be able to exercise jurisdiction in respect of contempts was anticipated when the 1981 Act was debated in

[56] "A clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of art 10 of the Convention": *Žugić v Croatia* App No 3699/08 at [45]. See also *Kovač v Croatia* (2011) 53 EHRR SE21 (App No 49910/06) and *Skałka v Poland* (2004) 38 EHRR 1 (App No 43425/98). Compare with *Re Anwar* in which, although the advocate's comments outside court contained "angry and petulant criticism" of the outcome of the trial, they did not amount to conduct that challenged the authority of the law, and so no contempt was found: *Re Anwar* [2008] HCJAC 36, 2008 SLT 710 at [44].

[57] It is possible for a statement to the media to be made in the court or its precincts and so be a contempt in the face of the court, but if the statement is made away from the court and does not disrupt proceedings it would not be contempt in the face of the court.

[58] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [171].

[59] "'Equality of arms' and other considerations of fairness … also militate in favour of a free and even forceful exchange of argument between the parties": *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [49].

[60] *Nikula v Finland* (2004) 38 EHRR 45 (App No 31611/96) at [54]. The court noted that "a relatively light criminal sanction may already serve to chill even appropriate and measured criticism" at [23]. And see *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) at [175] and [181] in which it was held that the defence advocate's art 10 right had been violated.

[61] This is the case for, amongst others, the Court of Appeal and the Crown Court. Details are set out in Appendix E.

[62] Statutory provisions confer powers to deal with contempt in the face of the court on particular courts, such as the county courts, "qualifying service courts" and the magistrates' courts. Details are set out in Appendix E.

[63] SI 1998 No 3132, Rules of the Supreme Court Ord 52, r 1(2). Order 52 is due to be replaced by a new Civil Procedure Rule 81, and related Practice Direction: see Ch 2 at para 2.59.

Parliament[64] and it remains.[65] This chapter addresses the position of the Crown Court and the magistrates' courts only.

Other than by contempt proceedings

5.27 The court's response to an apparent contempt will depend on the circumstances.[66] A minor disruption can, of course, be ignored.[67] If it cannot be ignored, the court may simply accept an apology from the person and take no further action.

5.28 Judges may warn a person not to continue with the abusive or disruptive behaviour. A person disrupting the proceedings may be removed from the court, even if that person is the accused, and in extreme cases the trial may proceed in his or her absence.[68] Courts are likely to be alert to attempts to disrupt the proceedings to the benefit of a defendant (or another) by causing it to be delayed.

5.29 Some kinds of behaviour will amount to criminal offences as well as to a contempt of court.[69] It is in the discretion of the court as to whether to proceed by way of contempt or to let the prosecuting authority take over the matter.[70] The court in *S*[71] listed factors relevant to the exercise of the discretion. A prosecution might be swiftly initiated but a separate prosecution will almost always be a more drawn-out way of proceeding.

5.30 If the judge does not deal with the contempt in one of the ways described above, he or she may refer the matter to the Attorney General for the Attorney to decide whether to apply to the High Court for an order of committal for contempt of

[64] *Hansard* (HL), 9 Dec 1980, vol 415, cols 672 and 677; *Hansard* (HL),15 Jan 1981, vol 416, cols 222 and 223.

[65] According to *A-G v BBC* [1981] AC 303, whether the court or tribunal has jurisdiction to act in respect of contempts depends on the purpose of the forum.

[66] One District Judge confiscated a person's sandwiches when he started eating them in court.

[67] For example, the Court of Appeal approved a judge's decision to take no action in relation to an outburst from the public gallery in *Linnell* [2009] EWCA Crim 2920. Some District Judges have told us that they find selective deafness useful.

[68] This course of action does not preclude taking action against the defendant for contempt. See *Baker* [2008] EWCA Crim 334, [2008] All ER (D) 201 (Apr).

[69] Other statutory offences which might be committed might be general criminal offences, especially public order offences or perverting the course of justice, and/or offences which are specific to participants in court proceedings (such as jurors or witnesses – see paras 5.14 to 5.19 above), or intimidating a potential or actual witness or juror contrary to s 51(1) or (2) of the Criminal Justice and Public Order Act 1994. An alternative offence may fail to reflect the true nature of the wrongdoing.

[70] *S* [2008] EWCA Crim 138 [17], [2008] Criminal Law Review 716. HHJ Tain notes that in cases of witness intimidation the Court of Appeal seems willing to give a wide discretion to the trial judge as to which course to take: P Tain, "Crown Court Contempt" (2008) 152(7) *Solicitors' Journal* 16.

[71] [2008] EWCA Crim 138, [2008] Criminal Law Review 716.

court.[72] The issue of how to deal with the alleged contempt can be put back until, for example, the end of the trial.[73]

By contempt proceedings in the Crown Court

5.31 The Crown Court has an inherent jurisdiction to deal itself with contempts in the face of the court. The procedure for dealing with contempt in the face of the Crown Court is governed by the Criminal Procedure Rules Part 62, section 2, "Contempt of Court by Obstruction, Disruption, etc".[74] These rules allow the Crown Court to take no further action (following explanation and possible apology), to enquire into the alleged contempt "there and then", or to postpone the enquiry. The court may, at any stage, decide not to pursue the matter. Whichever route is chosen, the defendant must be treated fairly and his or her rights under article 6 of the ECHR respected.[75] In either case, contempt needs to be proved to the criminal standard:[76] the judge must be sure beyond reasonable doubt that C committed the contempt.

5.32 **A survey of 100 Crown Court judges in 2012, of whom 43 responded, revealed that they had dealt with only eight cases of contempt in the face of the Crown Court within the preceding 12 months.[77] In consultees' experience, is this representative of the true prevalence of contempt in the face of the Crown Court?**

POWER TO REMAND ON BAIL OR IN CUSTODY PRIOR TO A FINDING OF CONTEMPT

5.33 The court has inherent powers to control proceedings.[78] It is stated or assumed in many cases that the judge may order the alleged contemnor to be detained until he or she is brought back before the court for the contempt to be dealt with.[79] If such a power exists, it must be by virtue of the court's inherent jurisdiction. Nevertheless, the alleged contemnor might have a right to bail in that intervening period. The starting point must be that the alleged contemnor is entitled to

[72] See s 45(4) of the Senior Courts Act 1981; Rules of the Supreme Court Ord 52, rr 5 and 1(2). The High Court has concurrent jurisdiction over contempts in the face of the Crown Court.

[73] The Court of Appeal considered the deferment of the issue of whether a contempt was committed in *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24. See also *S* [2008] EWCA Crim 138, [2008] All ER (D) 131 (Feb).

[74] SI 2011 No 1709.

[75] *S* [2008] EWCA Crim 138, [2008] All ER (D) 131 (Feb). Article 6 rights are discussed at paras 5.73 and following below.

[76] *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92); *Re Bramblevale Ltd* [1970] Ch 128,137. This latter was a case of civil contempt. The standard of proof can be no less in criminal contempt.

[77] See the results of the survey of the Crown Court which we conducted, at Appendix D.

[78] *Atkinson* [2011] EWCA Crim 1766 at [23]. See also paras 5.6 and n 12 above.

[79] See, eg, the Criminal Procedure Rules, rr 62.5 and 62.6; *Griffin* (1989) 88 Cr App R 63; *Hill* [1986] Criminal Law Review 457, CA; *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254; *Jales* [2007] EWCA Crim 393, [2007] Criminal Law Review 800 at [8]; and *Archbold* 28-118. See also the Civil Court Practice 2012 (the Green Book): "in cases of criminal contempt (which include contempt in the face of the court …), the superior courts have an inherent power of detention until the rising of the court on the day of the alleged contempt (see *Delaney v Delaney* [1996] QB 387, CA, by Bingham MR at 401)": III COT 21.2C.

liberty,[80] and that there is always a right at common law to apply for bail. (If domestic law did not allow the possibility of bail, the court would then be acting within its powers to remand a person in custody (and indeed could not do otherwise) but there would be a breach of article 5 by the very fact that the law required it to do so).

5.34 The Court of Appeal assumed there is the possibility of bail in *Jales*,[81] and we think this must be the case. There is no case law directly on point, but our view is that the right to liberty may only be denied in accordance with the Bail Act 1976.[82] There is a right of appeal against a refusal of bail in contempt proceedings.[83]

5.35 In any event, detention must comply with article 5 of the ECHR:[84] it must be ordered by a court which has power to make the order, in accordance with the applicable law, and on a ground which is compatible with the exceptions to the right to liberty under article 5.[85] The purpose of article 5 is to guard against arbitrary detention. If, therefore, a court makes an order arbitrarily,[86] there could well be a breach of article 5.[87] Further, if it can be shown that the contemnor might not have been detained but for breaches of article 6 in the contempt proceedings, then his or her detention may breach article 5.[88]

HEARSAY EVIDENCE

5.36 Questions arise as to what evidence the court may hear when enquiring into an alleged contempt in the face of the court, whether immediately or following a

[80] "It is fundamental in English law that any individual is entitled to his liberty unless there is a proper and recognised legal justification for depriving him of it. This right of the individual can be traced back to art 29 of Magna Carta (25 Edw 1 (1297)) and the Petition of Right (3 Car 1, c 1 (1627)). There is no arbitrary power of arrest or detention. The circumstances under which a person may be deprived of his liberty are various but they must all be based upon some clear legal authority": Hobhouse LJ in *In Re B (Child Abduction: Wardship: Power to Detain)* [1994] 2 Family Law Reports 479, 486.

[81] *Jales* [2007] EWCA Crim 393, [2007] Criminal Law Review 800 at [8].

[82] Either because contempt proceedings are "proceedings for an offence" within the meaning of s 1(1) of the Bail Act 1976, or because s 2 of the Habeas Corpus Act 1679 applies. When s 90 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is brought into force, the likelihood of the alleged contemnor receiving a custodial sentence will be relevant to the question of bail.

[83] *Serumaga* [2005] EWCA Crim 370, [2005] 1 WLR 3366.

[84] There is a right to compensation for breach of art 5, unlike for breach of other articles of the ECHR: s 9(3) of the Human Rights Act 1998.

[85] The specific paragraph of art 5 which will apply will be art 5(1)(c) which allows for "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so": *Weston v UK* (1981) 3 EHRR 402 (App No 8083/77). This must be read in conjunction with art 5(3): *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 (App No 332/57) at [14].

[86] For example, if the judge is seeking to punish C for his or her conduct before there has been a finding of contempt.

[87] See *Benham v UK* (1996) EHRR 293 (App No 19380/92); *McC (A Minor) v Mullan* [1985] AC 528; *Weston v UK* (1981) 3 EHRR 402 (App No 8083/77) (Commission decision).

[88] *Ratra v Department for Constitutional Affairs* [2004] EWCA Civ 731 at [26] and [27].

postponement.[89] The questions are whether hearsay evidence is admissible at all, excluded at all, or, if prima facie excluded, admissible under the Civil Evidence Act 1995, the CJA 2003, or on some other basis. There is no definitive statement of law which answers these questions.[90]

5.37 The hearsay provisions in the CJA 2003 apply to criminal proceedings to which the strict rules of evidence apply.[91] Dealing first with the issue of whether proceedings for contempt in the face of the court are civil or criminal, it is clear that the alleged contemnor must be dealt with in a way which respects his or her rights under article 6 of the ECHR,[92] but this does not settle the question of whether proceedings for contempt are civil or criminal.[93] Nor does it settle the question of whether civil or criminal rules of evidence apply.[94]

5.38 When the Crown Court and the magistrates' courts are exercising their criminal jurisdictions, the following factors[95] point to proceedings for contempt in the face of the court being criminal proceedings: they arise in the course of criminal proceedings; they are not initiated by a party to the proceedings; the criminal standard of proof applies; the protections of article 6 of the ECHR apply; and punishment can result.[96]

5.39 If the proceedings for contempt are criminal, there remains the question whether the strict rules of evidence apply. In *Chal*, following a finding that the accused was unfit to plead and to stand trial, the judge had to determine whether he had

[89] See para 5.31 above.

[90] Neither *Shokoya*, (1993) 57(1) *Journal of Criminal Law* 66, nor *H* [2005] EWCA Crim 2083, [2006] 1 Cr App R 4 at [7] is directly on point. In the former, a case which pre-dated the current rules on hearsay in criminal proceedings contained in the CJA 2003, the evidence to prove the contempt would not even be admissible under the CJA 2003. In the latter, the court ruled as to the applicability of the hearsay regime in the CJA 2003 to preparatory hearings which had started before the CJA regime came into force and took a purposive approach which is not necessarily relevant to the issue here.

[91] CJA 2003, s 134(1) and s 114.

[92] *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) and see para 5.31 and n 75 above. The defendant is entitled to the enhanced provisions of arts 6(2) and 6(3): *Daltel Europe Ltd and others v Makki and others* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [29].

[93] Contempt in the face of the court may be dealt with in the course of civil proceedings but this does not thereby make the proceedings criminal: *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704. If they were obviously criminal proceedings then s 3(2)(f)(iii) of the Prosecution of Offences Act 1985 would be unnecessary because they would be covered by s 3(2)(a).

[94] In civil contempt proceedings, the civil rules of evidence in the 1995 Act apply, even though the proceedings are criminal for the purposes of art 6: *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704.

[95] Lloyd LJ identified some of these factors when concluding that contempt proceedings in different circumstances were civil: "in a case such as the present, where a committal application is brought by a party to litigation, in the proceedings in or in relation to which the contempts are said to have been committed, the forum and the procedure are strong indications that the application is rightly characterised as a civil proceeding": *Daltel (Europe) Ltd (In Liquidation) v Makki (Committal for Contempt)* [2006] EWCA Civ 94, [2006] 1 WLR 2704 at [38].

[96] We note, however, that the mere fact that there may be penal consequences does not necessarily make proceedings criminal: *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 67, [2012] 3 All ER 999 at [26].

done the act charged. The possible consequences were a hospital order, a supervision order, an absolute discharge or an acquittal, but did not include a conviction or any punishment. In considering whether the hearsay rules in the CJA 2003 applied, the Court of Appeal concluded that the same rules of evidence should be applied "*as if* this were a criminal trial in the strict sense".[97] This may be contrasted with the conclusion in *Clipston*[98] where it was held that confiscation proceedings, being part of the sentencing process following conviction, are criminal in nature, but not criminal proceedings to which the strict rules of evidence apply.[99]

5.40 Given that a conviction and punishment may follow a finding of contempt in the face of the court, in our view it follows that proceedings for contempt in the face of the court are criminal proceedings, and that, although there is no authority directly on point, our view is that courts would be likely to interpret them as criminal proceedings to which the strict rules of evidence apply. As such, the rules contained in the CJA 2003 would apply, and, in light of recent case law, a statement admitted in accordance with those rules will comply with article 6(3)(d) of the ECHR even if it is central evidence against the accused.[100]

5.41 **Do consultees agree that proceedings for contempt in the face of the court are criminal proceedings to which the strict rules of evidence apply?**

IMMEDIATE ENQUIRY

5.42 Immediate enquiry into an alleged contempt used to be referred to as a "truly summary" procedure, and it operated as described by Lord Justice Mustill.[101] The courts stated many times that this summary procedure should only be used as a matter of last resort.[102] This procedure now needs to be read subject to the procedure laid down in Part 62 of the Criminal Procedure Rules. Part 62 requires the court to explain to the alleged contemnor what he or she is said to have done, that legal advice is available, what the court's powers are, that he or she may explain and/or apologise. The court must also allow the person a reasonable opportunity to reflect and take advice.[103] Thus, even where the court proceeds to deal with the contempt immediately, various protections are afforded to the

[97] *Chal* [2007] EWCA Crim 2647, [2008] 2 Cr App R 48 at [26] (emphasis added).

[98] [2011] EWCA Crim 446, [2011] 2 Cr App R (S) 101.

[99] *Clipston* [2011] EWCA Crim 446, [2011] 2 Cr App R (S) 101 at [45]. At para [56] the court said: "the demanding evidential requirements for the proof of guilt are not generally transposed to such post-conviction proceedings".

[100] On the impact of art 6(3)(d) on the rules in criminal trials see *Al-Khawaja v UK* (2012) 54 EHRR 23; *Horncastle* [2009] UKSC 14, [2010] 1 Cr App R 17; *Ibrahim* [2012] EWCA Crim 837, [2012] 2 Cr App R 32; and *Riat* [2012] EWCA Crim 1509.

[101] *Griffin* (1989) 88 Cr App R 63, 67.

[102] The procedure by which the court dealt with an alleged contempt immediately used to be referred to as the "truly summary" procedure. See, eg, *Moran* (1985) 81 Cr App R 51 by Lawton LJ, *Griffin* (1989) 88 Cr App R 63 by Mustill LJ, *R v Tamworth Justices ex p Walsh* [1994] Crown Office Digest 277 by McCowan LJ. For an example of a recent case where use of this procedure *was* justified, see *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1.

[103] CrimPR, rr 62.5(2) and 62.8.

alleged contemnor. Further protections are provided if the enquiry is postponed.[104]

SANCTIONS

5.43 Once there has been a finding of contempt in the face of the court[105] there is no power to defer sentence, or to remand pending sentence,[106] though there is a power to remand for a report on the contemnor's mental condition.[107]

5.44 The sanctions available to the Crown Court are imprisonment for a maximum of two years[108] and/or a fine.[109] The sentence of imprisonment may be concurrent or consecutive to a period of custody imposed following a conviction.[110] There is no power to impose a community sentence or non-custodial punishment other than a fine,[111] though the court may make a hospital order.[112] A custodial sentence may be suspended.[113] As to proportionality, there is no formal rule or guide, but in the case law it is clear that the courts have the proportionality of the punishment to the features of the case in mind.[114] The statutory early release provisions apply to contemnors.[115]

5.45 It seems that a finding of contempt will be recorded on the Police National Computer[116] and that it will be disclosed in some circumstances by the Criminal Records Bureau.[117]

[104] See CrimPR, rr 62.7 and 62.8.

[105] When making a finding of contempt, the court should state its findings of fact, and the process of reasoning behind them: *Goult* (1983) 76 Cr App R 140.

[106] *Re Stevens and Holness* (21 May 1997) QBD (unreported). This concerned interference with a witness.

[107] Mental Health Act 1983, s 35 and 1981 Act, s 14(4A).

[108] 1981 Act, s 14(1).

[109] Except that if the contemnor is under 17 the only sanction possible is a fine: s 14(2A) of the 1981 Act. If the contemnor is 18, 19 or 20, then s 108 of the Powers of Criminal Courts (Sentencing) Act 2000 applies.

[110] *Stredder* [1997] 1 Cr App R (S) 209.

[111] The Court of Appeal has expressed regret that there is no power to make a probation order, and hope that Parliament would consider creating such a power: *Palmer* [1992] 1 WLR 568, [1992] 3 All ER 289. From 1 Dec 2012 the Criminal Records Bureau is merging with the Independent Safeguarding Authority (ISA) to become the Disclosure and Barring Service (DBS): see part 5 of the Protection of Freedoms Act 2012.

[112] 1981 Act, s 14(4).

[113] *Morris v Crown Office* [1970] 2 QB 114,125.

[114] See *Montgomery* [1995] 2 All ER 28 and, eg, *Hardy* [2004] EWCA Crim 3397, [2005] 2 Cr App R (S) 48 at [12] by Rose LJ.

[115] CJA 2003, s 258.

[116] The PNC records convictions, as defined by s 1(4) of the Rehabilitation of Offenders Act 1974: "any finding … in any criminal proceedings … that a person has committed an offence or done the act or made the omission charged". See also *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [25].

5.46 In civil proceedings, the contemnor may have the right to purge his or her contempt[118] – in other words, to have an order of committal discharged by apologising to the court and, possibly, making good the wrong done by the contempt of court. So, for example, where the contempt consists in failing to obey a court order, the contemnor can comply with the order. It is less clear whether contempts in the face of the court in criminal proceedings can be "purged" in this way after the finding of contempt and imposition of a punishment.[119] The appropriate route seems to be, where the contempt proceedings were conducted very promptly after the contempt and, in effect, the contemnor has thought better of his or her behaviour and decided to apologise to the court, to apply to the court to have the sentence varied or rescinded.[120] The application must be to the court as it was constituted when the punishment was imposed,[121] which seems right in the case of contempt in the face of the court.

APPEALING FROM THE CROWN COURT

5.47 A person who has been found in contempt in the face of the court in the Crown Court may appeal against that finding, and/or against the sentence, to the Court of Appeal as of right.[122] The Court of Appeal may reverse or vary the Crown Court order, or make any order as seems just. Appeal from the Court of Appeal lies to the Supreme Court.[123] As this statutory right of appeal exists, challenge by way of judicial review is not available.

Contempt proceedings in the magistrates' courts[124]

5.48 As magistrates' courts are not courts of record, they may only exercise the powers given to them by statute.[125] That said, there is necessarily an inherent jurisdiction to protect the court's own processes from abuse.[126]

[117] The Police Act 1997 (Part 5) makes provision for the Home Secretary to issue certificates to applicants containing details of their criminal records and other relevant information. In England and Wales this function is currently exercised on behalf of the Secretary of State by the Criminal Records Bureau.

[118] *Delaney v Delaney* [1996] QB 387. See Civil Procedure (Amendment No 2) Rules 2012, r 81.31.

[119] *Delaney* does not apply to contempts in the face of the court: *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1 at [9]. But see *Deeney* in which S was dealt with for contempt by refusing to give evidence, and the trial judge "directed that Mr Stephenson be brought back to court on each day of the trial, in order that he should have a chance to purge his contempt" – in other words, to change his mind and give evidence: *Deeney* [2011] EWCA Crim 893 at [24] by Rix LJ. Where the court does have power to discharge an order of committal, CrimPR, r 62.4 applies.

[120] Under s 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000: *Phelps* [2009] EWCA Crim 2308, [2010] 2 Cr App R (S) 1 at [11].

[121] Section 155(4) of the Powers of Criminal Courts (Sentencing) Act 2000.

[122] Under s 13(2)(bb) of the Administration of Justice Act 1960.

[123] *OB v Director of the Serious Fraud Office* [2012] EWCA Crim 901, [2012] 3 All ER 1017.

[124] Our survey of 145 District Judges, of whom 52 replied, revealed that 31 had dealt with at least one incident of contempt in the face of the court in the 12 months in 2011/2012. See Appendix D.

[125] This point was made in the Phillimore Report, which noted that the magistrates' courts had no power to punish disruptive conduct in court: paras 25, 36 and 37.

5.49 The powers of magistrates' courts to deal with contempt in the face of the court are contained in section 12 of the 1981 Act.[127] Because the magistrates are constrained by the terms of the statute, they may not deal with people for "constructive" contempts,[128] but section 12(1)(a) itself has a wider reach than behaviour in the courtroom. Section 12(1) reads:

> A magistrates' court has jurisdiction under this section to deal with any person who—
>
> (a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court;[129] or
>
> (b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

5.50 It creates two offences; both require that the contemnor committed the act in question "wilfully". "Wilfully" has been held to mean, in this context, intentionally and recklessly.[130] Oddly, it has been held that "insults" in subsection (1)(a) does not include threats.[131] As regards the offence in subsection (1)(b) the proceedings must actually be interrupted, but the interruption can come from outside the courtroom.[132]

5.51 The court may deal with the contemnor by committing the offender to custody for a specified period not exceeding one month or imposing a fine not exceeding £2,500, or both.[133] There is no power at common law, or in the statute, to suspend an order committing the contemnor to custody under this provision.

[126] *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42.

[127] Section 12 is modelled on the County Courts Act 1959, s 157, the predecessor to s 118 of the County Courts Act 1984. In respect of witnesses there are separate statutory powers at s 97(4) of the Magistrates' Courts Act 1980, on which see para 5.15 above.

[128] Namely contempts which are not "in the face of the court" in the sense of being within the perception of the court itself, but which are nevertheless treated as being contempts in the face of the court. See para 5.7 above, and Blackstone's para B14.74.

[129] "Officer of the court" includes a reference to any court security officer assigned to the court house in which the court is sitting: see the Criminal Justice Act 1991, s 100, sch 11, para 29 (vol 12 of Halsbury's Statutes).

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

[131] *R v Havant Justices ex p Palmer* (1985) 149 *Justice of the Peace* 609. A different Divisional Court had to decide whether "insults" included threats in an identical provision which applies to the county courts (s 118(1) of the County Courts Act 1984). It was held that "insults" did encompass threats: "if the [county] court could deal with 'insults' but not 'threats', the court would not be able to give immediate protection to those who need it most. It would risk failing its users, whose cases have been sent to that court by the system": *Manchester City Council v McCann* [1999] QB 1214, 1224.

[132] *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397. If it is alleged that the contempt was committed by misbehaviour in court (s 12(1)(b)), must the misbehaviour occur in the courtroom itself? See Borrie and Lowe: The Law of Contempt para 13.50.

[133] The 1981 Act, s 12(2). As with contempt in the Crown Court, if the offender is under 17, the only sanction is a fine: s 14(2A) of the 1981 Act. If the contemnor is 18, 19 or 20, then s 108 of the Powers of Criminal Courts (Sentencing) Act 2000 applies.

5.52 **Our survey of 145 District Judges, of whom 52 replied, revealed that 31 respondents had dealt with at least one instance of contempt in the face of the court in a 12 month period in 2011/2012.[134] In consultees' experience, is this representative of the true prevalence of contempt in the face of the magistrates' courts?**

PROCEDURE

5.53 The relevant procedure is governed, as in the Crown Court, by the Criminal Procedure Rules Part 62, section 2, "Contempt of Court by Obstruction, Disruption, etc".[135]

5.54 The courts have the power to have the alleged contemnor brought before them and to inquire into the circumstances of the alleged contempt as incidental powers necessary to the exercise of those contained in section 12.[136] There has been a suggestion that there is an inherent power to adjourn proceedings for contempt beyond the "rising of the court",[137] but we are not aware of any case establishing that this power exists. There is no power of remand in such a situation.

5.55 Section 12(4) of the 1981 Act gives the magistrates power to revoke an order of committal and to order that a contemnor be discharged from custody.[138]

BAIL PROCEDURES IN MAGISTRATES' COURTS

5.56 As with the position of the Crown Court, the question arises whether an alleged contemnor is entitled to bail, and if so, on what grounds, and whether the law is compliant with article 5 in this regard. As there is no power of detention beyond the rising of the court,[139] any order which purported to remand the alleged contemnor beyond that time would be unlawful, and in breach of article 5. The question must arise whether the court should address the issue of bail during even the time between ordering detention and the rising of the court (when the alleged contemnor must be released).

[134] See Appendix D for the results of the survey of District Judges which we conducted.

[135] SI 2011 No 1709. See *Stones' Justices' Manual 2012* para 1.117 and following, Blackstone's B14.77, Archbold 28-117. Principles also found in *Moran* (1985) 81 Cr App R 51. Part 62 supersedes guidance in Practice Direction (Criminal Consolidated) [2002]: *Stone's Justices' Manual 2012* para 1.117.

[136] *Bodden v Commissioner of Police of the Metropolis* [1990] 2 QB 397 by Beldam LJ. Draycott suggests that the incidental power could go so far as to allow the bench to issue a Bench Warrant for the contemnor's arrest where the contemnor has absconded before being dealt with: A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 548, 550.

[137] A Draycott, "Contempt of Magistrates' Courts" (1983) 147 *Justice of the Peace* 548, 550.

[138] The early release provision in s 258 of the CJA 2003 applies too.

[139] What the Criminal Procedure Rules call "immediate temporary detention": r 62.5(2)(a)(iii).

5.57 Appeal is to the High Court by way of case stated or judicial review,[140] or to the Crown Court.[141] Between them, these routes of appeal allow a contemnor to appeal as of right against the finding of contempt, and/or against the sentence and against the manner in which the finding or sentence was made.

THE MAIN PROBLEMS WITH THE PRESENT LAW

5.58 The problems with the law may be summarised as follows.

Definition of the offence

5.59 Commentators have noted the lack of clarity about what amounts to contempt in the face of the court.[142] In particular, the law is not settled as to what mental element is required to commit contempt in the face of the court in the Crown Court,[143] while in the magistrates' court it must be committed "wilfully" which is not a word which members of the public will readily understand in this context. Some writers have suggested that a narrower definition of contempt in the face of the court is desirable.[144] The law needs to be clear in order to be compatible with article 7 of the ECHR.[145] Practically speaking, it is when the court's powers are limited to dealing with particular kinds of behaviour that it has been important to determine which behaviour amounts to contempt in the face of the court.[146]

5.60 It could be argued that section 12 contains more than one offence, and it would be better if the different ways in which a contempt in the face of the court could be committed were clearly separated out.

5.61 It could also be argued that the exclusion of threats from section 12[147] is an obvious defect which needs to be remedied.

Procedural difficulties

5.62 There may be questions of consistency over how different courts deal with an alleged contempt. A judge sitting in the Crown Court can refer an alleged contempt to the Attorney General for an application to be made to the Divisional Court, or to the CPS for it to consider whether there should be a prosecution for a criminal offence, or deal with it him or herself. A bench or District Judge in the

[140] *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888. There is no appeal under s 13 Administration of Justice Act 1960.

[141] Section 108 of the Magistrates' Courts Act 1980 and s 12(5) of the 1981 Act. See *Scarth* [2011] EWCA Crim 2228.

[142] Borrie and Lowe: The Law of Contempt para 12.5; Arlidge, Eady and Smith on Contempt para 10-11.

[143] See paras 5.9 and 5.10 above.

[144] Miller para 4.120.

[145] The law should be "sufficiently clear and certain to enable him to know what conduct is forbidden before he does it" and to be compatible with art 7: *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [33] and [34]. "Gradual clarification" may occur through case law: *SW and CR v UK* (1995) 21 EHRR 363 (App No 20166/92). See also Appendix B.

[146] See the White Book para 3C-6.

[147] See paras 5.49 and 5.50 above.

magistrates' court can refer the matter for prosecution or proceed under section 12 of the 1981 Act.

5.63 Referring a matter to be prosecuted as another offence if the conduct amounts to such an offence (such as assault) has obvious merits. The fairness of the trial of an accused in a criminal prosecution is guaranteed by a range of rules and practices,[148] whereas there may be a risk, if a contempt is dealt with summarily, that summary justice "appears to be rough justice".[149] Thus, it could be argued, that where behaviour can be dealt with by a criminal prosecution, it should be. This argument may be especially strong where the penalty for the contemnor if prosecuted as a normal criminal offence is less than if he or she is dealt with by the court for contempt.

5.64 There are, however, good reasons for a court not to refer a matter for prosecution as a normal offence even where possible, but to deal with it itself. It enhances the status of the court, and thus of the rule of law, for the court to have summary powers to deal with contempt in its face.[150] A flexible, swift and efficient response is needed, to enable the court to control its own proceedings,[151] especially where the contempt was perceived by the court itself.[152] A prompt, effective response may deter further contempts.[153]

5.65 If the court decides to deal with the matter itself and, before dealing with it, seeks to detain the alleged contemnor, the question arises of the extent of the court's powers to order detention and the contemnor's right to bail. There is an associated risk of breach of article 5 of the ECHR.

5.66 In the magistrates' courts there is no power to adjourn the contempt hearing beyond the rising of the court, and no power to remand the alleged contemnor on bail to a subsequent hearing.

5.67 It is not clear which rules of evidence apply to a contempt hearing.

5.68 The powers of punishment are restricted to custody and/or a fine.

[148] See Ch 4 at para 4.68.

[149] *Balogh v St Albans Crown Court* [1975] QB 73, 90.

[150] See M Chesterman, "Disorder in the Court: The Judge's Response" (1987) 10(1) *University of New South Wales Law Journal* 32, 43 to 44.

[151] ALRC, *Report on Contempt* (1987) para 95; Arlidge, Eady and Smith on Contempt para 2-27 and following.

[152] As in, eg, *Jones* [2011] EWCA Crim 3179 at [8] by Pitchford LJ: "the judge addressed his remarks to the appellant on three occasions. He saw for himself the appellant's contemptuous reaction. No further enquiry was required or indeed was appropriate. This was a contempt in the face of the court … . The appellant's response to the judge's request to desist was plainly contemptuous as that word is in ordinary use, and was not a technical breach of the requirement for good order in court".

[153] See the discussion in *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24, and see *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153 at [67].

5.69 It is unclear whether the magistrates' courts have the power to suspend an order for committal made under section 12 of the 1981 Act, but more likely that they do not.[154]

5.70 The process by which a contemnor may "purge" his or her contempt in the Crown Court is unclear.[155]

5.71 We now address the fairness of the immediate enquiry procedure in detail.

The immediate enquiry procedure for dealing with contempt in the face of the court

5.72 Courts have emphasised in a number of cases that the purpose of having power to deal with contempt is to protect the course of justice.[156] If, however, the procedure by which the court seeks to impose its authority lacks the basic features of justice which apply to criminal proceedings, then it undermines rather than enhances the rule of law.[157]

5.73 The summary process may also involve a breach of article 6 of the ECHR. A failure to comply with a requirement of article 6 may be resolved by the availability of appeal, with the result that there is ultimately no violation of article 6.[158] However, a detention which would not have occurred if article 6 had not been breached could entail a violation of article 5. We therefore consider what article 6 requires.

5.74 Article 6(3)(a) requires the contemnor to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her.[159] Part 62 of the Criminal Procedure Rules caters for this: 62.5(2) and 62.6(3).

5.75 The requirement under article 6(3)(b) of adequate time and facilities for the preparation of a defence is one of the main reasons that a court should be very wary of proceeding too summarily, and even if the court deals with a contempt

[154] Arlidge, Eady and Smith on Contempt write at para 14-47 that, "so far as magistrates are concerned, since s 12 of the Contempt of Court Act 1981 creates a criminal offence, there is no reason to suppose that the general law regarding suspension of sentences should not apply". The CPRC, however, thought it unclear whether the power to suspend in these circumstances exists: *A Proposal to Make Further Rules about Contempt* (2010) para 41 and following.

[155] See para 5.46 above. Reliance on s 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000 does not fit well with s 14 of the 1981 Act. Compare also with s 12(4) of the 1981 Act which seems to put a contemnor in the magistrates' courts in a better position.

[156] See, eg, *Morris v Crown Office* [1970] 2 QB 114, *Balogh v St Albans Crown Court* [1975] QB 73, *Powell* [1994] 98 Cr App R 224.

[157] See ALRC, *Report on Contempt* (1987) para 115.

[158] "There will be no breach of the Convention if matters can be rectified on appeal": *Dodds* [2002] EWCA Crim 1328, [2003] 1 Cr App R 3 at [13] by Hedley J, relying on *Edwards v UK* (1993) 15 EHRR 417 (App No 13071/87). However, if a custodial penalty has already been fully served before the appeal is dealt with, then there may still be a breach of art 6 even though the domestic law provides for an appeal: see *Lewandowski v Poland* (App No 66484/09).

[159] See *Schot* and *Barclay* in which Rose LJ said that the nature of the contempt must be clearly defined: [1997] 2 Cr App R 383.

immediately, this right must be respected.[160] It is allowed for at Criminal Procedure Rules 62.5(2)(b) and 62.6(3)(b).

5.76 Article 6 may require legal representation,[161] possibly publicly funded.[162] It has been held that legal representation may be dispensed with, but the compatibility of this view with article 6 has not been tested in the courts.[163] It may be particularly important for the alleged contemnor to be legally represented on a contempt allegation if he or she was an unrepresented defendant at the time of engaging in the behaviour alleged to be a contempt.[164]

5.77 Article 6 requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Lewandowski v Poland*[165] the contemnor had included insults directed against the judge personally in his appeal notice. That same judge made a finding of contempt and imposed the most severe sanction possible. The ECtHR found a violation of article 6(1).

5.78 The absence of bias or the appearance of bias is required also by the common law.[166] The special procedure for dealing with contempt in the face would be seen as unjust if applied to any ordinary criminal allegation. As Kirby P put it:[167]

> When a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines the matter in dispute and imposes punishment.

The presumption of innocence in article 6(2) is evidently at risk in this arrangement.[168]

[160] In a large court centre it is usually possible for the judge to make arrangements for legal representation almost immediately. However, this is not the position elsewhere.

[161] Appeals against findings of contempt have succeeded on the grounds that the judge did not give the contemnor the opportunity to have legal advice or representation or to prepare his defence: eg, *Brommell* 94/4066/Y5, CA, *R v Selby Justices ex p Frame* [1991] 2 All ER 344, *Haslam* [2003] EWCA Crim 3444, [2003] All ER (D) 195 (Nov) at [22].

[162] Articles 6(1) and 6(3)(c) may require this: *Benham v UK* (1996) 22 EHRR 293 (App No 19380/92) at [64]. See also *Steel and Morris v UK* (2005) 41 EHRR 22 (App No 68416/01). Public funding for representation in proceedings for contempt in the face of the Crown Court is currently governed by s 12(2)(f) of the Access to Justice Act 1999. That section has been prospectively repealed, and ss 14(g) and 15 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will provide for advice and representation for contempt in the face of any court.

[163] In *R v Newbury Justices ex p Du Pont* (1984) 78 Cr App R 255, 260 by May LJ, the court distinguished between cases where an adjournment was appropriate, which allowed for legal advice, and cases where the court needed to deal with "a disruption obstructing the process of the court's business" and held that this distinction justified dispensing with legal representation in the latter kind of case. We do not think the same approach would necessarily be taken now.

[164] It seems reasonable to expect the numbers of unrepresented defendants to increase in the Crown Court in light of the introduction of means-testing.

[165] App No 66484/09 at [45] to [50].

[166] The test is as stated in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] by Lord Hope: "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[167] *European Asian Bank v Wentworth* (1986) 5 NSWLR 445, 452.

5.79 One of the more difficult issues for the courts has been that of whether an alleged contempt should be dealt with by a different judge or bench.[169] It can be argued that if the alleged contempt is disputed, the issue should be heard by another court. Some would argue that it is necessary even if there is no dispute,[170] but the courts have held otherwise.[171] The Law Reform Commission of Western Australia thought this criticism overstated.[172] It is possible that, even if the contempt is heard by another court, that court would be seen as pre-disposed to believe the evidence of the judge or bench in whose court the contempt was said to have happened. District Judges have commented that referring a case to another court causes delay and disruption.[173] In this regard, the absence of any power for the magistrates to adjourn the matter to another day becomes particularly important.

5.80 The Criminal Procedure Rules now provide that where there is an enquiry into an alleged or admitted contempt, "the court that conducts an enquiry – (a) need not include the same member or members as the court that observed the conduct; but (b) may do so, unless that would be unfair to the respondent".[174] There is no specific guidance on what would amount to unfairness in this context.

5.81 One circumstance in which it might be unfair to the respondent for the same court to conduct the enquiry into the contempt is when the alleged contempt is

[168] See ALRC, *Report on Contempt* (1987) para 110. In *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01), the Chamber held unanimously that there had been a violation of art 6(2) but the Grand Chamber, having found a violation of art 6(1), did not think the complaint about breach of art 6(2) needed separate consideration. In a dissenting judgment Judge Costa thought this violation self-evident where the court had offered the contemnor the choice between a plea of mitigating circumstances or retraction of his statement: para [O-IV6].

[169] See *Haslam* [2003] EWCA Crim 3444; *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254; *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01); *Robertson v HM Advocate* [2007] HCJAC 63, 2007 SLT 1153; *Santiago* [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

[170] Emilianides argues that *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254 is wrongly decided and that it follows from *Kyprianou v Cyprus* (2007) 44 EHRR 27 (App No 73797/01) that "the practice, whereby the judge deals with contempt in the face of the court … himself, must be completely abandoned, since it violates art 6(1) … .": A Emilianides, "Contempt in the Face of the Court and the Right to a Fair Trial" (2005) 13(3) *European Journal of Crime, Criminal Law and Criminal Justice* 401, 411.

[171] Where there is no dispute as to the essential facts it is open to the judge to deal with the matter himself or herself since a fair-minded observer would not conclude there is a real possibility of bias: *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254.

[172] Law Reform Commission of Western Australia, *Review of the Law of Contempt* (2003) p 72.

[173] The Supreme Court of New Zealand has referred to "the need for speed" as a justification for the truly summary procedure: *Solicitor General v Siemer* [2010] NZSC 54 at [34], relying on Borrie and Lowe: The Law of Contempt (3rd ed 1996) para 473. See A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) para 5.6, http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf (last visited 1 Nov 2012).

[174] CrimPR, r 62.8(5).

particularly personal to the judge or magistrate.[175] While it is reasonable to expect a greater degree of resilience and objectivity from the judge/magistrate than from a lay person to abuse and insults, by virtue of training and the role, personally directed insults or threats might cause an observer to doubt that the person abused could be impartial.[176]

5.82 **Should there be specific guidance to courts on when an enquiry into an alleged contempt in the face of the court should be passed to another court, and if so, what factors would consultees identify as making that step desirable? Such factors might be:**

(1) when the alleged contempt is directed at the judge or magistrate personally; and/or

(2) when there are issues of fact to be resolved.

CONTEMPT IN THE FACE OF THE COURT AS A UNIQUE FORM OF PROCEEDINGS

5.83 Proceedings for contempt in the face of the court have a hybrid nature: part disciplinary and part criminal, and this fact lies behind some of the problems referred to above. The link between these aspects of the proceedings is the use of punitive measures to enforce the discipline, and to deter behaviour which the courts will not tolerate. For example, in *Santiago*[177] the Court of Appeal accepted that the threat of summary proceedings for contempt was likely to be more effective in preventing disruption than referring an alleged assault to the Crown Prosecution Service for later prosecution.[178]

5.84 Contempt in the face of the court is not a typical criminal offence. A finding of contempt may not be treated as a conviction for some purposes,[179] but it may for others,[180] and it will lead to a sentence. A person who is imprisoned for contempt

[175] Compare the situation where the judge has not observed the alleged contempt, in which case he or she may safely be regarded as an independent and impartial tribunal for the purposes of the contempt proceedings: *MacLeod* [2001] Criminal Law Review 589.

[176] Decisions as to bail also engage the right to an independent and impartial tribunal, so there may be cases where the bail decision should be passed to another court.

[177] [2005] EWCA Crim 556, [2005] 2 Cr App R 24.

[178] The Hong Kong Law Reform Commission made this point in its report: *Contempt of Court* [1987] HKLRC 1 para 4.2.

[179] See *R v Newbury Justices ex p Du Pont* (1983) 148 *Justice of the Peace* 248. Section 12(2A) of the 1981 Act would not be needed if proceedings under s 12 were proceedings for an ordinary criminal offence. The right of appeal provided by s 13 of the Administration of Justice Act 1960 would not be needed if a finding of contempt were a criminal conviction.

[180] See para 5.45 above and *Haw v Westminster Magistrates' Court* [2007] EWHC 2960 (Admin), [2008] QB 888 at [25].

is treated differently in law from other prisoners.[181] It is questionable whether proceedings for contempt in the face of the court are criminal proceedings.[182]

5.85 It is not always evident which of the standard rules and procedures which apply to ordinary criminal offences apply to contempt proceedings.[183] The speed with which a court may need to deal with contempt in the face of the court in order to maintain control of proceedings means, in our view, that it is not helpful to create a new criminal offence which attracts all standard criminal processes and procedures, nor to deem contempt in the face of the court to be a criminal offence for all purposes.

PROVISIONAL PROPOSALS FOR REFORM

Crown Court

5.86 We put three options forward for consultees' consideration. The first is to leave the law as it is, and leave the common law to resolve difficulties if they arise.

5.87 The second option is to abolish the common law power for the Crown Court to deal with contempts in the face of the court itself and to create a new, statutory, power for the Crown Court to deal with such contempt. That new power could be modelled on section 12 of the 1981 Act and section 118 of the County Courts Act 1984.[184] This option would bring about a large degree of consistency across magistrates' courts, county courts and the Crown Court. The statutory power would apply to the Crown Court in all its jurisdictions: there is no justification for the court's powers to differ depending on whether the case before it is a rehearing from the magistrates' courts, a trial, or a civil matter.

5.88 The third option is for a new statutory power applicable to both the Crown Court and the magistrates' courts,[185] similar to, but clearer, than the existing powers of the magistrates' and county courts, and without the defects of section 12.[186] It

[181] Section 258 of the CJA 2003 is a provision allowing for early release of prisoners. Section 258(1) states that it applies to those committed to prison for failing to pay a fine which was a penalty following conviction, and to those committed to prison for contempt of court. (The early release provision which applies to the majority of prisoners, ie to "fixed-term prisoners" other than those who have an extended term, is s 244.) The fact that it was necessary to include it indicates that s 244 does not apply. Special rules apply once he or she is imprisoned for contempt: Prison Rules 1999, r 7(3). Prisoners committed for contempt of court do not lose the right to vote.

[182] See paras 5.37 to 5.41 above.

[183] See, eg, the discussion about hearsay rules at para 5.36 and following and para 5.101 and following. See also *Jones* [1996] Criminal Law Review 806. There is "no question of pleading in the normal sense of the word": *R v Newbury Justices ex p Du Pont* (1984) 148 *Justice of the Peace* 248, (1984) 78 Cr App R 255, 259 by May LJ. See Arlidge, Eady and Smith on Contempt para 3-60.

[184] Another possibility that has been suggested is to limit the truly summary procedure to contemnors who cannot simply be removed from the court; see Miller para 4.120. However, this does not seem workable, as it is always open to a court simply to have the person disrupting proceedings removed from the courtroom (see para 5.28 above). A case can proceed even in the absence of the accused in extreme cases.

[185] We note that the New Zealand Law Commission has proposed a generic provision dealing with contempt in the face of the court: *Review of the Judicature Act 1908* (2012) IP29 para 5.17, and the Law Reform Commission of Western Australia has made a similar recommendation in *Review of the Law of Contempt* (2003) p 61.

[186] See paras 5.49 and 5.50 above.

would replace the existing magistrates' power in section 12 of the 1981 Act. We are not at this stage engaged in drafting, but **we provisionally propose a statutory power to deal with intentional threats or insults to people in the court or its immediate precincts and misconduct in the court or its immediate precincts committed with the intention that proceedings will or might be disrupted.**

5.89 The proposed power would:

(a) make clear where this kind of contempt of court can be committed;

(b) extend to cases of threats by C (unlike section 12 of the 1981 Act);

(c) make clear what mental element C must have when engaging in the conduct which amounts to the contempt; and

(d) extend the protection of the court to any person engaged in official business in the administration of justice in the court, which would include an officer of the court (such as a constable or security officer, an interpreter, probation officer), legal advisors, and friends and relations of witnesses and the accused.

Detention of the alleged contemnor

5.90 The Criminal Procedure Rules refer to the power of "immediate temporary detention", and this power is inherent in the Crown Court and statutory in the magistrates' courts.[187] We do not seek to interfere with the existence of this important power, which has the purpose of restoring order.

5.91 However, we believe that once detained, some minimum rights ought to be afforded to the alleged contemnor. It would be appropriate if something akin to rights available to a person who has been arrested and held in custody (to have someone told of the detention and to seek legal advice, under sections 56 and 58 of the Police and Criminal Evidence Act 1984) clearly applied. C will probably have been advised by the court, according to rule 62.5(2)(vi), that he or she may seek legal advice, but there should, in our view, be statutory rights of this kind for a person detained.[188]

5.92 We, therefore, **provisionally propose that where the Crown Court or the magistrates' court order C's immediate temporary detention, C shall be entitled, if he or she so requests, to have one friend or relative or other person told, as soon as is practicable, that he or she is being detained, and, if he or she so requests, to consult a legal representative in private at any time.**

5.93 The alleged contemnor will be brought back to court. Under the current law, in the magistrates' court this must be before the court rises that day. In the Crown Court this must be no later than the next business day. At this point the court will review the case. The next business day could, in the theoretical worst case, be five days

[187] CrimPR, r 62.5.

[188] Including a right to free legal advice at this stage.

later. This is far too long a period for a person to be detained without review of that detention; even detention without review over a bank holiday weekend, which is not unlikely, is too long in our view.[189] We propose that C's temporary immediate detention should be reviewed no later than the end of the day on which the detention is first ordered. At that review the Bail Act 1976 would apply, with a right to bail in the usual way,[190] and a right of appeal against a refusal of bail.[191] As one of the grounds on which bail may be withheld is that "the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him",[192] the court could put the bail aspect of the case over to the next day if necessary.

5.94 When detention is reviewed, if the Crown Court postpones dealing with the case, it must then order C's release.[193] We do not see the need for an additional power to detain beyond that point.

5.95 **We provisionally propose that the Crown Court should have the following specific statutory powers:**

(1) to require an officer of the court or a constable to take C into custody for the purposes of immediate temporary detention;

(2) following a finding of contempt, to impose a fine and/or a term of imprisonment;

(3) to suspend an order of committal; and

(4) to revoke an order of committal and to order the discharge of C.

5.96 **We provisionally propose that if the Crown Court orders C's immediate temporary detention then C should be brought back to court no later than the end of that court day when the court shall grant bail, conditionally or unconditionally, unless one of the exceptions to the right to bail in the Bail Act 1976 is made out.**

5.97 When making a finding of contempt, the court is required to state its findings of fact, and the process of reasoning behind them.[194] **Are there other powers which consultees think courts need or duties the court should have in relation to sentencing for contempt in the face of the court?**

5.98 **For example, do consultees think there is a need for a power to remand a person after a finding of contempt but before sentence, for reports to be provided to inform sentence?**

[189] The Court of Appeal held in *Wilkinson* that bringing C back to court on the Monday following detention on the Thursday was "the very limit of what could be either lawful or acceptable": *Wilkinson v S* [2003] EWCA Civ 95, [2003] 1 WLR 1254 at [22] by Hale LJ.

[190] If it appears at that point that, even if the contempt is admitted or proved, the contemnor would not receive a custodial sentence, then, once s 90 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is in force, bail may not be refused.

[191] See para 5.34 above. Part 19 of the Criminal Procedure Rules would apply.

[192] Sch 1, Part 1, para 5 to the Bail Act 1976.

[193] CrimPR, r 62.6(4)(c)(ii).

[194] *Goult* (1983) 76 Cr App R 140.

5.99 We note above[195] that the judge has a discretion as to how to deal with behaviour which appears to be contempt of court. In some cases the behaviour may amount to an offence which could be prosecuted in the ordinary way. Where the judge decides to deal with it as a contempt and there is a finding of contempt, the question arises whether the likely level of punishment which would have followed a prosecution is relevant to the punishment for the contempt. It may be a legitimate consideration,[196] but **should the court be required to have regard to the likely penalty which would have followed a conviction?**

The maximum penalty

5.100 The maximum penalty in the Crown Court under the current law is two years' imprisonment,[197] whereas the maximum penalty for the same behaviour in the magistrates' courts is one month's imprisonment. This is a large discrepancy. In addition, there will be few cases in which the conduct amounting to a contempt in the face of the court would merit two years' imprisonment. **Do consultees consider that there is any need to reduce the maximum sentence? If so, what maximum sentence would consultees suggest is appropriate?**

Hearsay evidence

5.101 We now turn to the question of which rules should apply in relation to the admission of hearsay evidence to prove an alleged contempt in the face of the court. The Criminal Procedure Rules currently permit evidence to be adduced at an enquiry into a contempt in the face of the court without any specified restriction or notice period.[198]

5.102 The essential features of the rules applicable to hearsay evidence at a contempt enquiry are, in our view, that the alleged contemnor has a fair hearing, that the rules comply with the ECHR, and that the enquiry should be able to proceed promptly. In any event, we think that the position should be the same in the Crown Court and in the magistrates' courts, as it is now under the Criminal Procedure Rules.

5.103 One particularly important aspect of the ECHR rules is the requirement that the accused (in this case, the alleged contemnor) should be able to examine or have examined witnesses against him or her.[199] As we state above,[200] it appears that the hearsay rules contained in the CJA 2003 are applicable to an enquiry into an alleged contempt in the face of the court and that, as interpreted in the case law, those rules are compatible with article 6(3)(d) of the ECHR.

[195] See paras 5.27 to 5.31 above.

[196] See *Montgomery* [1995] 2 All ER 28.

[197] See para 5.44 above.

[198] See CrimPR, r 62.8(3). Compare with CrimPR, r 62.11 which applies where the contempt is not a contempt in the face of the court and under which notice of hearsay evidence must be given. Compare also with CrimPR, Part 34 which applies to hearsay evidence in criminal proceedings.

[199] By art 6(3)(d).

[200] See para 5.40 above.

5.104 In consequence, evidence from the judge or magistrate who is, in effect, the complainant will be relevant evidence and there could be some cases where the judge or magistrate could be required to give oral evidence at the contempt hearing (unless one of the grounds for admitting his or her statement as hearsay applied)[201] and be subject to cross-examination by the alleged contemnor. Such cases will, in our view, be rare as the alleged contempt might not be disputed, and even if it is disputed, it is likely that evidence of the alleged contempt can be given from a different source (such as evidence from a court usher or other person present at the time).

5.105 **Do consultees think that it should be put on a statutory basis that enquiries into alleged contempts in the face of the court are criminal proceedings to which the strict rules of hearsay evidence apply?**

Other aspects of criminal procedure

5.106 We conclude above[202] that, in the case of contempt in the face of the court, it is not appropriate for it to be deemed to be a criminal offence. We have considered whether any of those rules which apply to ordinary criminal charges (such as the disclosure regime under the Criminal Procedure and Investigations Act 1996, a formal charge or indictment, mode of trial procedures, or rules about the admissibility of evidence other than hearsay) should nevertheless be incorporated into an enquiry into contempt in the face of the court.

5.107 It is important that an enquiry into a contempt in the face of the court should proceed fairly but promptly. We have taken account of the requirements imposed by Part 62 of the Criminal Procedure Rules.[203] It seems to us that, apart from the specific requirements covered separately in this chapter, there is no need to import any of the other rules which apply to ordinary criminal charges into a contempt enquiry.[204]

5.108 **Do consultees think that other aspects of the rules and procedures which apply to criminal proceedings ought to apply to an enquiry into a contempt in the face of the court, and if so, why?**

[201] Such as the grounds contained in s 116(2) of the CJA 2003, namely, that the witness is dead; is unfit; is outside the UK and it is not reasonably practicable to secure his or her attendance; cannot be found despite reasonable steps to find him or her; or is in fear.

[202] See para 5.85 above.

[203] See paras 5.31, 5.42, 5.53 and 5.74 above.

[204] We have considered in this chapter the concerns raised by the Criminal Procedure Rule Committee which relate to contempt in the face of the court.

Magistrates' courts

Power to suspend an order of committal

5.109 Unlike the Crown Court, the magistrates' courts do not currently have power to suspend an order of committal for contempt in the face of the court. It seems to us that the position should be the same in both courts, unless there is a good reason for their powers to differ. A power to suspend an order of committal could be useful, say as a deterrent to repeated contempts, and so **we provisionally propose that magistrates should have power to suspend an order of committal made under section 12 of the 1981 Act. Do consultees agree?**

Power to adjourn the enquiry into the contempt and power to remand into custody pending the contempt hearing

5.110 If it is right for the Crown Court to be able to defer the enquiry into the contempt, but to be required to review the bail position at the end of the day on which the immediate temporary detention is first ordered, the question arises why the situation should not be the same in the magistrates' courts.

5.111 Under the current law, magistrates may not put the case off beyond the rising of the court. This has already been mentioned to us by District Judges as causing difficulty. Allowing magistrates to adjourn the case to another day (and another court) could ameliorate difficulties in relation to impartiality of the tribunal.[205] These two considerations and the linked issue of the need for temporary immediate detention to be reviewed lead to the following questions.

5.112 **Do consultees think magistrates should have the power to adjourn the hearing for contempt beyond the rising of the court to the next business day? If so, should they have power to order that C be detained until that time but be required to review the alleged contemnor's bail position no later than the end of the court day; or should they have power to grant bail (conditional or unconditional) to C to attend the adjourned hearing but no power to remand C in custody?**

[205] See para 5.79 above.